J. N. Das
Advocate High Court
Jammu & Kashmir
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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1895 OF 1915.

February 13, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

Sreemati AKIYANNESSA AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABDUL GANI SADAGAR—PLAINTIFF—RESPONDENT.

Bengal Land Revenue Sales Act (XI of 1859), s. 37—"Protected interest"—Tank existing prior to lease—Appeal, second—Abatement of suit, no issue framed as to—Affidavit by person who does not know Court language, value of.

A tank existing prior to the defendant's lease is not a "protected interest" within the 4th exception to section 37 of Act XI of 1859. [p. 2, col. 2]

The question of abatement of a suit, which was raised in the written statement of the defendants who were substituted in the place of a deceased defendant but as to which no express issue was framed, cannot be allowed to be raised in second appeal. [p. 2, col. 1.]

An affidavit as to what was argued in a case, sworn by a person who did not know the language in which the argument was made, is worthless. [p. 2, col. 1.]

Appeal against the decree of the District Judge, Chittagong, dated the 9th June 1915, affirming that of the Officiating Munsif, Chittagong, dated the 12th September 1914.

Babu *Probodh Kumar Dass*, for the Appellants.

Babu *Chandra Sekhar Sen*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned District Judge of Chittagong, affirming the decision of the Munsif of the same place. The plaintiff brought the suit to recover possession of certain lands on the annulment of an encumbrance. Both the Courts below have decided the case in favour of the plaintiff. The present appeal has been brought by some of the defendants, and the first point that has been raised is as to whether the Courts below ought not to have found that the suit had abated and no proper case had been made for setting aside the abatement. The facts are these:—The suit was instituted on the 18th April 1911. In June 1912 the original defendant No. 5 died. On the 19th June 1914 the plaintiff applied to substitute the heirs of the deceased defendant No. 5 and an order was, accordingly, made. That order was, however, made *ex parte*. After that the substituted defendants applied for and obtained further time in order to file their written statement. In their written statement they did raise the case that the suit had abated and no grounds had arisen for setting aside the abatement. But when the issues were settled, no express issue was framed as to whether a case entitling the Court to set aside the abatement had or had not arisen. The evidence which lay in a very small compass on the plaintiffs' side was to the effect that the defendant No. 5 died in Rangoon and that the plaintiff did not know of the death earlier. The evidence on the defendants' side was practically nil. In the course of his judgment on the issue as to limitation the Munsif did make some remarks that are said to have reference to this point. But that does not appear to be so. It is also a most important matter that in the judgment of the learned District Judge, no reference is made to this matter

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at all. It is said on an affidavit made by one of the parties, whose name I have forgotten but who describes himself as the son of late Sanaulla and who does not know a word of English and had had the affidavit interpreted to him and signed his affidavit after an explanation in the Vernacular, that the learned Judge totally misapprehended the case, and that this point was raised and pressed; and this deponent states that, although he is unaware of the language of the Court, he knows all these facts of his own knowledge. A man who can state that must have got an elastic conscience; a man who does not know the language of the Court obviously cannot know these facts of his own knowledge. I may as well pledge my oath that I who am ignorant of the Bengali language understand what two Bengali gentlemen speak in their own language. It is quite clear that this affidavit is a valueless affidavit and no attention ought to be placed on it at all. The point now made is that it was the real point in the case and must have been taken in the lower Courts. I am not satisfied that it was so. If it had been raised and if a proper issue had been framed on it, then the plaintiff having stated that the defendant No. 5 died in Rangoon would have produced evidence which might have satisfied the Court that he did not know and could not have known of the death of the defendant No. 5 before the date on which he first came to know of it. It is no use keeping such a point aside to be raised in second appeal with a view to get the case remanded and re-tried on a further issue. But the point must be raised and taken at the outset and an issue framed on it.

The next point is that the learned Judge has altogether made a mistake about the case that he had to try. A certain *dag*, as is called, of the property sought to be recovered bears the number 746. It consists of a tank. It is quite true that that tank like other tanks usually has banks, because it is impossible to dig a tank on the ground without having taken out a certain amount of the earth to contain the water and also, if one so wishes, to enjoy the fish. Otherwise, unless one gets some of the improved and modern forms of locomotion to reach the tank he must have to walk to and from the tank so as to enjoy either the water or the fish. It is quite obvious that it was not in the contemplation of the parties with reference to property valued at Rs. 20 only that the parties should reach this tank by any of the more modern methods of locomotion. It has been found that *dag* No. 746 is a tank. It is a tank no doubt and it is a tank existing from before the defendants' lease and, on the authorities of this Court, such a tank is not a protected interest within the 4th exception to section 37 of Act XI of 1859. That gets rid of the second point.

The third point is that there was a lease held by the defendants. The document was not put in evidence. The Judge said that he must do the best he could without the document as the defendants failed to give it in evidence. The appellants now say that they ought to have been given some time to produce the document. They had some time and a good deal of time too. I do not see any reason why they should have any further time and it is not a matter that should be raised in second appeal.

In the result the appeal fails and must be dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed..

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1356 OF 1916.

January 22, 1917.

Present:—Mr. Justice Chevis.

FAKIRA AND OTHERS—DEFENDANTS—APPELLANTS

versus

PIR BAKHSH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 11, 47—Decree based on compromise, construction of—Suit for possession of land already decreed, whether competent—Decree-holder, remedy of.

A decree based on a compromise in a declaratory suit to the effect that the plaintiff is to get possession of certain land is a decree for possession. The mere fact that the word "*dakhilyabi*" does not occur in the decree is not enough to alter it from a decree for possession into a declaratory decree. [p. 3, col. 2.]

A suit for the recovery of possession of land already decreed is not maintainable; the only remedy of the decree-holder being the execution of the decree. [p. 3, col. 2.]

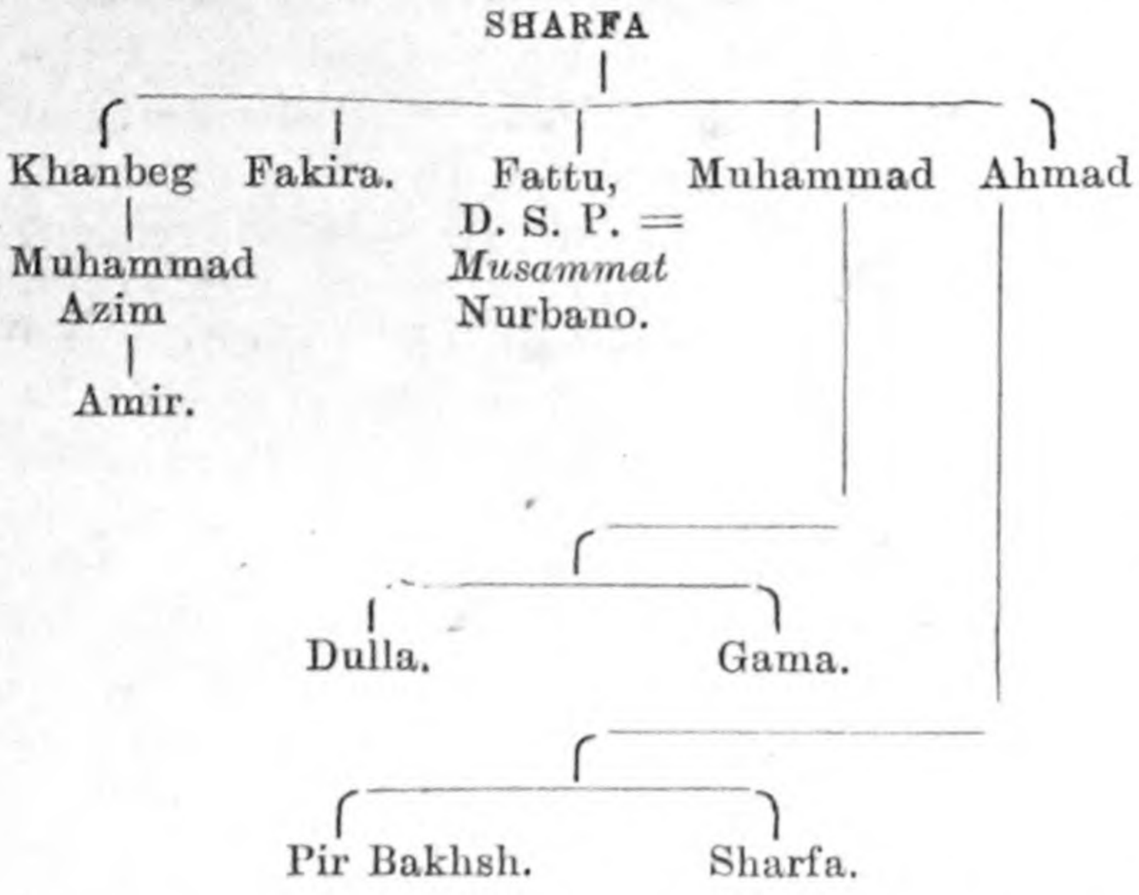
MANGALI LAL *v.* ABIDYAR KHAN.

Second appeal from the decree of the District Judge, Attock, at Campbellpur, dated the 25th February 1916, affirming that of the Munsif, first class, Campbellpur, dated the 16th June 1915, decreeing plaintiffs' claim.

Mr. *Nand Lal*, for the Appellants.

Mr. *Saunders*, for the Respondents.

JUDGMENT.—The genealogical tree is



The dispute is as to part of the estate of Fattu, which comprised over 4,000 *kanals*. After his death it appears that his widow *Musammat* Nurbano made some alienations in favour of some reversioners, so Dulla, Pir Bakhsh, Sharfa and Gama sued for a declaration that her alienations should not affect their reversionary rights. This ended in a compromise by which it was agreed that the then plaintiffs were to get 160 *kanals* at once—Dulla and Gama to get 100 *kanals*, and Pir Bakhsh and Sharfa 60 *kanals*—and to give up their claim to the rest of the land. Decree followed on 23rd November 1910.

Later on came litigation in which Sharfa, who was a minor at the time of the former suit, sued to get the decree set aside. This case came up to the Chief Court, but Sharfa failed to get the decree set aside.

Then Pir Bakhsh and Sharfa brought this suit for possession of the 60 *kanals* which they were to get under the compromise.

The lower Courts have decreed the claim, overruling defendants' contention that plaintiffs should have sued out execution of the former decree and that a fresh suit for possession does not lie.

Defendants appeal to this Court. I think their appeal must succeed. Though the plaint in the former suit was only for a declaratory decree, the compromise shows clearly that plaintiffs were to get possession of the 160 *kanals* at once, and the decree, which was simply for 160 *kanals* of land according to the "compromise", is clearly a decree for possession and not merely a declaratory decree. The mere fact that word "*dakhilyabi*" does not occur in the decree is not enough to alter it from a decree for possession into a declaratory decree. Plaintiffs should have executed their decree. I hold that they cannot bring a separate suit to get possession.

I accept this appeal and reversing the decision of the lower Courts, I dismiss the suit. But as plaintiffs are clearly entitled in equity to the 60 *kanals* I leave the parties to bear their own costs in all Courts in this suit.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 187 OF 1915.

April 5, 1917.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MANGALI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABIDYAR KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908*)*, *s.* 28—*Evasion of Registration Law—Property included fictitiously in sale-deed for purposes of registration—Sale-deed, validity of.*

Where an item of property of little value not belonging to the vendor is included in a sale-deed in order to give jurisdiction to a Registration Officer to register the sale-deed, the sale-deed is invalid and does not pass any title to the property purported to be sold thereby. [p. 8, col. 1.]

First appeal from a decree of the Subordinate Judge, Pilibhit.

MANGALI LAL *v.* ABIDYAR KHAN.

Dr. *S. M. Sulaiman*, for the Appellants.

Messrs. *B. E. O'Conor*, *Abdul Raoof* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises is based upon the following state of facts. There was a lady named Naushani Begam, who died as long ago as the 24th of November 1900. On the findings now before us we must take it that she left two heirs to her estate under the Muhammadan Law; one was her husband, Ahmad Husain, and the other was a distant cousin named Abdul Wahid Khan. The pedigree filed with the plaint, the accuracy of which may be taken as established, shows that Abdul Wahid Khan was the son's son of one Ali Muhammad Khan and that Naushani Begam was the son's daughter of another son of the said Ali Muhammad Khan. The relationship was thus a distant one, and this alone might account for the fact that Abdul Wahid Khan did not find it easy to enforce his claim to a share in the estate of the deceased lady. It further appears from this record that the legitimacy of Abdul Wahid Khan was contested by other members of the family. So far as the record before us goes, we must take it that in the present litigation Abdul Wahid Khan's legitimacy is established; but it is a point of importance in the history of the case that Abdul Wahid Khan's legitimacy was at one time contested. It would appear that, as a matter of fact, Ahmad Husain succeeded in taking effective possession of the entire estate of his deceased wife. He has since been dealing with it as owner and has made a number of transfers. Abdul Wahid Khan himself never attempted to bring his claim to the adjudication of a Court of Law. On November the 18th, 1903, he executed a deed of sale which is the document of title on which the present suit is based. By that deed Abdul Wahid Khan purported to convey to the present plaintiffs his rights in the estate left by Naushani Begam. A specification of that lady's estate and of the property purported to be conveyed was appended to the sale-deed. The consideration was stated at Rs. 5,000, of which Rs. 100 had been paid in advance and Rs. 4,000 were formally handed over to Abdul Wahid Khan at the time of the registration, while a sum of Rs. 900 was retained for the time being by the purchasers, under a covenant to pay it later on when they had succeeded in obtaining settled possession over the property conveyed. We may note at once certain facts bearing on the principal question now before us for determination. The whole of the immoveable property which formed part of the estate of Naushani Begam, and which purported to be conveyed by the sale-deed of the 18th of November 1903, was situated in the District of Pilibhit. In the ordinary course of things a deed of sale in respect of that property required to be registered before the Sub-Registrar of Pilibhit and registration in any other office would be invalid under the provisions of the Indian Registration Act. The sale-deed in question, however, was registered before the Sub-Registrar of Bareilly. This was done on the strength of a certain detail appended to the said deed. The important words are the following:—"I include," says Abdul Wahid Khan, "in this sale a ruined house with the land appertaining to it, bounded as below, situated in Naqsha Bandan Mohalla in the city of Bareilly, which I purchased from Syed Sher Ali under a sale-deed, dated the 3rd of September 1903." In the specification at the foot of the deed the boundaries of this house situated in the above-mentioned quarter of the city of Bareilly are set forth. In the suit as brought a large array of defendants was impleaded. Ahmed Husain, husband of Naushani Begam, was dead and his heirs were impleaded as defendants of the first party. Abdul Wahid Khan was alive at the date of the institution of the suit and was impleaded as defendant No. 3. He died while the suit was pending in the Court below and his heirs were brought on the record. The remaining defendants consist of transferees of different portions of the property under conveyances executed by Ahmed Husain or his heirs. In the suit as brought all the property set forth in the deed of the 18th of November 1903 was claimed, including the alleged "ruined house" in the city of Bareilly. Abdul Wahid Khan did not defend the suit and he was presumably the only person interested in this particular item of property. The defence set up by the

other defendants, however, happened to raise the question whether Abdul Wahid Khan had even been the owner of any such property in the city of Bareilly as was specified in the sale-deed of November the 18th, 1903, and sooner than produce even *prima facie* evidence on this point the plaintiffs elected to abandon this part of their claim.

The defence set up by the other defendants raised two essential points and a number of questions of detail. One of the essential questions raised was the legitimacy of Abdul Wahid Khan and we must treat that point to have now been decided in favour of the plaintiffs. The other essential point was the validity of the plaintiffs' document of title, the sale-deed of the 18th November 1903. Before taking up this question it is worth while to mention the questions of detail which were raised regarding certain items of property claimed. In the plaint as drafted the most important item of property was a *zemindari* share in a village, named Parasi or Parsea, in Pilibhit District. The question of this property is still in issue now before us in appeal. The second item specified was a *zemindari* share in a village called Manpur Jalalpur in the same district. This property seems to have now passed into the ownership of certain persons, two of whom are Niranjan Singh and Janak Singh, impleaded as defendants Nos. 7 and 8 in the plaint as filed. In this Court there has been some difficulty about the service of summons on these two, and sooner than persevere in this matter the plaintiffs have elected to abandon the appeal against Niranjan Singh and Janak Singh. This means that they abandon their claim as regards the greater part, if not the whole, of the second item. In the view we take of the case it is not necessary for us to determine how much they abandoned; but we note the fact. The third and fourth items specified in the plaint were small parcels of land described as "*maqruqa* property" in a village named Desnagar. As regards one of these parcels of land there has been a finding that it never belonged to Naushani Begam, and this finding is not contested before us in appeal. With regard to the other parcel, the finding of the Court below is that it did at one time belong to Naushani Begam, but she conveyed it to her husband by a deed executed shortly before her death. The question of the validity of this alleged transfer is in controversy in this appeal and we note the fact, although it will not be necessary for us to determine it. The next item of property concerned, specified in the plaint, is three houses situated in the town of Pilibhit. The Court below has found that these houses formed no part of the estate of Naushani Begam. This finding has been contested before us in appeal; but if it were necessary for us to determine it, we should have no hesitation in holding on the evidence that these houses, as described in the plaint, are not proved to have belonged to Naushani Begam. The last item of property specified in the plaint is the alleged "ruined house" in Bareilly the claim to which was abandoned.

Having said this much by way of explanation, we return to the principal question in issue, *viz.*, the validity of the plaintiffs' document of title. That there was in the present case an attempt to evade the provisions of the Indian Registration Act, by including in the deed of sale a purely formal transfer of an item of property to which neither the vendor nor the vendees attached substantial value, is beyond question. The motive which actuated Abdul Wahid Khan and the present plaintiffs in adopting this course is a matter for inference only. Abdul Wahid Khan died before he could be called upon to make any statement in Court. Evidence on the point has been given by Sher Ali, the alleged former owner of the "ruined house," and by the plaintiff Nadir Husain. Sher Ali seems to have fenced a good deal with the questions put to him. He certainly tried to convey to the Court a belief that Abdul Wahid Khan had purchased the site in question from him with the *bona fide* intention of building a house thereon and settling down in Bareilly. It may be noted that he was in fact a resident of Pilibhit. Sher Ali was compelled, however, to make a number of admissions which show that this statement on his part was quite unreliable. He seems to have acted as a broker between Abdul Wahid Khan and the present plaintiffs in the matter of the sale, and no doubt he had some object to serve in

bringing about that transaction. He had to admit that Abdul Wahid Khan never took effective possession of the site in question or made any attempt to build a house thereon, and as a matter of fact he proceeded to sell it to the plaintiffs by the deed of the 18th of November 1903, as already noted. The plaintiff Nadir Husain was more straightforward in his evidence and made statements which show clearly enough, up to a certain point, what the meaning of this transaction was. He says that Abdul Wahid Khan complained to him that his relatives at Pilibhit were oppressing him, or bringing pressure to bear on him, or keeping him under their thumbs. The expression used in the vernacular is a vague one of which the last expression seems the best translation into idiomatic English. He added that his intention in purchasing this "ruined house" in the city of Bareilly was that he might thereby "cause a suit to be instituted" against the aforesaid relatives. The long and the short of the matter is that Abdul Wahid Khan was anxious to execute a conveyance of the Pilibhit property, in the hope of thereby getting a litigation started against Ahmed Husain or other members of the family, and at the same time he did not wish these persons to have any opportunity of getting to know of the execution of the deed. Whether he was afraid of their remonstrances, or did not wish to have the question of his legitimacy at once raised by the institution of a declaratory suit, we can only conjecture; but it is clear from Nadir Husain's own admissions that the motive for this juggling with the Registration Law was to keep the matter secret as long as possible from the persons residing at Pilibhit who had an interest in the property of the deceased Naushani Begam. Now the question is whether in this attempted juggle with the Registration Law the plaintiffs have not gone too far and have not, as a matter of fact, accepted a deed of transfer which is void for want of legal registration. Of course, if Abdul Wahid Khan was on the 18th of November 1903 the *bona fide* owner of a parcel of land with a ruined house thereon in the city of Bareilly, and the transfer of this land was in good faith included in the sale-deed of the 18th November 1903, it being the intention of the parties to the transaction that the ownership of this land should pass from the vendor to the vendees, the mere fact that the immediate object of this transaction was to obtain a legal warrant for the registration of the sale-deed at the Bareilly office, instead of the Pilibhit office, would not invalidate the transaction. The question, however, is whether there was as a matter of fact any *bona fide* transfer of any property in the city of Bareilly, or within the jurisdiction of the Sub-Registrar of Bareilly, effected by this particular sale-deed. With regard to the case-law on the subject, the point has been very ably argued before us by the learned Advocates on both sides. A number of cases have been referred to us, two cases of our own Court, one of the Calcutta High Court and one case decided by their Lordships of the Privy Council. The cases of this Court are *Jagannath* v. *Ram Nath* (1) and *Bansraj Singh* v. *Rajbans Bharthi* (2). The Calcutta case is *Purna Chundra Bakshi* v. *Nobin Chandra Gangopadhya* (3). The Privy Council case is *Harendra Lal Roy* v. *Hari Dasi Debi* (4). The argument before us has centred principally around this last judgment. Different passages in the same are relied upon by the two parties. On behalf of the defendants-respondents reliance is placed upon certain passages in the judgment, especially on the paragraph on page 989 commencing with the words:—"But the point may be put in another way upon broader grounds.....," in which stress is laid upon the inadmissibility of a purely fictitious transfer to give jurisdiction to a Registration Office. On behalf of the plaintiffs-appellants stress is laid on other passages of the same judgment, and also on the decision of the Calcutta High Court, dealing principally with the question of the burden of proof. It does not seem to us that this matter of the burden of proof is really vital in the present case. Undoubtedly the defendants to the present suit, who were challenging the validity of the plaint-

(1) 26 Ind. Cas. 52; 12 A. L J. 913.
(2) 24 Ind. Cas. 451; 12 A. L. J. 918.
(3) 8 C. W. N 362.
(4) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050.

iffs' document of title, were under an obligation to satisfy the Court that that document was invalid by reason of defective registration. This point seems to have been fully appreciated by the Court below. Both parties led evidence in the case, the plaintiff Nadir Husain giving his own evidence and the witness Sher Ali being also examined as already stated. The real question is what are the conclusions of fact which the Court is justified in drawing from this evidence. One point which emerges with great clearness is that this parcel of land (admitting for the sake of argument that there is in the city of Bareilly a parcel of land situated within the boundaries stated in the sale-deed of the 18th of November 1903) was practically valueless. It is supposed to have been sold by Sher Ali to Abdul Wahid Khan for Rs. 50. Abdul Wahid Khan never attempted to make the slightest use of it, nor did the present plaintiffs. The circumstances under which the plaintiffs have now abandoned their claim to this land have been already noted. The next question which arises is whether Sher Ali was really the owner of any land falling within the description given in the sale-deed and whether there was a valid and effectual conveyance of this land by Sher Ali to Abdul Wahid Khan. It may be true, in a certain sense, that the burden of proving that the document was invalid for want of proper registration was on the defendants; but the defendants cannot be expected to prove a negative by direct evidence. The plaintiffs undertook to show that Abdul Wahid Khan was in fact the owner of this parcel of land on the 18th of November 1903, and the conclusion we have come to is that the plaintiffs certainly failed to prove this. According to Sher Ali's oral evidence, if that evidence is to be believed, the parcel of land consisted of a "ruined house" standing on a plot of land adjoining Sher Ali's residential house. It is said to have been conveyed by means of an unregistered sale-deed dated the 3rd of September 1903. No such sale-deed was produced, and the explanation of the plaintiff Nadir Husain as to the disappearance of this alleged document does not sound convincing. In any case, the existence or otherwise of an unregistered deed of sale would not be of vital consequence in the case, because title to immoveable property could not be conveyed merely by such unregistered deed. The plaintiff's case is that title was conveyed by Abdul Wahid Khan's payment of Rs.50 to Sher Ali and by Abdul Wahid Khan's taking effective possession of the land transferred to him in return. We are unable to conclude from the evidence before us that there was any such effective sale by delivery of possession, even supposing that the evidence on the record is such as to justify the conclusion that Sher Ali was the actual owner of a parcel of land answering to the description in the deed of November the 18th, 1903. According to the plaintiffs' evidence the site in question is now a plot of waste land, somewhere by the roadside in a part of the city of Bareilly, whose only occupants are stray dogs and birds and casual passers-by. On the whole the evidence, to which we have given our best consideration, justifies the conclusion arrived at by the Court below as to the invalidity of this document. The parties to the sale-deed of November the 18th, 1903, set out to evade the clear provisions of the Indian Registration Act and in attempting to do so they seem to have overreached themselves. Sher Ali was not going to transfer property of any appreciable value to Abdul Wahid Khan, and consequently the arrangement was come to that the theory should be put forward that a transfer had taken place between them of something or other which was of no value whatever. It is quite beyond question that on the evidence on this record it could not be found affirmatively that Sher Ali was the owner of the parcel of land alleged to have been sold by him to Abdul Wahid Khan, or that Abdul Wahid Khan had become legal owner of the said parcel of land when he purported to convey it by the deed of November the 18th, 1903. On the contrary, under all the circumstances of the case, and making due allowance for the position of the parties and the opportunities which they respectively had of producing evidence in the Court below, the finding appears to be justified that on the 18th of November 1903, Abdul Wahid Khan did not own or possess in Naqsha Bandan Mohalla in the city of Bareilly any such item of immoveable property as that which he purported to transfer under the deed of November the 18th, 1903.

TILAK BRITTIAL *v.* RUDESWAR.

From this conclusion it necessarily follows that the inclusion of this item of property in the aforesaid sale-deed was a purely fictitious use made of it, in order to a fraudulent evasion of the Registration Law. We affirm the finding of the Court below that the plaintiffs hold no valid document of title in respect of the property claimed by them. Their suit was rightly dismissed and we dismiss this appeal with costs, including fees on the higher scale. We allow three sets of costs to the respondents, one set to those represented by Dr. Sapru, another set to those represented by Mr. O' Conor and another set to those represented by Mr. Abdul Raoof.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3803 OF 1914.

April 4, 1917.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

TILAK BRITTIAL—PLAINTIFF—APPELLANT

versus

RUDESWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Sale of land valued at less than Rs. 100 to person in possession without registered document, validity of.

The sale of land of the value of less than Rs. 100 to its usufructuary mortgagee, who is already in possession, without a registered document in accordance with the provisions of section 54 of the Transfer of Property Act, is not valid. [p. 8, col. 2; p. 9, col. 1.]

Appeal against the decree of the District Judge, Assam Valley Districts, dated the 10th July 1914, reversing that of the Munsif, Jorhat, dated the 23rd December 1912.

FACTS will appear from the following extracts from the judgment of the lower Court:—

"This is a suit for declaration of plaintiff's title to 1 *cotta* 8 *lessas* of land * * * * *

It is alleged by the plaintiff that the land in suit originally belonged to his cousin, Kusheswari, the mother of the defendant No. 1, that, being hard up for money, Kusheswari mortgaged to him, on 8th September 1897, 17 *lessas* of land * * for Rs. 18 allowing him to enjoy the same, that on her failure to redeem the land, Kusheswari verbally sold the mortgaged area together with 11 *lessas* * * for Rs. 40 in 1898, that since then he has been in peaceful possession of the land measuring 1 *cotta* 8 *lessas*—the land in suit—and has considerably improved the same * * * but that the defendant No. 1 got the land transferred to his name from that of his mother denying his title thereto, * * that after the defendant No. 1 got the *pollat* transferred to his name, the defendant No. 1 mortgaged the land to the defendant No. 2 who ultimately got the land sold in auction to the defendant No. 3 in satisfaction of decree, * * * * and that defendant No. 3 wanted to take possession of the land in June 1912 denying his title thereto.

"The defendant No. 1 denies any mortgage or sale of the land to the plaintiff by his mother. He also denies the plaintiff's title to and legal possession of the same. He questions the validity of the alleged mortgage or sale and pleads limitation. The defendant No. 2 also denies the plaintiff's title to the land in suit. He says that he took mortgage from the rightful owner, the defendant No. 1 * * * "

One of the points raised was whether the plaintiff acquired any title by purchase since the sale took place without a registered instrument, and the Munsif held that as the plaintiff was not in possession of the land as a mortgagee at the time the sale took place, the sale was valid without a registered instrument. Ultimately the suit was decreed against all the defendants, who thereupon preferred an appeal to the District Judge, and the learned District Judge decreed the appeal by reversing the decision of the Munsif by a judgment in which he observed: "it is clear from the above evidence that the plaintiff was, at the date of the alleged sale, an usufructuary mortgagee in possession of the land in suit, and hence there could be no valid sale of the land without the registered document in accordance with the provisions of section 54 of the Transfer of

Property Act. This view is supported by a case reported as *Sibendrapada Banerjee* v. *Secretary of State* (1). The mortgage must be held to be still subsisting and Kusheswari (who is not a party to this suit) has a right of redemption within the statutory period."

Babu *Kshitish Chandra Chakrabarty*, for Babu *N. C. Bardalai*, for the Appellant.

Babu *Narendra Kumar Bose*, for the Respondents.

JUDGMENT.—We cannot go behind the finding of the learned District Judge of the Assam Valley Districts that at the time of the alleged sale the plaintiff was in occupation of the land as a mortgagee. The facts of the present case cannot be distinguished from those of the case which the learned Judge has cited and followed. We refer to the case of *Sibendrapada Banerjee* v. *Secretary of State* (1).

The learned Pleader for the plaintiff has very properly drawn our attention to the case of *Sonai Chutia* v. *Sonaram Chutia* (2). That decision was founded upon facts which, so far as we can see, do not exist in the present case. It is, therefore, distinguishable.

In the view we take, the appeal must be dismissed with the usual order as to costs.

Appeal dismissed.

(1) 34 C. 207; 5 C. L. J. 390.
(2) 34 Ind. Cas. 692; 20 C. W. N. 195.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 237 OF 1916.

March 7, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C

LALTA PRASAD *alias* PUTTOO LAL — PLAINTIFF—APPELLANT

versus

RAGHUBAR SINGH AND OTHERS— DEFENDANTS—RESPONDENTS.

Pre-emption—Sale by stranger vendee to co-sharer before suit, effect of—Pre-emptor, right of, proof of.

Where property in respect of which a right of pre-emption exists in favour of a co-sharer is sold to a stranger but before a suit for pre-emption is brought, it passes back into the hands of a co-sharer, a suit for pre-emption cannot be maintained, unless the person instituting the suit can establish his right as against the co-sharer, if the former has a right superior to that of the latter to have it. [p 11, col. 1.]

Liakat Husain v. *Rashid-ud-din*, 29 A. 125; 3 A. L. J. 794; A. W. N. (1906) 313, relied upon.

A purchaser may use a title acquired by him subsequently to the origin of the cause of action as a defence against a suit for pre-emption instituted after his acquisition of the said title. [p. 11, col. 1.]

Tahawwar Khan v. *Madho Ram*, 11 O. C. 290, followed.

A re-sale of property acquired by a person to the man from whom it was obtained stands on a different footing from the sale of that property to a person who has a preferential right of pre-emption and who is in a position to enforce that right within the time allowed by law for that purpose. The former is a voluntary act, while the latter is more or less an acknowledgment of the right of another to acquire that property in preference to the person by whom it was purchased accompanied by a surrender in his favour. [p. 10, col. 2.]

Manna Singh v. *Bihari Singh*, 37 Ind. Cas. 181; 19 O. C. 183; 3 O. L. J. 720; *Raj Bahadur Singh* v. *Chandrapal*, 37 Ind Cas. 170; 19 O. C. 185*n*, distinguished.

A vendee against whom a right of pre-emption is asserted by another is not required to sit quiet till the latter has brought a suit to enforce his right or all possible claimants have turned up to assert their rights. If he acknowledges the right of a pre-emptor and sells the property to him to obviate the trouble and expense of meeting a suit for pre-emption, he does so at his own peril, but his act cannot on that account be treated as wrongful. [p. 10, col. 2.]

Appeal against the decree of the District Judge, Hardoi, dated the 31st May 1916, reversing that of the Munsif, Sandila, dated the 31st March 1916.

Mr. *M. Wasim*, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption brought by the plaintiff-appellant in respect of a sale effected by Kali Singh, Bhawani Singh and *Musammat* Seoka in favour of Baijnath on the 22nd May 1914. The sale-deed was registered on 5th October 1914. On the 19th July 1915 Baijnath sold the property purchased by him to Raghubar Singh, a co-sharer of the sub-division in which the property sold was situated. This sale was effected in recognition of the pre-emptive right asserted by Raghubar Singh.

On the 23rd September 1915 Jit Singh and Lalta Prasad filed a suit, claiming pre-emption in respect of the original sale as

against the vendors and the vendee, who were parties to that sale, making the subsequent vendee, Raghubar Singh, also a defendant to that suit. Raghubar Singh opposed the claim on the grounds that he had purchased the property in enforcement of his pre-emptive right and that he was entitled to preference as against the plaintiff. Jit Singh subsequently withdrew from the suit. The main question for consideration is whether Lalta Prasad is entitled to claim pre-emption in preference or opposition to Raghubar Singh, regardless of the sale effected by Baijnath in favour of the latter prior to the suit.

The finding of the Courts below is that Lalta Prasad was not a co-sharer of the sub-division in which the property sold is situated and that the right of Raghubar Singh, who was a co-sharer in the same sub-division as the original vendors, was superior to his. The claim of Lalta Prasad was, therefore, dismissed by both the Courts below.

It appears from the pedigree filed with the plaint that Raghubar Singh is related to Kali Singh, Bhawani Singh, and the husband of *Musammat* Seoka by blood, and as such he is entitled to preference as against Lalta Prasad, who is a co-sharer in another sub-division of the *mahal*, and so far as relationship is concerned, a perfect stranger to the family of the vendors. The main contention of the learned Counsel for the plaintiff-appellant is that the cause of action, which accrued to the plaintiff by reason of the sale effected by Kali Singh, Bhawani Singh and *Musammat* Seoka in favour of Baijnath, could not be prejudiced by the sale subsequently effected by Baijnath in favour of a person possessing a superior pre-emptive right, and reliance is placed by him in support of that argument on the decision in *Manna Singh* v. *Bihari Singh* (1). That was, however, a case in which a mortgagee who had obtained a decree absolute for foreclosure had executed a deed of relinquishment of the property covered by that decree in favour of the judgment-debtors, the ex-mortgagors, with the object of defeating the right of pre-emption, and had obtained from the latter on the same date a fresh deed of mortgage of the same property with the exception of a few *bighas*, which had been left for their benefit. It was held in that case, following an earlier decision in *Raj Bahadur Singh* v. *Chandrapal* (2), that the deed of relinquishment could not stand in the way of the plaintiff's enforcing the pre-emptive right which had accrued to him when the decree absolute for foreclosure was passed. A re sale of the property acquired by a person to the man from whom it was obtained stands on a different footing from the sale of that property to a person who had a preferential right of pre-emption and who was in a position to enforce that right within the time allowed by law for that purpose. The former is a voluntary act, while the latter is more or less an acknowledgment of the right of another to acquire that property in preference to the person by whom it was purchased, accompanied by a surrender in his favour. A vendee against whom a right of pre-emption is asserted by another is not required to sit quiet till the latter has brought a suit to enforce his right or all possible claimants have turned up to assert their rights. If he acknowledges the right of a pre-emptor and sells the property to him to obviate the trouble and expense of meeting a suit for pre-emption, he does so at his own peril, but his act cannot on that account be treated as wrongful, for it may be that no other pre-emptor may have come forward till then to assert his right or satisfied him that he had a right superior to the one whose right he was recognising. If after a sale effected by the vendee in favour of such a person, another person comes forward and asserts his pre emptive right, he can rely either on his original cause of action or on the cause of action accruing by the subsequent sale. But in either case he cannot succeed, unless he establishes that he has a preferential right of pre-emption as against the person to whom the vendee had sold the property prior to the institution of the suit or has at least an equal right with him so as to render the provisions of section 9 of the Oudh Laws Act (XVIII of 1876) applicable. As pointed out in *Liakat Husain* v. *Rashid-ud-din* (3), where property in respect of which a right of

(1) 37 Ind. Cas. 181; 19 O. C. 183; 3 O. L. J. 720.

(2) 37 Ind. Cas 170; 19 O. C. 185*n*.

(3) 29 A. 125; 3 A. L. J. 794; A. W. N. (1906) 313.

pre-emption exists in favour of a co-sharer is sold to a stranger but before a suit for pre-emption is brought, passes back into the hands of a co-sharer, a suit for pre-emption cannot be maintained, unless the person instituting the suit can establish his right as against the co-sharer, if the former has a right superior to that of the latter to have it. The cause of action accruing to the plaintiff from the original sale is not in any way withdrawn. It only ceases to subsist or be enforceable as against the transferee, who holds the property at the time of the suit. In *Tahawwar Khan* v. *Madho Ram* (4) it was held that a purchaser may use a title acquired by him subsequently to the origin of the cause of action as a defence against a suit for pre-emption instituted after his acquisition of the said title and in *Amir Hasan* v. *Sardar Begam* (5) the effect of a partition having taken place severing the relationship between co-sharers *inter se* was taken as destroying the right of the co-sharers to sue for pre-emption as if it was joint property. The principle of those decisions applies to the present case.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(4) 11 O. C. 290.
(5) 3 Ind. Cas. 546; 12 O. C. 229.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 922 OF 1916.

April 30, 1917.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

Babu RAMJI RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Lala SADHU SARAN LAL—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B.C. of 1885), s. 103—Record of Rights, entry in—Declaration, suit for—Limitation.

Where there is a definite challenge to the plaintiff's rights by an entry made in the Record of Rights and the fact is patent that the plaintiff must have been aware of that challenge to his rights, a suit for a declaration that the entry is wrong, if brought upon that challenge, must be brought in accordance with the six years' rule of limitation. If, however, in spite of the challenge the plaintiff retains possession of the property, he is not required to institute any suit upon that challenge but may institute a suit at any time within six years of any new challenge which has the effect of prejudicing his rights. [p. 11, col. 2; p. 12, col. 1.]

Appeal from a decision of the Subordinate Judge, Saran, dated the 18th April 1916.

Messrs. *L. N. Sinha* and *Gangadhar Das*, for the Appellants.

Mr. *Rajendra Prasad*, for the Respondent.

JUDGMENT.—In this case there was a Record of Rights prepared in the year 1899. In that Record of Rights the respondent was not shown as having any interest at all in the land in suit, the appellant was shown to be the *lakhirajdar* thereof. The appellant, therefore, brought this suit against the plaintiff for a declaration that the respondent's title was not that of a *lakhirajdar* but that of a mortgagee and that the equity of redemption vested in the plaintiff.

The Courts below have found as a fact that the appellants are merely mortgagees by virtue of a *patowa patta* dated 1890 and that the plaintiff-respondent is the owner of the equity of redemption by virtue of an auction-purchase of 1894. They have, therefore, decreed the plaintiff's suit and given him a declaration of his title and of the defendants' title, thereby recording a decision that the entry contained in the Record of Rights is incorrect. Against this decision an appeal is laid on two grounds: *Firstly*, that under section 42 of the Specific Relief Act the plaintiff's suit is barred by reason of the fact that he could and should have brought a suit for redemption of the mortgage. *Secondly*, because the first challenge to the plaintiff's title being made in section 103 proceedings prior to the final publication of the Record of Rights, the suit is barred by the six years' rule of limitation under section 120. We are not prepared to go quite as far as our learned brother Mullick, J., in *Amiruddin* v. *Saidur Rahman* (1), but it is clear that where there is a definite challenge to the plaintiff's rights by an entry made in the Record of Rights and where the fact is patent that the plaintiff must have been

(1) 35 Ind. Cas. 433; 1 P. L. J. 73.

aware of that challenge to his rights, the suit, if brought upon that challenge, must be brought in accordance with the six years' rule of limitation. If in spite of the challenge the plaintiff retains possession of the property, he is not required to institute any suit upon that challenge but may institute a suit at any time within six years of any new challenge which has the effect of prejudicing his rights.

In the case before us it is alleged that there was a new challenge in the year 1911. It is not suggested that that new challenge has in any way placed the plaintiff in a position worse than that which he occupied between the date of the finally published Record of Rights and the year 1911. That the plaintiff was fully aware of the challenge to his rights contained in the Record of Rights is patent from the fact that he was a party to the proceedings under section 103 upon which the preparation of the record was based. We must, therefore, hold that this suit is barred by limitation. The appeal must be decreed with costs and the suit dismissed with costs, without prejudice to any suit which the plaintiff may now bring for the redemption of the property by payment of the sum due to the mortgagee.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2841 OF 1915.

May 14, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

DIGAMBAR DAS - PLAINTIFF—APPELLANT

versus

BISWESWAR CHOWDHURY AND OTHERS —DEFENDANTS—RESPONDENTS.

Defamation—Suit against several persons making defamatory statements, maintainability of—Malicious prosecution—Complaint, filing of, whether furnishes cause of action.

Where a number of persons make defamatory allegations against the plaintiff, a suit against all of them to recover damages for defamation will not lie, unless it is proved that the defendants made those allegations acting together, as each publication of the libel or slander is a distinct tort and a separate suit would lie against every person uttering and publishing the slander. [p. 12, col. 2; 13, col. 1.]

A mere filing of a petition of complaint charging the plaintiff with criminal offences is not by itself sufficient to support an action against the complainants for damages for malicious prosecution. [p. 13, col. 1.]

Appeal against the decree of the District Judge, 24 Perganas, dated the 16th January 19 5, confirming that of the Subordinate Judge, Alipur, dated the 28th November 1913.

Babu *Provash Chandra Mitter* and Babu *Surendra Madhab Mullick*, for Babu *Susil Madhab Mullick*, for the Appellant.

Babus *Jogesh Chandra Roy* and *Sarat Chandra Mookherjee*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff from a judgment of the learned District Judge of the 24-Perganas, affirming the decision of the learned Subordinate Judge of Alipur. The plaintiff brought his suit against eleven defendants to recover damages, first of all, for malicious prosecution and secondly, for defamation I use the word "defamation" advisedly. The case set up in the plaint was that the plaintiff had been prosecuted before the Deputy Magistrate of Diamond Harbour by reason of the defendants having filed a petition before the learned Magistrate alleging that the plaintiff had been guilty of certain offences. The case of defamation as argued in this Court and before the learned District Judge is, I am satisfied, a totally different case to that set up in the plaint. It is quite true that in the third paragraph of the plaint the plaintiff states that the defendants are persons living in the same village with the plaintiff and that they in collusion with one another are spreading false imputations against the plaintiff at various places, such as that the plaintiff had been assisting in abducting young women. But it is impossible to imagine that the case set up by the plaintiff was that the eleven persons at one and the same time were at various places making serious allegations against the plaintiff with reference to his having set fire to certain houses and being engaged in abducting girls. As a matter of fact, a suit like that will not lie unless it is proved that the defendants made these allegations acting together, as each publication

of the libel or slander was a distinct tort and a separate suit would have to be maintained against every person uttering and publishing the slander. The real truth is that in this inartistic plaint it must be meant that these allegations against the plaintiff have got round the village and he, therefore, suffered in his reputation in the village by reason of these allegations which had become known by the petition of complaint. The learned Subordinate Judge dismissed the suit. The learned District Judge also affirmed that decision on appeal.

First of all, as regards the case of malicious prosecution, the view, that the learned Judge of the lower Appellate Court took, was that a mere filing of a petition of complaint would not by itself be sufficient to maintain an action for damages for malicious prosecution. That was the view taken by this Court in the case of *Golap Jan* v. *Bhola Nath Khetry* (1). A similar view has been taken by myself sitting on the Original Side of this Court in the case of *DeRozario* v. *Gulab Chand Anundjee* (2). It is quite clear that we must follow those judgments and hold that the allegations in the plaint in the present case do not disclose any case for which damages for malicious prosecution can be awarded in favour of the plaintiff.

The question of the defamation stands on a different footing. Mr. Mitter on behalf of the appellant has argued that the fourth paragraph of the written statement amounts to an admission of the publication of the defamatory statements set out in the third paragraph of the plaint and merely adds a plea of justification. I am not satisfied, notwithstanding Mr. Mitter's statement and the knowledge he has of the Vernacular in which the pleadings are drawn, that that is correct. I think that by the written statement it was probably intended to put in issue the question as to whether these defamatory statements had been published and in that view I am fortified by the opinion of the learned Subordinate Judge and also of the learned District Judge. They took a similar view that the written statement did, in fact, put in issue the question as to whether these defamatory statements had ever been published. The view that the learned District Judge took with regard to that was that on that part of the case for damages for slander the plaintiff had brought his suit against the eleven persons, not stating which of them uttered and which of them published these slanders, where they were published and how they were published and to whom. He thought it highly improper in a case like this to allow the plaintiff to amend his plaint and set out the further particulars. I agree with the learned District Judge that if this plaint was amended in the way Mr. Mitter suggested, it would be impossible, now we know that the plaintiff's case is that the defamatory words were uttered and published orally, to find that these eleven persons all at one and the same time acting in concert made publication of identically the same defamatory statements against the plaintiff. I think in that case we would have to split up the case and direct eleven separate trials of these split up suits with regard to the separate publication of each of these separate slanders, because each publication amounts to a separate and independent tort. The plaintiff ought not now, considering that this suit started six years ago in the year 1911, to be allowed to take such a course. Whether the incidents of setting fire to the pile of straw or the assisting in the abduction of young girls are forgotten incidents or not I do not know. But it is quite possible that after such a length of time the plaintiff Digambar Das has been restored by his continued good conduct to the confidence of his friends and the general public. I think that this case ought not to be sent back for retrial at this period. The present appeal, therefore, fails and must be dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

(1) 11 Ind. Cas. 311; 38 C. 880; 15 C. W. N. 917.
(2) 6 Ind. Cas. 877; 37 C. 358.

BARHAMDEO NARAIN *v.* BADRI NATH.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1199 OF 1916.

June 19, 1917.

Present:—Mr. Justice Chapman.

Lala BARHAMDEO NARAIN AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

Lala BADRI NATH AND OTHERS—DEFENDANTS —RESPONDENTS.

Bengal Estates Partition Act (V *of* 1897), *ss.* 64, 65, *interpretation of—Orchard or land belonging to one proprietor, meaning of.*

Under the provisions of section 65 of the Bengal Estates Partition Act, a Deputy Collector may permit one proprietor to retain occupation of the land allotted to another upon agreeing to pay an annual rent, otherwise the section is self-contained. It does not read "orchard or land" belonging to one proprietor as is read in section 64 of the Act. [p. 14, col. 1.]

Appeal from a decision of the Officiating Sub-Judge, Darbhanga, dated the 14th July 1916.

Messrs *Sharoshi Ch. Mitra* and *B. N. Mitra*, for the Appellants.

Messrs. *Baidyanath, N. Sinha, Rajendra Parsad, Oudh Behari Chaubey* and *Murari Parsad*, for the Respondents.

JUDGMENT.—There was a partition under the Estates Partition Act (V of 1897) made at the instance of one Lala Badri Nath, who claimed a nine-annas share in a certain estate. The other parties to the partition were Lala Barhamdeo Narain and Lala Lal Behari Lal, who claimed a seven-annas share. In making this partition the Deputy Collector allotted a certain orchard to the separated share corresponding to the seven-annas share belonging to Barhamdeo Narain and Lal Behari Lal. The Deputy Collector, however, directed that this orchard should remain in the possession of Lala Badri Nath and that Lala Badri Nath should pay rent for it to the proprietors Lala Barhamdeo Narain and Lala Lal Behari Lal. The suit out of which this appeal arises is instituted by the seven-annas proprietors, Lala Barhamdeo Narain and Lala Lal Behari Lal, for possession of this orchard upon the ground that the direction of the Deputy Collector that the orchard should remain in possession of Lala Barhamdeo Narain upon payment of rent was *ultra vires*. The Munsif decreed the suit.

The Court of first appeal has held that the suit is barred by the provisions of section 119 of the Estates Partition Act (V of 1897). Now there can be no doubt that the order of the Deputy Collector purported to have been made under section 65 of that Act. Section 65 is contained in Chapter IX of the Estates Partition Act. Section 119 is to the effect that no order made under Chapter IX of the Act shall be liable to be contested or set aside by suit in any Court, or by any means other than those expressly provided in this Act. *Prima facie*, therefore, the judgment of the Court of first appeal would appear to be correct, and it has been somewhat difficult to ascertain the grounds upon which that judgment is assailed in this Court.

I understand the first ground to be that section 65 only applies to the case of an orchard, which belongs to one of the proprietors, that is to say, which is planted by one of them. The reason upon which this contention is founded appears to have reference to the wording of section 65, to the effect that the Deputy Collector may apply the provisions of section 64 to orchards and section 64 deals with the case of a dwelling-house belonging to a proprietor. The contention, I understand, is that the words "belonging to one proprietor" which occurred in section 64 must be read into section 65, and the section 65 must be read as if the words "belonging to one proprietor" followed the words "orchard or land." That is not the interpretation which I put on section 65. Section 65 says that the Deputy Collector may apply the provisions of section 64 to orchards and gardens. I understand the meaning to be that the Deputy Collector may do what section 64 provides for, that is, he may permit one proprietor to retain occupation of the land allotted to another upon agreeing to pay an annual rent. Otherwise section 65 is self-contained and it is to this effect, that this arrangement may be made by a Deputy Collector when in his opinion the orchard is of special value to the proprietor in whose occupation it is found to be in consequence of improvements made by such proprietor or of the particular use to which such land is put. It appears that according to section 65 the first point which the Deputy Collector has to find is whether the orchard is in the occupation of the particular proprietor in whose favour the arrangement is to be made.

In this question of occupation, I do not see

that any question of title is concerned which would justify the inference of the Civil Court. In fact it was not contended before me that at the time when the Deputy Collector made this order this orchard was not in the occupation of Lala Badri Nath. Upon my making a reference from the Bench to the latter part of section 65 which requires the Deputy Collector to come to a finding that the land is of special value to the proprietor, the contention was taken up on behalf of the appellants that the Deputy Collector had come to no such finding in this particular case and that, therefore, his order was without jurisdiction. This contention does not appear to have been made before the first Court or in the Court of first appeal or in the memorandum of appeal to this Court. It may be that if the contention had been made that the Deputy Collector's order was not made with reference to any special value to the proprietor, the other side would have been able to show from the record of the Deputy Collector's proceedings or from some other paper in those proceedings that the Deputy Collector's order had been made in consideration of the special value of the land to the proprietor. In any event it is too late to raise that ground now in second appeal.

Another point mentioned in the course of the argument was with reference to the title of defendant No. 1. This land originally belonged to one Lala Ajodhya Behari Lal, who died leaving a widow named Jasoda Kuer and two daughters. Defendant No. 1, Lala Badri Nath, was the husband of one of these daughters. Therefore, so far as inheritance from Lala Ajodhya Behari Lal is concerned, plaintiff No. 1 would have no title. Defendant No. 1 in fact purchased this estate at a sale in execution of a decree against Ajodhya Behari Lal's widow and in a subsequent litigation between defendant No. 1 and the present plaintiffs respecting the purchase by defendant No. 1, a compromise was come to under which it was agreed that defendant No. 1 should be held entitled to nine-annas share and the present plaintiffs to seven-annas share. I do not find that although it is suggested in the plaint that this was a *benami* purchase by Lala Badri Nath that point was pressed in any stage of the proceedings. In the first and in the second Court litigation proceeded on the assumption that defendant No. 1 would have a title to the land with his sons Jai Behari Prasad and Sheo Behari Prasad, defendants Nos. 2 and 3. There appears to be no ground whatever for saying in second appeal that defendant No. 1 had no title to the land, and that is not the ground on which the jurisdiction of the Deputy Collector was assailed in the first Court or in any stage of the proceedings. In fact it would have been difficult to assail the Deputy Collector's proceedings upon such a ground inasmuch as Lala Badri Nath's title rests upon a compromise between him and the plaintiffs in a contested litigation.

The result is that this appeal is dismissed.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 77 OF 1916.

June 1, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

BADRI AND OTHERS—DEFENDANTS—APPELLANTS

versus

KHURSHED ALI KHAN—PLAINTIFF, SHEO NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (*I of* 1877), *s.* 42—*Declaratory relief—Discretion of Court—Notice of ejectment, cancellation of, by Revenue Court on ground of perpetual lease—Suit in Civil Court for cancellation or declaration of invalidity of lease—Civil Court, jurisdiction of.*

Where a tenant in a suit to contest a notice of ejectment claimed to be a perpetual lessee and relied on a perpetual lease which was upheld by the Revenue Courts and the notice was cancelled, and a suit was then brought for the cancellation of the lease or for a declaration of its invalidity on the ground that it was a forgery or that it was executed by a person who had no authority to execute the same:

Held, (1) that the decision of the Civil Court on either of those points could not affect the validity or otherwise of the decision of the Board of Revenue in regard to a matter with which it was competent to deal; [p. , col. .]

(2) that a declaratory decree militating against the decision of a competent Court having exclusive jurisdiction to decide the matter should not be granted. [p. , col. .]

Appeal against the decree of the Subordinate Judge, Gonda, dated the 20th April 1916.

BADRI *v.* KHURSHED ALI KHAN.

Mr. *Mahmud Beg*, for the Appellants.

Mr. *Aditya Prasad*, for the Respondents.

JUDGMENT.—The plaintiff is the proprietor of the village Agyabuzurg, wherein the defendants cultivate some land. The plaintiff sought to eject them through the Revenue Court, alleging that they were holding the land under leases of the 11th June 1904 which had expired. The defendants contested the notices of ejectment sent to them, on the ground that they had not executed any leases on the 11th June 1904 and that the land in question was held by them under a perpetual lease, granted to Manni Murao, their predecessor in-title, on the 13th August 1842 by the then proprietor of the village. This contention was upheld by the Board of Revenue, which held that the defendants held the rights of a perpetual lessee and were not liable to ejectment. The notices of ejectment issued by the plaintiff were accordingly cancelled.

The present suit was then filed by the plaintiff reiterating that the defendants held the land under leases of the 11th June 1904, by which they had surrendered all their previous rights and agreed to hold the land for a period of three years, which had expired, and also asserting that the alleged lease of the 13th August 1842 set up by the defendants was not genuine or binding on the plaintiff. There was a further allegation that during the continuance of the tenancy, defendants Nos. 1, 2 and 3 had applied to the Revenue Court for the entry of their names as *birtdars* of the land in dispute, but it was not stated whether their application was successful or not. Several reliefs were claimed in the plaint; but the only relief granted by the Court below, with which this appeal is concerned, was a declaration that the *patta* of the 13th August 1842 set up by the defendants was void and ineffectual as against the plaintiff and that the leases of the 11th June 1904 relied on by the plaintiff were binding on the defendants. The claim for possession was disallowed by it but two other declarations were also granted, negativing the rights of the defendants to transfer their leasehold rights and adjudging that they had no proprietary or under-proprietary rights in the disputed area, in regard to both of which the learned Counsel who appears for the defendants-appellants admits that he does not question their propriety. He has urged in support of the appeal three distinct points. In the first place, it is contended by him that the leases of the 11th June 1904 were not executed by the persons by whom they purport to have been executed and that the evidence adduced by the plaintiff in support of these leases was insufficient and untrustworthy. One of those leases purports to have been executed by Ram Din, Salig, Patan, Jugal, Mahabir, Bhola and Gaya Dat and recites that the executants have given up all their previous rights in the land in dispute, whether as ordinary tenants or occupancy tenants or otherwise, and accepted in lieu thereof a tenancy of the said land for a period of three years at a rental of Rs. 345 per year. The other lease was executed by Ghulam and Hardas, reciting a similar relinquishment and an acceptance of a lease of the same land for three years at a rental of Rs. 115 per year. The previous rental of both these lands was, according to the plaintiff, Rs. 435-4-9 per annum. If the defendants were holding the said lands as perpetual tenants, it is obvious that the relinquishment gave them no benefit, and unless there was any consideration to support it, it cannot be enforced or treated as binding. The evidence adduced by the plaintiff in support of the alleged deeds of relinquishment, which also contained a renewal of the leases for a period of three years in each case, is, however, of a very unsatisfactory character. The executants were illiterate, and the only evidence produced to prove the execution of those leases consists of two witnesses, Bishunath, who was the scribe of those deeds, and Hardas, who was the executant of one of them. Bishunath is a person who writes petitions in the compound of the Registration Office. He admits that he is not in a position to identify the persons who came to get the said document executed; and the statement of Hardas alone, whatever might be its value in regard to himself, is of little weight as against the other defendants, particularly when it is remembered that in a previous statement made by Hardas himself in the ejectment proceedings, he had denied that he had executed any of

those leases. The registration endorsement shows that the alleged executants were identified before the Sub-Registrar by Wajid Khan and Suraj Bali Lal. Both of them were attesting witnesses to the deeds, but neither of them has been produced. Suraj Bali Lal is stated to be dead, but there is no reason why the evidence of Wajid Khan was withheld. The deeds were registered, but the circumstances, in which the relinquishments are stated to have been obtained and fresh leases granted for a period of three years without any corresponding advantage to the executants, render it necessary that the evidence which has been adduced on the point should not be accepted without careful scrutiny. The Sub-Registrar took the thumb-impressions of the persons who appeared before him and admitted the execution of the said leases, and it is stated that some of those thumb-impressions resemble the thumb-impressions of some of the defendants; but no finger print expert was examined in this case, and no reliance can, therefore, be placed on the alleged resemblance of thumb-impressions, even if it exists. The statement of Hardas is obviously insufficient to shift the responsibility for the execution of these deeds upon the illiterate executants, to whom they are now attributed, and in any event the absence of consideration for the relinquishment of the previous rights without any corresponding advantage to them renders those deeds, so far as they purport to relinquish the previous rights held by them in the land, invalid and unenforceable.

It is next urged on behalf of the defendant-appellant that the existence of the perpetual lease of the 13th August 1842 was affirmed by the Board of Revenue in the ejectment proceedings, and that the present suit, so far as it militated against the finding of the Board of Revenue, adjudging the defendants to be perpetual tenants, was not maintainable. It is argued on behalf of the plaintiff-respondent that a suit for the cancelment of such a lease or for a declaration of its invalidity, either on the ground that it was a forgery or on the ground that it was executed by a person who had no authority to execute the same, was maintainable in the Civil Court; and reliance is placed in support of that proposition on the decisions in *Raghubar Dayal* v. *Mahesh Gir* (1) and *Ram Autar* v. *Abul Hosan Khan* (2). The question in the former case, however, was whether the granting of a perpetual and heritable lease not beneficial to the general body of co-sharers, was within the competence of a *lambardar*, and if not, whether a suit for a declaration that such a lease was invalid as against the other co-sharers was within time and could be entertained in a Civil Court. The finding of this Court was that such a suit could be entertained in order that the rights of the parties might be authoritatively determined prior to some further action before the Rent or Revenue Courts for the actual enforcement of their rights. There had, however, been no previous adjudication in that case, declaring the nature of the tenancy, such as was made in this case by the Board of Revenue, and that decision does not, therefore, help the plaintiff. In the latter case, the relationship of landlord and tenant was denied, and the authority of the Civil Court to determine whether such relationship existed on the strength of certain documents, the genuineness of which was denied, could hardly be disputed. Section 42 of the United Provinces Act III of 1901 authorizes the Collector to determine in any dispute respecting the class or nature of any tenancy the status which the tenant occupies and section 233, clause (i), of the same Act debars the Civil Court from determining that question. Their Lordships of the Privy Council have accordingly held in *Mohammad Abul Husan Khan* v. *Prag* (3) that the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds. The Civil Courts have the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or under-proprietary right in the same, but have no jurisdiction to enter into the question of the nature of

(1) 20 Ind. Cas. 147.
(2) 28 Ind Cas. 307; 2 O. L. J. 131 at p. 137.
(3) 38 Ind. Cas. 814; 20 O. C. 8; 19 Bom L. R. 202; (1917) M. W. N. 232 & 456; 32 M. L. J. 388; 21 C. W. N. 583; 15 A. L. J. 113; 21 M. L. T. 102 (P. C.).

the tenancy, where no proprietary or under-proprietary right is claimed or set up. The decision of this Court on the genuineness or otherwise of the lease of 13th August 1842 cannot have any effect on the validity or otherwise of the decision of the Board of Revenue, which is a decision of a competent Court in regard to the matter with which it deals. There are, however, sufficient indications in the record to show that the lease of the 13th August 1842 was a genuine document, the execution of which was admitted by the executant, Ahmad Ali Khan, himself in as far back as 1860. Its genuineness was also affirmed in an ejectment proceeding, to which a mortgagee of the present plaintiff was a party, in 1889. The lease purported to grant to Manni Murao a right to clear the jungle from the land in Azyabuzurg and cultivate the same free of rent for a period of seven years, and subject to the payment of a gradual scale of rent thereafter in perpetuity. It also gave power to him to get the land populated and authorized him to retain besides a share of the produce one-fourth of the rent payable to the landlord for his labour in clearing the land of the jungle. The land in dispute has been occupied since the execution of that lease by several generations of the descendants of Manni Murao, and the previous attempts made to eject some of them had been unsuccessful. The plaintiff admits that Ahmad Ali Khan, the grantor of the lease, was one of the owners of the village, though he denies that he had any right to grant the lease at the time it was granted. The suggestion is that his father was the owner of the village and was then alive. But there is no evidence to show that the village belonged to his father or that the predecessor-in-interest of the plaintiff had any right to object to a lease granted by Ahmad Ali Khan. In a suit filed by Ahmad Ali Khan against Karim Bakhsh Khan in 1860 Ahmad Ali Khan was described as the landholder and *muafidar* of the village Azya Tappabir. Even if he was only a *lambardar*, his co-sharers would have questioned his acts any time within twelve years from the date when they came to know of the existence of the lease either by the delivery of possession of the lease-hold property to the lessee or otherwise. No such action was, however, taken by them in the present instance. The predecessors-in-title of the defendants cut the jungle and cleared the land and brought it under cultivation. They and their descendants have since been holding it in their possession for the last seventy years or more and paying rent not only to the present plaintiff but also to his predecessors-in-title. It is impossible to conceive that the latter were not aware of the existence of this lease, when it was granted or at all events when possession was taken by the lessee and the land brought under cultivation.

The plaintiff, however, admits in paragraph 6 of the plaint that when he redeemed the mortgage made by his predecessor-in-title in favour of Ramzan Bakhsh Khan, he came to know that an attempt made by the mortgagee to eject the defendants had been unsuccessful, and that certain rights were then set up by the defendants in denial of the right of the mortgagee to eject him from the disputed land. The plaintiff states that he thereafter managed to induce the defendants to relinquish all their previous rights and to accept leases in return for a fixed period of three years at an enhanced rent, but he has failed to prove that allegation.

It is also urged on behalf of the defendants-appellants that the Court below had improperly exercised its discretion in granting a declaratory relief, which could have no other effect than that of conflicting with the decision of a competent Court in the matter of the nature of a tenancy. The grant of a declaratory decree under section 42 of the present Specific Relief Act (I of 1877) is purely discretionary, and, as pointed out by their Lordships of the Privy Council in *Jaipal Kunwar* v. *Indar Bahadur Singh* (4), no declaration should be granted when it can serve no legitimate purpose.

The plaintiff-respondent has filed a cross-objection claiming that a declaration should have been granted that the defendants had no right under the lease of the 13th August 1842 and were not perpetual lessees thereunder.

(4) 26 A. 238; 31 I. A. 67; 8 C. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 149; 8 Sar. P. C. J. 625; 7 O. C. 239 (P. C.).

But such a declaration, as has been shown above, cannot be granted without encroaching on the exclusive jurisdiction of the Revenue Court, which has already decided that the defendants were perpetual lessees and that the lease of the 13th August 1842 was genuine. The Court below rightly refused to grant the said declaration.

The appeal is, therefore, allowed in so far that the declarations A and B granted by the Court below will be set aside. The cross-objection is disallowed. The defendants-appellants will get their costs from the plaintiff here and below in proportion to their success. This plaintiff will similarly get his costs in the proportion to which he has been successful.

Appeal partly allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 87 OF 1916.

March 14, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice N. R. Chatterjea.

PRIYA SANKAR CHOWDHURI, MINOR, BY HIS MOTHER KULAKAMINI CHOWDHURANI—DEFENDANT—APPELLANT

versus

JITENDRA NATH BHADURI, MINOR, BY HIS MOTHER PADMA KAMINI DEBI, AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata, constructive—Suit decreed without decision of material issue—Practice of keeping undecided material issue, propriety of.

In a suit between the plaintiffs and the defendants the question of the transferability of an occupancy holding, which was directly and substantially in issue, was not decided by the Court, which decreed the plaintiffs' suit but left the question open between the parties. In a subsequent suit between the same parties in which the same question was in issue:

Held, that though the course adopted by the Court was not proper, yet its decision in the previous suit could not operate as *res judicata* on the question of the transferability of the holding. [p. 22, cols. 1 & 2.]

Letters Patent Appeal against the decree of Mr. Justice Newbould, dated the 21st March 1916, in appeal from Appellate Decree No. 3902 of 1913.

FACTS material to the report will appear from the judgment of Newbould, J., from the argument and from the judgment in the Letters Patent Appeal.

NEWBOULD, J.—The plaintiffs-appellants who represent the entire body of landlords brought this suit for the ejectment of the defendant, who is a purchaser of a non transferable occupancy holding in execution of his own mortgage decree. The Court of first instance granted the plaintiffs a decree which was reversed by the lower Appellate Court. The lower Appellate Court dismissed the suit on two grounds, *first*, that it was barred by estoppel, and *secondly*, that it was barred by *res judicata*. As regards the question of estoppel, the learned Subordinate Judge is, in my opinion, obviously wrong. He has held that the plaintiffs by their own conduct are estopped from saying that the defendant or his predecessor could not make a valid purchase of the holding because rights of occupancy are not transferable. The question in this case is not whether rights of occupancy are transferable or not, but whether they are transferable without the landlord's consent. Because the landlord himself brings his occupancy holding to sale that cannot be any bar to his subsequently saying that that holding is not saleable without his consent; nor can a subsequent recognition by the whole body of landlords of a previous transfer be regarded as an admission that the transfer would have been valid, if they had not recognised it. It is not necessary to dwell on this point as the learned Vakil for the respondent with his usual frankness admitted that he could not support the decision of the learned Subordinate Judge in this respect.

As regards the issue of *res judicata* the facts are as follows:—In Suit No. 927 of 1907 in which the present defendant was the plaintiff and the present plaintiff and one Madan Mandal were the defendants, there was an express issue as to whether rights of occupancy were transferable or not. The Court of appeal below avoided the decision of that issue by saying that the plaintiffs as auction-purchasers of the holding could not raise the question of transferability and the learned Subordinate Judge also stated in his judgment: "This

decision will be no bar to the defendants," that is to say, the present plaintiffs, "if they raise the question of transferability at any other time as landlords." The learned Subordinate Judge was of opinion that the question whether rights of occupancy were transferable or not could not again be re-opened in the present suit, as there would not be any finality of proceedings if material questions of law or fact were left open in one suit to be decided in a subsequent suit. In my opinion when a matter has been left open at a previous trial and has obviously not been heard and finally decided, section 11, Code of Civil Procedure, is not applicable. The learned Vakil for the respondent refers to Explanation IV of that section, which runs as follows:—"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." It is pointed out that such a matter not having been raised could not have been heard and finally decided and that consequently there can be an issue barred by *res judicata* without there having been an express decision upon it. The answer to this appears to me to be that issues referred to in Explanation IV—issues not expressly raised—must be held to be constructively raised and though not expressly decided are constructively decided. This is quite distinct from cases like the present where an issue has been expressly raised and expressly left open. The view I take is supported by the leading text book on the Law of Res judicata—Hukum Chand's Works, Edition 1894. In paragraph 53 at page 117 in the marginal notes, it is stated that any matter expressly left undecided will not be deemed to have been decided, and in the following paragraph it is stated that the same rule applies when the matter left undecided requires to be decided, for the decision of the suit. In support of these conclusions amongst the cases there relied or, I may refer particularly to the remarks of Mr. Justice Macdonell of this Court in the case of *Kanai Lall Khan* v. *Sashi Bhuson* (1): "We think it impossible to say that a question not only not decided in the previous suit but in express language excluded from the decision therein can be treated as *res judicata*." As a later and still more binding authority I may also refer to the decision of the Privy Council in the case of *Parsotam Gir* v. *Narbada Gir* (2). In deciding whether a question that had been previously left open by the decision of the High Court in 1886 was a bar to a subsequent suit, their Lordships of the Judicial Committee remarked:—"The question is not whether the judgment of the High Court in 1886 was right, but whether it did or did not finally decide the present question as between Nipal Gir and Narbada Gir. It would be a contradiction in terms to say that the Court has finally decided matters which it expressly left untouched and undecided." In the present case, the question is not, as the learned Subordinate Judge seems to have thought, whether the Subordinate Judge who tried the appeal in Suit No. 927 of 1907 was right in leaving the question of transferability open, but the question only is whether it was left open or not and the words which I have quoted from that judgment show that it was left open. I hold, therefore, that the lower Appellate Court was wrong in both the points on which it decreed the appeal and dismissed the suit. I accordingly decree this appeal, set aside the judgment and decree of the lower Appellate Court and restore those of the Court of first instance. The appellants will get their costs in this Court and in the lower Appellate Court.

(1) 6 C. 777 at p 781 8 C. L. R. 117, 4 Shome L. R. 110; 3 Ind. Dec. (N. S.) 603.

Babu *Manmatha Nath Roy* (with him Babu *Mokendra Nath Roy*), for the Appellant.—The appeal arises out of a suit for ejecting the defendant-appellant on the ground that he is the purchaser of a non-transferable occupancy holding. The holding in question was mortgaged to the defendant in 1894. Then in 1903 he purchased the holding in execution of a mortgage-decree, and subsequently instituted a suit for recovery of possession against the present plaintiff-landlord and some other persons settled upon the land by the latter, and got a decree for possession of eight-annas interest in the holding as it was then found that his mort-

(2) 21 A. 505; 1 Bom. L. R. 700; 3 C. W. N. 517; 26 I. A. 175; 7 Sar. P. C. J. 534; 9 Ind. Dec. (N. S.) 1028 (P. C.).

gagor had only an eight-annas share in the holding. In that suit the present plaintiff-landlord raised the question of the non-transferability of the holding.

[Babu *Krishna Kamal Moitra*, for the Respondent.—The suit was directed principally against the tenants settled upon the land and the present plaintiff was made only a *pro forma* defendant, and the question of transferability was left open by the Court.]

When the question of transferability was distinctly and directly raised by the landlord in that suit, the Court was bound to decide that point and any reservation in the judgment keeping the point open would not bind the party against whose interest the reservation was made. The reservation was, having regard to the provisions of the Civil Procedure Code, without jurisdiction and hence a nullity.

[SANDERSON, C. J.—How can section 11 of the Civil Procedure Code help you? The point was not finally decided in that suit.]

Section 11 will help me if I can show that the Court was not competent to make that reservation. If the reservation goes away, the effect is that the issue of transferability was decided in my favour. The case is similar to that class of cases where it has been held that if a Court not competent to allow a suit to be withdrawn under Order XXIII, rule 1, allows it to be withdrawn with liberty to institute a fresh suit, the fresh suit would be barred by *res judicata*. See *Kali Prasanna Sil* v. *Panchanan Nandi* (3). The Code of Civil Procedure does not entitle the Court to make any such reservation. See Order XX, rules 4 and 5.

[SANDERSON, C. J.—Still you cannot get rid of the fact that the point was not finally decided.]

If the reservation in the judgment keeping the point open was a nullity, the point cannot but be taken to have been finally decided. In that case I can successfully plead *res judicata*. I am entitled to say that the issue in question was heard and finally decided in the previous suit.

Then the landlord is estopped from denying the right of transferability. Prior to the mortgage to this defendant the landlord recognised the transfer of the holding to one Peary Mohan, so that it is not now open to him to say that the holding is not transferable.

Babu *Krishna Kamal Moitra*, for the respondent, referred to *Bhupati Roy Chowdhury* v. *Secretary of State* (4), *Mohamaya Prosad Singh* v. *Ram Khelawan Singh* (5).

JUDGMENT.

SANDERSON, C. J.—I think that this appeal ought to be dismissed: and inasmuch as the circumstances are rather peculiar I think it right to make a few observations.

The first point which was raised by the learned Vakil was with regard to *Estoppel*, but he did not argue it very strenuously and did not read the judgment of the learned Judge upon that point: and, the fact was, I think, brought home to him, during the course of the argument by the observations which fell from my learned brother and myself, that there was no case of estoppel. I need not say anything upon that point except that I agree with the judgment of the learned Judge.

The real point which has been argued before us is that this was a matter of *res judicata*.

The action in this case was brought by the plaintiffs to obtain possession of the land and upon this question of *res judicata*, it appears that in a previous suit in which the present defendant was the plaintiff and the present plaintiffs and one Madan Mandal were the defendants there was an express issue as to whether the rights of occupancy were transferable or not. I ought to have said that that is an issue which has been tried in this case,—the Court of first instance avoided the decision of that issue by saying that the present plaintiffs, who were the defendants in the previous suit, as auction purchasers of the holding could not raise the question of the transferability, and the learned Subordinate Judge stated in his judgment: "This decision will be no bar to the defendants (that is to say, the present plaintiffs) if they raise the question of transferability at any other time as landlords."

Now, the learned Judge, Mr. Justice Newbould, has decided that under those circumstances the matter of the issue of the trans-

(3) 33 Ind. Cas. 670; 23 C. L. J. 489; 20 C. W. N. 1000; 44 C. 367.

(4) 5 C. L. J. 662 at p. 663.

(5) 15 Ind. Cas. 911 at p. 913; 15 C. L. J. 684.

ferability of the occupancy holding was not *res judicata*.

The learned Vakil for the appellant has argued that the learned Subordinate Judge in the first suit, if I may so call it, had no jurisdiction to do that which he did, namely, to leave open the question of the transferability of the occupancy holding, and to say that the decision in that case would be no bar to the plaintiffs to raising the question at a later date; and, he then proceeds to argue that if that be so, and the learned Judge had no jurisdiction to make that order, then that part of the order must be taken as if it had not been made and consequently he argues that inasmuch as the issue of the transferability of the occupancy holding was in fact raised in the first suit and inasmuch as the plaintiffs obtained a decree in the first suit it must be taken that that issue was decided, and was decided in favour of the plaintiff in that case, that is to say, in favour of the defendant in this case.

In my judgment, that is not a sound argument.

Before I give my reasons for that opinion, I must say that I cannot approve of the course which was taken by the learned Subordinate Judge in the first suit. I think that if that course were to be adopted in other cases, it might lead to multiplication of law suits and to much delay and also to unnecessary expenses to the parties and might lead to considerable injustice. I hope that such course will not be adopted and that anything we say in this case will not be taken as approving in any sense whatever of the course which was adopted by the learned Subordinate Judge in the first suit. But that is not the point that is material to the question in this case.

The point that I have to consider is whether the issue is a matter of *res judicata* within the meaning of section 11 of the Civil Procedure Code. That section is as follows:—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties.....litigating under the same title in a Court competent to try such subsequent suit."—now all that, as far as I have gone,—applies to this case because it is clear that the Court was a competent Court; the parties are the same; and there is no doubt that the matter in issue in this suit was in issue in the first suit—then the section goes on to say, "and has been heard and finally decided by such Court."

In relying upon this defence of *res judicata* Mr. Roy's client has to show two things: *first* he has to show that this matter was in issue in the first suit and the *second* thing he has to show is that it has been heard and finally decided by such Court. We find that the matter in the first suit was dealt with in this way; in the first Court it was decided that it was not open to the then defendants (the plaintiffs in this case) to raise this point, and, therefore, as regards the first Court it cannot be said that that issue was decided by the first Court. Then the learned Subordinate Judge said in effect that though he was giving the plaintiff a decree, he was not giving the plaintiff a decree on the ground that the occupancy holding was transferable: on the contrary the effect of what he said was that he did not decide that question but that he left that question to be decided on a future date, if necessary. In this state of things, how can it be said that Mr. Roy's client has shown that the matter was not only in issue in the former suit but was finally decided in that suit?

In the case of *Parsotam Gir* v. *Narbada Gir* (2) Lord Macnaghten said this: "The question is not whether the judgment of the High Court in 1886 was right"—so also here the question is not whether the judgment of the learned Subordinate Judge in the former suit was right—"but whether it did or did not finally decide the present question as between Nepal Gir and Narbada Gir."—So here the question is whether the learned Subordinate Judge did or did not finally decide the present question between the parties, namely, whether this occupancy holding was transferable or not.—"It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left 'untouched and undecided.'" I think these remarks are applicable to the present case and, for these reasons I think that the learned Judge's judgment, which if I may say so is quite clear, is right and ought to be supported and this appeal dismissed with costs.

N. R. CHATTERJEA, J.—I agree.

Appeal dismissed.

NAND RAM *v.* JIWA RAM.

ALLAHABAD HIGH COURT.
EXECUTION SECOND APPEAL No. 1440 OF 1915.
March 3, 1917.
Present:—Mr. Justice Rafique and Mr. Justice Piggott.
NAND RAM—DECREE-HOLDER—APPELLANT
versus
JIWA RAM AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 12—Possession, decree for, in favour of co-plaintiff—Reversal of decree—Mesne profits, suit for—Liability of plaintiff who was not decree-holder.

A Hindu died leaving two widows *A* and *B*. *A* made a *waqf* of half the property in favour of a certain temple. Subsequent to *A's* death, *B* adopted one *J.*, alleging that she had permission from her husband to do so. *B* and *J.* then sued for possession of the *waqf* property questioning the validity of the *waqf*. The suit was contested by the *mutawalli N.*, who was in possession. The Subordinate Judge decreed the claim of *A.* for possession of the *waqf* property, but held that the adoption of *J.* was not proved. *N.* appealed and the case was referred to arbitration and the arbitrator gave an award. The decree which followed the award was that *J.* was the adopted son of *A.* and that the *waqf* was a valid *waqf*. *N.* the *mutawalli* on obtaining possession of the *waqf* property sued both *A.* and *J.* for the recovery of *mesne profits* for the period of dispossession:

Held, that *J.* could not be made liable for the period prior to the date of the decree on the award inasmuch as he was not a decree-holder prior to that date, but that as the decree on the award made him a joint decree-holder with *A* his liability began from that date. [p. 24, col. 1.]

Execution second appeal against the decision of the Second Additional Judge, Aligarh, dated the 17th of April 1915.

The Hon'ble Mr. *B. E. O'Conor*, the Hon'ble Dr. *Tej Bahadur Sapru*, Messrs. *A. P. Dube* and *Panna Lal*, for the Appellant.

Messrs. *P. L. Banerji* and *Lakshmi Narain*, for the Respondents.

JUDGMENT.—This appeal arises out of execution proceedings. It appears that one Gobardhan Das died leaving him surviving two widows, *Musammat* Rupo and *Musammat* Singhari. On the 19th of August 1900, *Musammat* Singhari made a *waqf* of half the property of her deceased husband in favour of a temple of Gangaji in Aligarh district. Subsequent to the death of *Musammat* Singhari, the other widow *Musammat* Rupo adopted one Jiwa Ram, alleging that she had permission from her husband to do so. On the 21st August 1909, she and Jiwa Ram sued for possession of the *waqf* property questioning the validity of the *waqf*. Nand Ram, who was appointed by the deed of *waqf* as *mutawalli* and was in possession of the *waqf* property, contested the suit. He denied the alleged adoption of Jiwa Ram. The Subordinate Judge, who tried the suit, held that the adoption of Jiwa Ram was not proved and that the *waqf* was invalid. He decreed the claim of *Musammat* Rupo for possession of the *waqf* property. In execution of that decree *Musammat* Rupo obtained possession of the *waqf* property against Nand Ram on the 4th of May 1910. Nand Ram preferred an appeal to the High Court and the case was remanded for re-trial on the merits on the 4th of July 1911. On the 12th of February 1912, by consent of parties the case was referred to arbitration and the arbitrators gave an award on the 18th February 1912. On the 21st March 1912, the learned Subordinate Judge passed a decree in terms of the award. The decree which followed the award was to the effect that Jiwa Ram was the adopted son of *Musammat* Rupo and that two parcels of property of Gobardhan Das dedicated by his widow *Musammat* Singhari were properly dedicated and were *waqf* property. Nand Ram applied for and obtained possession of the said two parcels of property on the 20th of April 1913. Subsequent to his obtaining possession, he applied to the Court of the Subordinate Judge of Aligarh for the recovery of mesne profits for the period of his dispossession, *viz.*, from the 4th of May 1910 up to the 20th April 1913. Both *Musammat* Rupo and Jiwa Ram filed objections contesting the amount of mesne profits as also the method of assessment. The Court of first instance disallowed the objections and directed an enquiry as to the amount of mesne profits against both. *Musammat* Rupo and Jiwa Ram went up in appeal to the Court of the District Judge, and for the first time in that Court a fresh objection was raised on behalf of Jiwa Ram. It was urged that he had never obtained possession through Court and that legal possession always remained with *Musammat* Rupo and consequently he was not liable under section 144 of the Code of Civil Procedure for any mesne profits due to Nand Ram. On behalf of *Musammat* Rupo it was urged that the award settled all disputes between the parties and that the right of Nand Ram to

get mesne profits for the period *Musammat* Rupo was in possession was not decided by the arbitrators in favour of Nand Ram. The award taken as a whole should be construed to mean that all that Nand Ram was entitled to was to get possession of two parcels of property mentioned therein as *waqf* property and no more. The learned District Judge accepted the argument on behalf of Jiwa Ram and released him from all liability. He rejected the objection of *Musammat* Rupo and directed that enquiry as to mesne profits should be made against her only. Nand Ram has come up in second appeal to this Court and contends that Jiwa Ram should also have been made liable for the mesne profits due to him. For the respondents the argument before the District Judge is repeated, and it is said that Jiwa Ram not being a decree-holder section 144 does not apply to him. The other argument which affects the liability of *Musammat* Rupo on the basis of the award is also urged. The objection on behalf of *Musammat* Rupo need not be considered, as she has not appealed against the order of the learned District Judge. The only point, therefore, before us is whether Jiwa Ram is liable for the claim of Nand Ram to mesne profits. We think that his objection is so far correct that he cannot be made liable for the period prior to the date of the decree on the award, as he was not a decree holder before that date. But the decree of the 21st March 1912 made him a joint decree-holder with *Musammat* Rupo and from that date his liability begins. We, therefore, modify the order of the lower Appellate Court and direct that enquiry into the amount of mesne profits due to Nand Ram be made as against *Musammat* Rupo from the 4th of May 1910 and as against *Musammat* Rupo and Jiwa Ram from the 21st March 1912. Proportionate costs should be allowed to the parties throughout, including in this Court fees on the higher scale.

Appeal accepted in part.

MADRAS HIGH COURT.

APPEAL No. 400 OF 1914.

January 11, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE COLLECTOR OF THE TINNEVELLY DISTRICT—DEFENDANT—

APPELLANT

versus

PALANIYAPPA PILLAI AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Waters, law of—Riparian rights—Channel irrigating a mitta, *right of* mittadar *to dam—Rights of lower owners—Crown, right of entry of, on private property to regulate distribution of water—Injunction, grant of, legality of—Specific Relief Act (I of 1877), s.* 54.

In systems of connected tanks in different *mittas* or villages supplied with water by or through a permanent or artificial channel, each upper owner is entitled in the flood season to fill his tank, which in general is of sufficient storage capacity for the *ayakat*, and, subject to this, is bound to allow the water to flow freely on to the lower tank till the last of them is supplied. Whatever may be the means adopted to let out the surplus, the owner of the tank, in such cases, has no right to increase the storage capacity of his tank beyond what it was at the time the channel was dug, which, in many cases, can only be proved by the customary flow of water into the tank. [p. 31, col. 1.]

Where Government is found to have no right to water supplied to tanks in a *mitta* by an artificial channel passing through the village, the revenue officers as agents of the Government are not entitled to go on the *mittadar's* land against his wish to regulate the supply or distribution of water to his *mitta* and other *Aiyan* villages or to execute repairs. Such a right can only be exercised without violating the proprietary rights of others and by the use of lawful means. [p. 27, col. 1; p. 33, col. 1.]

Government can be restrained by an injunction from committing trespass on the properties of private owners for controlling the distribution of water for purposes of irrigation. [p. 27, col. 1; p. 33, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Tinnevelly, in Original Suit No. 60 of 1911.

Mr. *V. Ramesam* (Government Pleader), for the Appellant.

Mr. *J. L. Rosario* (with him Messrs. *E. S. Chidambaram Pillai* and *P. N. Marthandam Pillai*), for the Respondents.

This appeal coming on for hearing on the 13th, 14th and 15th December 1916 and having stood over for consideration till this day, the Court delivered the following

SECRETARY OF STATE *v.* PALANIYAPPA PILLAI.

JUDGMENT.

ABDUR RAHIM, J.—The respondents (plaintiffs) are the proprietors of Kunnakudi Mitta. The southern boundary of it is a small river called Harihara Nadhi. A channel called Kunnakudi Kal takes off from a point in the river, goes a little distance towards the north and then to the east (or rather south-east), feeds a tank called Kunnakudi Periakulam which discharges its water at the other end through a weir; from here the channel continues and feeds a smaller tank called Kunnakudi Pettaikulam; and thereafter it goes on till it discharges itself in Sivalaperikulam. The villages on the north and north-east of the channel are *ryotwari* villages held of the Government and named Kuthukkalvalasai and Tenkasi. Sivalaperikulam derives its name from the village of Sivalaperi, also a *ryotwari* village in Tenkasi Taluk. At the source of the channel, a short distance from the river, there is a head sluice situate in the *mitta*. Further on also within the boundaries of the *mitta* is one of the points in dispute, what is called outlet No. 2. This outlet or calingula is on the southern bank of the channel; it has a vent in the middle, a masonry wall on each side, with wing walls in the eastern and western *bunds*. The head of the vent before the interference of the revenue authorities was half a foot lower than that of the channel. There was opening between the stones in the vent to admit of wooden planks being inserted and these used to be put in when it was found necessary, in order to carry water into the tank; in times of flood the planks would be removed so that water might flow down to the river to the south.

The *mittadars* claim that they are entitled to the whole of the water which comes into the channel and through the channel into the two tanks mentioned above within the Kunnakudi Mitta; and if any surplus water is left after irrigating all the lands that they want to cultivate, that is drained off into the Sivalaperi tank. On behalf of the appellant, the Secretary of State for India in Council, it is stated that the channel is a common source of supply created for the benefit of the plaintiffs' *mitta* tank, *i. e.*, Periakulam tank and the Ayan Sivalaperi tank. He does not recognise Pettaikulam as a tank in which plaintiffs are entitled to store water and says that the Sivalaperi tank is entitled at all times to two-fifths of the water in the channel which the *ryot's* have a right to take in seasons of good supply through the open vents in the surplus weir of the Periakulam tank, and in times of low supply through a *madai* or sluice called Pulavadaimadai at the western end of the Periakulam tank. In the alternative, he says that the Sivalaperi tank is entitled to all the water of the surplus weir of Periakulam as the weir stood in 1859.

The defendant also alleges that until 1892 the waterspread of the Periakulam tank was 7·50 acres of *mitta* land and 10·39 acres of Government *poramboke* land on the north, that since that date the *mittadars* by inserting permanent wooden shutters in the vents of the weir, which till then used to remain open, increased the full tank level and caused permanent submersion of 13 acres of Government wet land on the foreshore of this tank. He contends that this act of the *mittadar* is unlawful and that the F. T. L. (Full Tank Level) of Periakulam should be reduced by one foot. The defendant then states that the Kunnakudi channel was in a dangerous condition and needed repairs and for his purpose he found it necessary, as guardian of public interests, to convert outlet No. 2 into a calingula, sent notice and estimates to the *mittadars* calling upon them to pay their contribution, and that as they would not agree he began doing the works himself. The calingula is constructed with dam stones with their top as their full sluice level and so made as to work automatically without endangering the channel bank or diminishing the supply in the channel or the tank. As for Pettaikulam the case of the defendant is that it is only a portion of the channel below the surplus weir of Periakulam and that it was converted by the *mittadars* into a supplemental tank in 1871 by constructing a masonry dam across the channel. He wants that the dam should be removed. The defendant claims that the Government, as such, has a right to do all the necessary repairs in the channel partly from contributions from public funds and partly from contributions made by the

mittadar and the Ayan *ryots*. It is denied that the plaintiffs have any right to execute repairs to any of the works in the channel or tank without the defendants' permission.

The Kunnakudi channel is an ancient channel. It does not appear when it was dug and at whose cost. It lies almost entirely within the Kunnakudi Mitta and there cannot be the slightest doubt that whoever dug it, it was intended mainly for irrigating the lands of that *mitta*. The *mitta* is a portion of the old Chockkampatti Zemindari. The Zemindari was sold for arrears of *peishcush* or revenue payable to Government in 1835—1836. It was under the management of the Government till 1859 when it was granted to the successor of the original Zemindar and afterwards again sold and divided into parcels. One of these parcels is the Kunnakudi Mitta.

During the period that the Zemindari was under the management of the Government they executed repairs and improvements in the channel and it was after such improvements had been effected that the grant of 1859 was made to the predecessor-in title of the *mittadar*. On the other hand by the *muchilika* executed at the time, the then Zemindar undertook to keep tanks *and* channels in repair according to the ancient custom of the Zemindari, and there was no limitation imposed on the right of the Zemindar to use the water of the channel and the tank for purposes of irrigating the Zemindari land. The question of the respective rights of the *mittadars* and the Government with respect to the user of the water of the channel was raised between them in Original Suit No. 69 of 1894 on the file of the Court of the Subordinate Judge of Tinnevelly (Original Suit No. 26 of 1896 on the file of the Court of the Temporary Subordinate Judge of Tinnevelly), the Government alleging that the water stored in the *mittadars'* tank belonged to them, as it was obtained from an artificial channel maintained by the Government and situated in Government land; and they claimed the right to levy water-cess (*fasli jasthi*) in respect of the second crop raised by the *mittadars* by irrigating the land with the channel water. The claim of the Government was disallowed by all the Courts, the Court of trial, the District Judge in appeal and by the High Court in second appeal [*Secretary of State* v. *Perumal Pillai* (1)]. It was found that the whole of the water in the tank supplied by the channel belonged to the grantee (*i. e.*, the *mittadar*) and not to the Government, and that the Government was not entitled to increase the *peishcush* on the ground that the *mittadars* had increased wet cultivation and made other improvements in the lands of the Zemindari. But at the end of the judgment of the High Court, it was observed that their finding and decision "should not be understood as determining any question between the grantee and those who may be entitled to the surplus water of the tank according to established usage." It is this reservation that is relied upon by the defendant in support of his present claim put forward on behalf of the Sivalaperi and Kuthukkalvalasai *ryots*. But instead of instituting a proper suit to obtain determination of the right to the surplus water of the Periakulam tank which the *ryots* in the Ayan villages in question may have according to 'established usage,' the Government took upon itself the responsibility of forcibly entering upon the *mittadars'* land and asserting the right claimed by them to regulate the distribution of water to the *mittadars* and to the *ryots* of the Government villages. Mr. J. L. Rosario, appearing on behalf of the *mittadars*, has strongly protested against this action of the revenue officers. On the other hand, the learned Government Pleader urges that it is the paramount right and also duty of the Government in this Presidency to distribute and control the distribution of water for purposes of irrigation and that the revenue officers acting on behalf of the Government were, therefore, justified in going upon the *mittadars'* land without their permission and in spite of their protests. He relies upon the ruling in *Robert Fischer* v. *Secretary of State* (2). That case instead of helping him contains an observation which is opposed to his contention. It is stated, "it could not, of course, be suggested that, for the

(1) 24 M 279; 11 M. L. J. 117.
(2) 2 Ind. Cas. 325; 32 M. 141; 5 M. L. T. 149; 19 M. L. J. 131.

purpose of exercising their right of control, Government would be warranted in committing an act of trespass," and no other authority is cited in support of such a *prima facie* untenable proposition, that the Revenue Officers as agents of the Government are entitled to go upon people's land in this Presidency against their wishes for the exercise of any right that the Government may possess to regulate the distribution of water of rivers and channels. Such a right, however, in my opinion, can only be exercised without violating the proprietary rights of others and by the use of lawful means and there can be no doubt, therefore, that the defendant was rightly restrained by injunction from going upon the plaintiffs' land against their wishes to regulate the distribution of water to the channel and the tank.

Mr. Rosario then contended that we should not go any further and declare the rights of the parties in the water of the channel and says that this should be done only when the *ryots* concerned institute a proper suit for the purpose. But having regard to the fact that so much evidence has been taken on the various issues raised in connection with the question and that the dispute has been going on for a very long time, it is not desirable that the matter should be left again in an unsettled condition, in so far as it can be determined now.

The first question is, what are the respective rights of the *mittadars* and the Sivalaperi *ryots*.

The history of the disputes relating to this channel goes back upon the record to 1820. It appears from Exhibit XVII (*a*) of 1822 that the right of the *ryots* of Sivalaperi to irrigate the lands under the Sivalaperi tank with water drawn from the Kunnakudi channel according to *mamool* or usage was recognised by the then Zemindar. As regards the exact extent of that right, it was claimed on behalf of the Sivalaperi *royts* that they were entitled to two-fifths of the water in the channel (the Zemindar being entitled to three-fifths) in times of scarcity through a sluice in the channel called Pulavadimadai at the western end of the Periakulam tank, and in times of full supply over the weir at the eastern end of the tank. It is also evident from Exhibit XVII (*b*) that even in 1882 there was obstruction on the part of the Zemindar to the exercise of this alleged right by the Sivalaperi *royts*. In so far as can be gathered from the documentary evidence in the case which is the most reliable evidence available the claim of the Sivalaperi *ryots* to take water through Pulavadimadai was never recognised by the Zemindar or successfully established against him. It is not even shown that there is any defined channel by which water is taken to Sivalaperi lands through the Pulavadimadai. It is, however, clearly established that the Sivalaperi tank has been deriving its supply from the water that flows over the surplus weir of the Periakulam tank at the eastern end. This is proved by documentary evidence going as far back as 1820. In fact it is the main, if not the sole, source of supply for the Sevalaperi tank; and this has been recognized by the proprietor of Kunnakudi Mitta from time to time. The *mittadar*, his agents and lessees have in fact asked for and obtained contribution from the Sivalaperi *ryots* towards the repairs executed to the channel, and when the repairs were done by the Government the *mittadar* paid what was accepted by him as his proper share, the rest being borne by Government and the Sivalaperi *ryots*. The proportions in which the expenses were met have sometimes amounted to nearly three-fifths by the *mittadar* and two fifths by the Government and its *ryots* at Sivalaperi. These facts are borne out by documents dating from 1870, *viz.*, Exhibits V, IX*b*, IX*a* IX*j*, IX*m*, XVI series, etc. This evidence would, therefore, seem to indicate to some extent that the division of water in the channel between the *mittadars* and the Ayan *ryots* used to be made in the proportion of three-fifths and two-fifths. In the absence, however, of more definite evidence on this point and in view of the fact that the right of defendant to take water through Pulavadimadai in times of scarcity is not established, I am not prepared to hold that the Sivalaperi *ryots* are entitled to two-fifths of the entire water in the channel and the plaintiffs to three-fifths. The division of the expenses of repairs in such proportion only indicates in a rough way the amount of the benefit which the parties respectively derived from the channel. It would appear that the

supply of water in the channel, if it is not allowed to run waste through want of repairs in the channel or otherwise, is ordinarily abundant and it seldom happened that it was not found to be sufficient for the needs both of the *mittadars* and the defendant. It should also be borne in mind in this connection that the plaintiffs are entitled to irrigate the lands as they always have been doing through sluices in the channel as well as in the tanks, and it cannot be said that the plaintiffs' rights of irrigation are confined to any particular acreage or to a single crop.

The next important question for decision is whether the plaintiffs are entitled to store water in the Pettaikulam tank and if so, what are the extent and limits of that right. The case of the defendant is that the Pettaikulam is a new tank altogether and so is the dam at its eastern end, and it is claimed on his behalf that the Pettaikulam should be filled up in so far as it exceeds the width of the channel as it goes down from the Periakulam weir. The evidence as to the Pettaikulam tank is somewhat obscure. But evidently there is allusion to a dry *pottai* tank in a report by the Revenue Officer made in 1822 (Exhibit XVII). Exhibit P, which is the delivery warrant issued to a purchaser of Kunnakudi village in a civil suit of 1866, makes distinct mention of Kunnakudi Pettaikulam from which the *marugal* channel is stated to be running to Sivalaperi tank. It is possible that it is nothing but a natural depression as stated in Mr. Brandt's Memorandum of 1873 (Exhibit VI). It is not suggested that it was dug by any one and the appearance of it as described by Mr. Brandt rather tends to negative the supposition that it is an artificial tank. If that is so, there can be little doubt that it was originally a part of the channel itself. It lies entirely within the limits of the *mitta* and the *mittadar* is in my opinion entitled to all the water that is stored there, and the surplus that flows over into the channel continued at the eastern end is what the *ryots* of Sivalaperi are entitled to. The first dispute that arose over the Pettaikulam was in 1870 or thereabouts and related to a sluice on the south and to a dam across the channel at the eastern end of this tank. It was distinctly asserted at the time in the memorandum of appeal filed on behalf of the *mittadar* to the Collector that at first the *madai* or sluice in the Pettaikulam was made of palmyra trunks and that subsequently it was replaced by an earthernware sluice or *nazhimadai*. It was also stated that the old *madai* had got blocked for a time and that by changing its material, no harm was caused to the Sivalaperi *ryots* and that in fact it prevented waste of water. The Collector Mr. Puckle held reversing the order of the Sub-Collector, that the Zamindar had an undoubted right to use whatever water was stored in his tank to the best advantage and the Sivalaperi *ryots*, whose tank (*i.e.*, the Sivalaperi tank) was only entitled to the surplus drainage, had no cause to complain as long as the surplus channel was left open. It appears, however, from a Memorandum of Mr. Brandt (Exhibit VI) and from Exhibit VIII, which is a letter from Mr. Puckle, who had heard the appeal of the *mittadar*, to the District Engineer, that the new dam that had been put up at the Pettaikulam tank was regarded as objectionable by the revenue authorities. Orders were passed in 1874 requiring the then *mittadar* to remove the dam but he apparently did not feel himself bound to comply with the requisition.

There can be no doubt that the *mittadar* is entitled to take water through the sluice on the south of Pettaikulam. The point for decision is whether he is entitled to retain the dam. It is alleged that by this dam, obstruction is caused to the flow of water into the channel leading to the Sivalaperi tank according to usage, and in fact the claim of the defendant goes further for he wants that the Pettaikulam tank should be removed or filled up. The evidence on behalf of the plaintiffs is that by the masonry dam which they have put up no alteration is effected in the supply of water to the Sivalaperi tank. In my opinion, the plaintiffs are entitled to put up a proper weir at the eastern end of Pettaikulam, provided they do not thereby cause any detriment to the supply of water to Sivalaperi, which the *ryots* have been accustomed to get before the construction of the new dam. It would appear from Exhibit VII, a report made in 1874 by the Government Tahsildar to the

Collector, that the masonry weir at Pettaikulam was constructed under the orders of the Range Officer and that it was sanctioned by the Collector himself. The evidence is not clear upon the materials available as to how and to what extent, if any, damage has been caused to the Sivalaperi *ryots* by this construction. I think it must be left to the Ayan *ryots* themselves to seek their proper remedy by a separate proceeding, if in fact they have suffered any injury. That the defendant is not entitled to have the Pettaikulam tank itself removed, is to my mind abundantly clear.

Then with reference to the Periakulam tank, the question that we have to decide is, what is the extent of water which the plaintiffs are entitled to store in it, or in other words, what is the proper *ayakat* of this tank. The evidence furnished by the Settlement Register shows that part of the Survey No. 262 amounting to 10 acres, 9 cents of Government *ryotwari* land in Kuthukkalvalasai is a portion of the waterspread of Periakulam. This is also borne out by other documentary evidence. The same is the effect of the evidence of the plaintiffs' 14th witness, Mr. Vaikuntam Ayyar, an Executive Engineer, who prepared a map showing the waterspread of this tank at different levels. There can be little doubt that the proper waterspread of this tank is represented by what is called the 3rd contour which corresponds to the sill level of the vents in the calingula. Taking the crest of the surplus weir at 100, the 3rd contour, represents 97·34. The plaintiffs are not entitled to raise the full tank level above this point, whether by the use of wooden shutters or otherwise; for the result of increasing it would be that more *ryotwari* land on the north would be submerged than is justified and there would be less water to flow over the surplus weir into the channel leading from Pettaikulam to the Sivalaperi tank.

The next point for consideration refers to outlet No. 2, the construction made by the defendant in the channel not far from the head sluice. The evidence of Mr. Vaikuntam Ayyar, which I find no reason for discrediting, shows that by raising the sill level by 1 foot, damage is likely to be caused to the channel. It would seem that the natural result would be that the silt that comes into the channel with the drainage from the north, would not be discharged to the same extent as before into the Harihara Nadhi, but would accumulate into the channel itself and gradually get carried into the Periakulam tank. As regards the rest of the construction, I do not think it can be said that any harm will be caused to the channel or to the interests of the *mittadars*.

It should, therefore, be declared (*a*) that the channel, so far as it lies within the boundaries of the *mitta*, belongs to the plaintiffs. (*b*) That the defendant's officers are not entitled to enter upon the *mitta* land in order to execute any work in connection with the channel with a view to regulate the distribution of water to the Periakulam and Sivalaperi tanks or for any other purpose, if such entry and execution of works is objected to by the *mittadars*. (*c*) The plaintiffs are entitled to store water in the Periakulam tank to the level indicated by contour No. 3 delineated on the plan prepared by the 14th witness for the plaintiffs marked as Exhibit E and they will be restrained from increasing that level. (*d*) The plaintiffs are also entitled to the water that comes into the Pettaikulam tank but are not entitled to store more water than what used to be contained in it before the date of construction of the new masonry dam, *i.e.*, before 1871; if this new dam has caused any injury to the *ryots* of Sivalaperi, they will be at liberty to pursue such remedy as they may have by a proper suit. (*e*) The plaintiffs are entitled also to take water through the sluices already existing in the channel and in the Periakulam and Pettaikulam tanks. (*f*) The plaintiffs must keep the channel and the works in connection therewith in proper repair and efficient condition - the costs thereof to be borne by them and the Government in the proportions of three-fifths and two-fifths. (*g*) The plaintiffs must not obstruct the flow of surplus water over the weir at Periakulam at the level indicated by contour No. 3, and the overflow of water from the Pettaikulam tank as it existed before 1871.

The defendant will bear the costs of this appeal. Time for payment will be three months.

SRINIVASA AIYANGAR, J.—This appeal arises out of a suit brought by the proprietors

of the Kunnakudi *mitta* against the Government for certain declarations in respect of an irrigation system, the Kunnakudi channel and its connected tanks, and for an injunction restraining the Government from in any way interfering with it.

The Kunnakudi channel which takes off from the Harihara river, a natural stream, first empties itself into the Kunnakudi Periakulam (big tank) at its western end and after filling it flows out through a weir at the lower and eastern end of the tank, fills a small tank called Pettaikulam lower down, flows out over a dam placed in the channel contiguous to the eastern *bund* of that tank and finally flows into the Sivalaperi tank which belongs to the Government. There is a dam in the river to lead the water into the channel, a head sluice which was constructed in the channel about a furlong off from the off-take to regulate the flow and an outlet No. 2 called Chakkilichimadai still lower down in the channel to discharge the excess water in times of flood. The channel has been in existence from time immemorial and was evidently formed for the irrigation of the *mitta* Kunnakudi lands and certain lands under the Sivalaperi tank in Teakasi, a Government village. Kunnakudi Mitta formed part of the ancient Zemindari of Chokkampatti which was purchased by Government in 1835 for arrears of revenue, remained in *amani* management till 1859 when it was re-granted to a representative of the original family, for whose debts it was sub-divided and sold in 1861 in Court auction. There have been constant disputes between the proprietors of Kunnakudi and the *ryotwari* owners of the lands under Sivalaperi from about the year 1820 as to the rights of irrigation through the Kunnakudi channel, which have not yet been settled by any final adjudication by a Civil Court.

The main points of difference are the following:—

(*i*) as to the right to the water in the channel in times of scarcity,

(*ii*) as to the full tank level of the Periakulam, *i.e.*, the height to which the proprietor of Kunnakudi is entitled to impound and store the water flowing in the channel,

(*iii*) as to his right to store water in the Pettaikulam.

There is a certain amount of irrigation through sluices in the channel, of which the most important for the present purpose is through a sluice known as Pulavadimadai at the western end of the tank at the place where the channel enters the tank. Through this sluice water in times of scarcity flows out of the main channel into a small channel along the southern *bund* of the tank (*purakal*) and irrigates the lands of the proprietor. The *ryotwari* owner under Sivalaperi claims a right to lead water into his tank through this channel and says that he is entitled to two-fifths of the water flowing in the main channel and only the remaining three-fifths belongs to the *mittadar*. There are some general assertions of this right and it also appears that the cost of the repairs and other works executed in the main channel has been divided in the proportion of three-fifths to the proprietor and two-fifths to the Government and their *ryotwari pattadars*; but there is no reliable evidence except vague oral evidence that the Sivalaperi tank ever had a supply through the *purakal* or side channel. It is remarkable that in 1820 the request made by the *ryotwari* owner under the Sivalaperi tank to the Zemindar was to take water through Pallathumarugal, *i.e.*, the surplus weirs at the lower end of the tank (Exhibit XVIIc). Though orders appear to have been passed in 1822 and in 1835 that the Sivalaperi tank should get two-fifths of the water through the Pulavadimadai in seasons of scarcity and through Pallathumarugal in ordinary seasons, so early as 1873 it was stated that Sivalaperi was getting water only through the surplus weir (Exhibit VI). The claim was revived in 1874 and supported by the Tahsildar again in 1893 and supported by the Revenue Inspector, but nothing came of it. In these circumstances without much better evidence than we have in this case, it is not possible to come to any other conclusion than what the lower Court arrived at on this point.

The next question is as to the right of the *mittadars* to appropriate the water in the channel. According to them they are entitled to use and impound as much of the

water of the channel as they like and let out the surplus on to the lower owner who can make such use of it as he wants when he gets it, but that the lower owner is not entitled as of right to any flow in the channel; in effect the plaintiffs claim a right of drainage without being under any obligation to let the water flow on in the channel to the Sivalaperi tank. This obviously is not their right. In these systems of connected tanks supplied with water by or through a permanent artificial channel, each upper owner in the flood season is entitled to fill his tank, which in general is of sufficient storage capacity for the *ayakat* and subject to this, is bound to allow the water to flow freely on to the lower tank till the last of them is supplied. In a considerable number of cases, before the introduction of modern engineering appliances, this was managed by having an automatic escape at the lower end of the tank, especially if the soil was hard or rocky, approximately at a level with the full tank level of the tank. These escapes were called *thambogis*. But whatever may be the means adopted to let out the surplus, the owner of a tank in such cases has no right to increase the storage capacity of his tank beyond what it was at the time when the channel was dug, which in many instances can only be proved by the customary flow of water into the tank. In this case there is some evidence that the escape Pallathumarugal, which, there is no reason to doubt, always existed in the lower end of the tank at the place where the weir now is, was not paved with stones till about the year 1888, when probably the *mittadar* began 2nd crop cultivation systematically (see Exhibits X and XIV), that the level was below the full tank level probably in consequence of scouring, and that it was usual to block it with turf which was opened to let out the water into the channel lower down, when water was low (Exhibit XVII series). There is also some evidence that the *mittadar* introduced two vents in the weir and put up plank shutters in 1892 or thereabouts and raised the *bunds* of his tank to increase the storage capacity. On the other hand, the *mittadar* has adduced evidence to prove that his tank has remained in the same state for about 50 years. Apart from this conflict of testimony, there is other reliable data in the case to fix with sufficient accuracy the F. T. L. of the plaintiffs' tank. Admittedly the tank water in the north submerged some lands of the Government village of Kuthukkalvalasai *alias* Jagaveeramaperi, when water stood in the tank at the F. T. L. Exhibit IV*a* is the Settlement Register of that village prepared after the first revenue survey in 1874 and shows a part of Survey No. 262 (262N in the new survey) of about 10 acres odd in extent as the waterspread of the tank. There is no reason to doubt the accuracy of this statement. The plaintiffs' 14th witness, a retired Engineer from the Travancore service, prepared a plan and has drawn contours of the waterspread of the tank at various levels, one of them being the sill level of the surplus weir as it exists now. That is the 3rd contour at 97·34 level, taking the crest as the *datum* (100), and it will be seen that that submerges just about the extent mentioned in IV*a*. The *adangal* accounts of Kuthukkalvalasai prove that after 1893 when the *mittadar* began to block up the vent way of the surplus weir with plank shutters thereby raising the level of the water in the tank, about 13·25 acres more of the lands are submerged so as to render them unfit for cultivation. We may fairly conclude that the present sill level of the weir is the full tank level of that tank and that the plaintiffs were bound to keep the weir open without any obstruction to the outflow from the tank at the lower end.

There is one further question on this part of the case. The *mittadar* says that a small tank called Pettaikulam further down the channel is entitled to a supply, and at the best Sivalaperi is only entitled to the water which overflows a dam placed across the channel at the eastern end of the tank. That this so-called tank was not one of the original system is quite clear; it is not referred to in the earlier documents or disputes. Mr. Brandt who saw the place in 1872-1873 says that "it has not the appearance of a tank, it has merely the appearance of a slight widening of the channel." It appears from the careful memorandum pre-

pared by him (Exhibit VI) that the *mittadar*, taking advantage of a depression there, put up or heightened the *bund*, managed to get the consent of the Range Officer of the Public Works Department to construct a masonry dam across the supply channel, to retain the water in the newly formed tank, and also introduced a sluice to let out water for irrigation. This took place in about the year 1869 and the Sivalaperi *ryot* at once complained to the Revenue authorities. The Sub-Collector directed the closing of the sluice and directed that such orders as might be passed as to the masonry work after reference to the Range Officer should be carried out; but on appeal by the *mittadar* the Collector modified the order of the Sub-Collector by allowing the retention and use of the sluice. Finally the Sub-Collector and Collector ordered the removal of the dam. Though the *mittadar* was asked to remove the dam which was the real impediment to the flow of the water in the channel, he did not do so and he has managed to keep it on ever since. There is a *pottaikulam* referred to in an early document of 1822, but that is not this tank; the word *pottaikulam* (blind tank) is used there as a common name, probably in the sense of a tank without a sluice or a weir and, therefore, not useful for irrigation; and it is remarkable that the tank now in question had originally no *ayakat* under it. However that may be, there can be very little doubt that the masonry dam in the channel below Pettaikulam was newly put up in 1871 and that the *mittadar* was not entitled to do so. As we know when it was put up and as sixty years have not elapsed, so as to give the *mittadar* a right by prescription against the Government, and as it is quite clear that no right to dam the channel and obstruct the flow of water at that place was granted to the *mittadar*, he is bound to remove all obstruction to the flow of water as it was flowing before the dam was put up.

Whether in seasons of scarcity or draught the Sivalaperi *ryots* are entitled to a division of the water flowing in the channel into three-fifths and two-fifths is difficult to determine on the materials before us. If once the water reaches the Periakulam there is *now* no means of letting it out to Sivalaperi till the water overflows the weir, which is quite unlikely when water is low in the channel and the flow scanty. Though proposals were made in 1874 and 1894 for constructing a channel in Government land to draw off two-fifths of the water before the Kunnakudi channel flows into the Periakulam, no such channel has been constructed. The question of three-fifths and two-fifths can only arise if such a channel is constructed, and we need not, therefore, determine it now.

There is one other question in the case which is of great importance in determining the exact reliefs which the parties are entitled to in this case. The suit as already said was instituted by the plaintiffs for, among other things, an injunction restraining the Government from entering their lands for doing any repairs or making any alterations in the channel system within the limits of the *mitta*. The learned Government Pleader contends broadly that if it is found that the Government are entitled to any portion of the water flowing in the channel, their paramount right to distribute all unappropriated water in the public interest gives them a right to enter on the lands of a private owner through which the channel flows and make such repairs or execute such works as may be necessary to ensure a proper distribution of the water between the *mittadar* and their own *ryots*. *Robert Fischer* v. *Secretary of State* (2), the only authority cited by him in support of his contention, is really against him, for the learned Judges at page 156 of the report observe as follows: "it could not, of course, be suggested that for the purpose of exercising their right of control, Government would be warranted in committing an act of trespass." In *Ambalavana Pandara Sannathi* v. *Secretary of State* (3), where also an *inamdar* sued for an injunction restraining the Government from entering on his land and executing any repairs in an irrigation channel within the limits of his village, the learned Judges apparently assumed that a right to another man's land was not implied in the Governmental function of the conservation and control of the irrigation channels. They had, therefore, to decide

(3) 28 M. 539; 15 M. L. J. 251.

whether the channel was granted to the *inamdar* or remained the property of the Government.

The Government Pleader also contends that the facts proved in this case establish that the Government were the owners of the channel. It is proved that the Government constructed the head sluice in the channel in 1886, repaired the dam in the river in 1870 and 1885 and levied contribution from the *mittadar*. On the other hand, there is evidence that the *mittadar* executed some repairs in the channel himself and obtained contribution from the Sivalaperi *ryots*. The greater portion of the channel lies within the *mitta* limits and the channel as its name implies was primarily intended for the irrigation of Kunnakudi; at any rate the *ayakat* under the Kunnakudi tank is much larger than under Sivalaperi. The grantee of the Zemindari in 1859 also covenanted to keep the tanks and channels in repair according to the ancient custom of the Zemindari. This covenant, though intended primarily for the benefit of the inhabitants of the Zemindari, cannot be ignored in coming to a conclusion as to whether or not the channel was included in the grant. In these circumstances the fair inference to be drawn is that the channel within the limits of the *mitta* belongs to the *mittadar*. This conclusion is materially strengthened by the conduct of the Government. In 1869, the Tahsildar drew the attention of the *mittadar* to the estimate made to close a breach in the Kunnakudi dam, said that the *mittadar* was bound to keep the dam in repair as it was within his jurisdiction and warned him that he will be held responsible for any loss to the Ayan *nanja* lands (Exhibit N). In 1873 and 1874, though peremptory orders were issued to the *mittadar* to remove the masonry dam placed in the channel at the lower end of the Pettaikulam, when he did not do so, the Government did not feel at liberty to enter on the channel at that place and remove the dam. All that the Collector could do was to advise a civil suit by the Sivalaperi *ryots*. Again when the *mittadar* shut up the vent way by planks and raised the level of the water in the tank, so as to obstruct the supply to Sivalaperi and also to submerge the Government lands in the north, the Government felt themselves unable to abate the nuisance and unsuccessfully resorted to the indirect means of imposing *fasli jasthi*. After the final disposal of the litigation in respect of the *fasli jasthi* against the Government, the matter of submergence was again considered in 1903 and all that the Collector could say was that the *ryots* should be left to protect themselves; and in 1907 when the loss to Sivalaperi by the obstruction of the water-course was again brought to the notice of the Collector, the only proposal made was to construct a dam and dig a new channel to Sivalaperi in Government lands. In fact till 1910 nobody imagined that the Government had the right to enter on the channel within the *mittadar's* limits. It is scarcely likely that the Government would have allowed the *mittadar* to set them at defiance if the channel belonged to them. I, therefore, think that the Government are not entitled to enter on the land of the *mittadar* against his wish and the plaintiffs are entitled to an injunction restraining the Government from doing so either for the purpose of altering or repairing the channel or tank or executing new works.

Mr. J. L. Rosario strongly urged that if we came to the conclusion that the Government are not entitled to go on his land, we should not determine any question as to the irrigation rights between the *mittadar* and Sivalaperi *ryots* or Government but should leave the matter at large for a subsequent litigation by the Government or their *ryotwari pattadars*. As those rights have been the subject of issues and elaborate enquiry in this suit and as the whole matter has been fully argued before us and as it is further impossible to give adequate relief to the plaintiffs or frame a proper decree without declarations as to the substantive rights of the parties in the irrigation system, I think we ought to declare the rights of the parties, more especially as it is not suggested that any more materials are available for a decision on those questions.

I have not hitherto referred to the works done by the Government in outlet No. 2. Owing to the wastage of water through that outlet when water was required for irrigation, and its insufficiency to protect the channel during floods, the Government

made certain alterations in the outlet which they considered to be an improvement. The *mittadar* does not like it and has prayed for a mandatory injunction directing the Government to restore the outlet to the old state. I am not satisfied that the alterations made will in any way prejudicially affect the *mittadar's* rights. But in the view that I take, *viz.*, that the *mittadar* is entitled and is bound to keep the channel efficient and the tanks in good repair, so as to prevent waste of water in his limits and allow the flow of water in the channel, subject to his right to fill his tank up to the present sill level of the weir, it is unnecessary to grant a mandatory injunction.

I agree, therefore, to the decree and order for costs proposed by my learned brother.

Appeal partly allowed;
Decree modified.

V.R.P.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 168 OF 1915-16.

March 24, 1917.

Present:—Mr. Maynard, F. C.

PAT RAM—PLAINTIFF—APPLICANT

versus

ABHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 8—Occupancy rights—Non-payment of rent for 28 years—Morni hill tract.

The position of tenants in the Morni hill tract who pay revenue and cesses only is a peculiarly strong one.

Where a tenant in the Morni hill tract had, for 28 years during which he and his immediate predecessor-in-interest had been in cultivating possession of the land, paid no rent over and above revenue and cesses:

Held, that he was entitled to occupancy rights under section 8 of the Punjab Tenancy Act.

Revision from the order of the Commissioner, Ambala, dated the 16th May 1916.

Mr. *Gullu Ram*, for the Applicant.

Mr. *Mahabir Parshad*, for the Respondents.

ORDER.—Pat Ram, *Gujar*, son of Hamira, resident of Mauli Bhoj Rajpura in the Morni hill tract of the Naraingarh *Tahsil*, contests notice of ejectment, and claims occupancy rights in 8 *bighas* 2 *biswas* of land, *Khasra* numbers 42 *min.*, 43 *min.* and 46 *min.*

A careful examination of the Revenue Records shows that no rent over and above revenue and cesses has been paid for 28 years during which the applicant and his immediate predecessor-in-interest have been in cultivating possession. It is not proved that the applicant's grandfather was in possession; because records for the period prior to the Settlement of 1888-89 are not available; and a claim to occupancy rights under section 5 (1) (*a*) of the Punjab Tenancy Act has not been established.

The position of tenants in the Morni hill tract, who pay revenue and cesses only, is admittedly a peculiarly strong one and the Settlement Officer of Ambala, Mr. (now Sir A.) Kensington thought that there was no doubt that they were really entitled to permanent rights in the land; and such a position would be quite in accordance with that of the cultivators in many portions of the Punjab Himalayas whose "*warisi*" rights under the rule of the indigenous Rajas were virtually rights of permanent occupancy, subject to the payment of the dues of the State. Among the reasons which have contributed to the peculiar strength of the tenants' position in these tracts is the difficulty of finding and of replacing tenants.

Having regard to the history of the Morni tract tenures as given in the Settlement Report and to the proved fact of occupation for 28 years through two generations without payment of any rent over and above land revenue and cesses, I find that Pat Ram is entitled to occupancy rights under section 8 of the Punjab Tenancy Act. I accept the application for revision, cancel the notice of ejectment, and find that occupancy rights under section 8 are established. The point decided being a new one, I give no order on the subject of costs.

Revision accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 211 OF 1915.

July 21, 1916.

Present:—Mr. Stanyon, A. J. C.

JHITIBAI—DEFENDANT—APPELLANT

versus

TEJMAL—PLAINTIFF—RESPONDENT.

Guardian and ward—Minor, whether personally *liable for simple debt contracted by guardian—Guardian, whether can bind ward's estate—Hindu Law—Ancestral trade, management of, by guardian—Minor, liability of, for acts of guardian.*

The guardian of a minor cannot bind his ward *personally* by a simple contract debt [p. 37, col. 1.]

Tukaram Manaji Dhangar v. *Ramchandra Hari Peshkar*, 2 N. L. R. 25 and *Surendra Nath Sarkar* v. *Atul Chandra Roy*, 34 C. 892; 7 C. L. J. 87, followed.

A guardian cannot bind his ward's estate except by a document purporting to bind it. [p. 37, col. 1.]

Maharana Shri Ranmalsingji v. *Vadilal Vakhatchand*, 20 B. 61; 10 Ind. Dec (N. S.) 599 and *Bhawal Sahu* v. *Baijnath Pertab Narain Singh*, 35 C. 320; 12 C. W. N. 256; 3 M. L. T. 156, followed.

Under Hindu Law where an ancestral trade descends upon a minor as the sole member of the family, and the ancestral trade is carried on under the superintendence of the minor's natural guardian for the benefit of the minor, the minor will be bound by all the acts of the guardian necessarily incidental to or flowing out of the carrying on of the trade. [p. 36, col. 1.]

Appeal against the decree of the Divisional Judge, Chhattisgarh Division, dated the 17th December 1914, confirming that of the Subordinate Judge, Raipur, dated the 7th November 1914.

Mr. *Lal Mohan Vivian Bose*, for the Appellant.

Dr. *H. S. Gour* and Mr. *Gulam Mohi-ud-din*, for the Respondent.

JUDGMENT.—In my opinion the Courts below have gone completely wrong in this case. In the very teeth of the rulings of this and other Courts laying down the law for their guidance they have given a personal decree against a minor for a debt contracted by her guardian. The decree of the first Court is "that the defendant do pay plaintiff Rs. 1,898-5-0", and the decree of the lower Appellate Court dismisses the appeal made by the defendant from that decree. The decree does not purport to bind any estate. Yet it was pointed out clearly enough over ten years ago in *Tukaram Manaji Dhangar* v. *Ramchandra Hari Peshkar* (1), on the authority of several rulings coming from the Privy Council and the High Courts of Calcutta, Madras and Bombay, that a minor cannot be bound personally by contracts entered into by a guardian which do not purport to bind the estate. A later ruling to the same effect will be found in *Surendra Nath Sarkar* v. *Atul Chandra Roy* (2).

It is, however, necessary to see whether the plaintiff is entitled in this suit to any decree against any estate belonging to the minor. In *Rampartab Samrathrai* v. *Foolibai* (3) it was held that under Hindu Law, where an ancestral trade descends upon a minor as the sole member of the family, and the ancestral trade is carried on under the superintendence of the minor's natural guardian for the benefit of the minor, the minor will be bound by all the acts of the guardian necessarily incidental to or flowing out of the carrying on of the trade. The principle governing this decision was applied by analogy in *Sakrabhai* v. *Maganlal* (4), in which a Full Bench ruled that trade debts properly incurred by a Hindu widow on the credit of the assets of the business, which she had inherited as the heiress of her deceased husband, are recoverable after her death out of the assets of the business as against the reversioners who have succeeded thereto. In *Raghunathji Tarachand* v. *Bank of Bombay* (5) it was held that where a joint Hindu family carries on a business or profession, and maintains itself by it, the share of a minor co-parcener is responsible for the debts of such business or profession, irrespective of any necessity or benefit other than the carrying on of the family business or profession. All usual acts done by the manager in the normal course of carrying it on will be considered as necessary and within his authority. In the ruling last cited Chandavarkar, J., regarded the above case as an exception to the rule of Hindu Law that debts contract-

(1) 2 N. L. R. 25.
(2) 34 C. 892; 7 C. L. J. 87.
(3) 20 B. 767; 10 Ind. Dec. (N. S.) 1082.
(4) 26 B. 206; 3 Bom. L. R. 738.
(5) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.

ed by a managing member of a joint family are binding on the other members only when they are for a family purpose. With due respect it seems to me that the case is not any exception to, but an illustration of, that rule. To carry on the trade of a trading family is as much a family purpose as anything can be, and I am unable to appreciate the difference drawn by the learned Judge between "family purpose" and "trading purpose or purpose incidental to it" in a case where the trade is itself a family purpose. We may take it as sound law that where a Hindu family maintains itself by trade, and a minor becomes by inheritance the sole owner of such business, if the trade is thereafter carried on by the guardian, the assets of such business will be liable for debts contracted by the guardian necessarily incidental to or flowing out of the carrying on of the trade along its normal course.

It is now necessary to see how far, if at all, the present case can be brought within this rule. The suit is laid against the defendant as the proprietor of a firm styled 'Hanmantramji Pemraj,' said to carry on business in shopkeeping and money-lending. The plaint asserts that the defendant through her husband and guardian began dealings with the plaintiff's shop at Raipur on the 22nd November 1910 and making up accounts on the 9th November 1912, acknowledged Rs. 75 4-0 as the balance due: that thereafter dealings were continued up to the 3rd May 1913 when a balance of Rs.1,898-5-0, including interest at the rate of 9 per cent. per annum customary among money-lenders, was payable by the defendant, and payment was promised within one month; but nothing was paid. Upon these allegations the plaintiff claimed a decree against the defendant for Rs. 1,898 with interest thereon at 9 per cent. per annum from the date of the suit to the date of payment, and the costs of the suit.

Under cross-examination as P. W. No. 2 the plaintiff admitted that two or three months before the death of the defendant's father Pemraj—who had carried on business as 'Hanmantram Pemraj'—accounts between the plaintiff and that 'firm' were closed, nothing being due by Pemraj to the plaintiff; and that, sometime after the death of Pemraj, Udechand, the husband of the defendant, opened a fresh account under the name of 'Hanmantram Pemraj' with the plaintiff.

The evidence does not show that there was any ancestral family business. There is no allegation in the plaint to that effect. Pemraj was a Surana by caste and shopkeeping seems to have been his business. It is a common practice among Marwadis and other trading castes to call themselves owners of firms, the firm generally being purely nominal, created by prefixing to the name of the living sole proprietor the name of a deceased ancestor—usually the father. As a private individual Pemraj, the son of Hanmant Ram, would sign himself "Pemraj Hanmantram;" but his shop, whether for petty grain dealing and money-lending or for large banking would be styled "Hanmantram Pemraj" and be dignified by the further appellation of "firm." It is proved that Pemraj carried on dealings in money and goods with the plaintiff under the style of Hanmantram Pemraj; but there is nothing to show that he carried this on as an ancestral business. The evidence goes to show that Udechand, the husband of the defendant, was appointed by the District Judge as her guardian, and that under the name and style of Hanmantram Pemraj he has launched out into dealings in money, cloth and other commodities with several firms and shops, including that of the plaintiff, and has rendered the business insolvent, so that it has had to discontinue business. Whether the District Court has maintained any control, by calling for accounts, of this squandering of the minor's property, does not appear. But it is clear that the management of the business has not been for the benefit of the minor and that there is neither allegation nor evidence to show that there are any assets of "Hanmantram Pemraj" in the hands of the defendant.

It is manifest that here the plaintiff sought a personal decree against the minor defendant for a balance due upon dealings begun, continued and ended ostensibly on her behalf by her guardian, and that there is neither allegation nor proof that the dealings were necessary for carrying on an ancestral family business upon normal lines so as to bring the case within the rule laid down by the Bombay decisions above cited.

The proposition that a guardian of a minor cannot bind his ward *personally* by a simple contract debt is beyond dispute: and it is also established law that a guardian cannot bind his ward's estate except by a document purporting to bind it: *Maharana Shri Ranmalsingji* v. *Vadi'al Vakhatchand* (6); *Bhawal Sahu* v. *Baijnath Pertab Narain Singh* (7). When the plaintiff began fresh dealings with Udechand, as guardian of the minor defendant, it was his business to see that the dealings were of a kind binding on the minor. The mere fact that the money and goods were supplied to carry on a shop for the defendant is not enough. If the shop was the ordinary business of the family and the guardian confined himself to carrying it on in the usual course without undue speculation, as a means of maintaining and advancing the minor, those facts should have been alleged and a decree claimed against the assets of the shops. But that was not the case laid. The suit was brought against the defendant as personally liable for the debts of her shop, and a personal decree was claimed against her. This was not a "slight imperfection in the pleadings of the plaintiff" as the lower Appellate Court has described it, but a fatal defect in the whole suit. It might have been cured by a proper amendment before the trial began, but it is too late now. The defendant pleaded (1) that she knew nothing about the transactions, (2) that the shop Hanmantram Pemraj was closed three years before the suit, and (3) that she could not be made personally liable. In face of these pleadings the plaintiff chose to press his claim for personal liability, and he must take the consequences. The decrees of the Courts below, on the case laid before them, cannot be sustained in any form.

The appeal is allowed; the decrees of the lower Appellate Court and of the original Court are set aside, and it is ordered that a decree do issue dismissing the plaintiff's suit with costs on him in all three Courts.

Appeal allowed.

(6) 20 B. 61; 10 Ind. Dec. (N. S.) 593.
(7) 35 C. 320; 12 C. W. N. 256; 3 M. L. T. 156.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3191 OF 1914.

March 19, 1917.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

GOLAPDI MEAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

PURNA CHANDRA DUTTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Karta, *power of, to give consent for transfer of occupancy holding not transferable by custom—Appeal—Respondent wrongly named, effect of.*

The consent given for the transfer of an occupancy holding not transferable by custom, by the *karta* of a joint Hindu family under which it is held, is binding on the other members of the family. [p. 37, col. 2; p. 38, col. 2]

The powers of a *karta* of a joint Hindu family include the power to recognize the transfer of a tenancy not transferable without the landlord's consent. [p. 39, col. 1.]

Where in an appeal the respondent was wrongly named, the mistake being due to a clerical error in the decree appealed against:

Held, that the mistake was not fatal. [p. 38, col. 2.]

Appeal against the decree of the Subordinate Judge, first Court, Faridpur, dated the 7th August 1914, reversing that of the Munsif, second Court at Goalundo, dated the 20th August 1913.

Sir *Rash Behary Ghose* and Babu *Probodh Chandra Roy*, for the Appellants.

Babu *Monmatha Nath Mukherjee*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—I have read the judgment prepared by my brother Walmsley and concur in it. On the question of the extent of the *karta's* authority which is raised, I had little doubt during the argument that the *karta* of a joint Hindu family has authority to consent on behalf of the joint family to the transfer of an occupancy holding held by the tenants under the joint family as landlords and not transferable without their consent duly given by themselves or on their behalf.

WALMSLEY, J.—This is an appeal by defendants Nos. 2 to 7 against a judgment of the learned Subordinate Judge of Fridpur, who reversed the decision of the first Court and decreed the plaintiffs' suit. The circumstances are as follows. The Dutt family, to which the plaintiffs belong, hold a certain tenure, and within that tenure the land in

suit was let out to two tenants named Dinu and Menajuddin in 1878. Their interest was that of occupancy *raiyats*, without the right of transfer, except with the consent of their landlords. The Dutt family consisted of three brothers,—Khudiram, Mohesh and Kodai. Plaintiff No. 1, Purna, is the son of Kodai, and plaintiff No. 2, Soshti, is the son of Mohesh. Khudiram had three sons, Kali Charan, Ram Charan, and Soshi Mohan. Kali Charan is defendant No. 8 and Soshi Mohan is defendant No. 9. Kali Charan's wife is Joy Durga Sundari Dasi, defendant No. 1. Sometime before 1900 Dinu and Menajuddin borrowed money from Joy Durga and mortgaged the holding to her. She brought a suit on the mortgage, and in execution of the decree she caused the holding to be put up for sale, and then bought it herself on November 24, 1900. She was put in possession in the following year. On November 29, 1900, she let out the land to the defendants Nos. 2 to 7, now the appellants, and they paid her a bonus of Rs. 700. On November 26, 1912, Purna instituted the present suit for recovery of *khas* possession to the extent of his one-third share, and his cousin Soshi subsequently joined him as plaintiff. Joy Durga filed one written statement, and defendants Nos. 2 to 7 another, but Joy Durga has not joined in the present appeal.

The learned Munsif found that Joy Durga had changed sides after filing her written statement, and on the merits of the case he held that the mortgage to Joy Durga was effected with the consent of the plaintiffs and their co-sharers, that Soshi Mohan Dutt was *karta* of the family, and that he actually conducted the mortgage suit on behalf of Joy Durga, and consented to her purchase of the holding at the auction sale, that Joy Durga was recognized by the plaintiffs and in particular by Soshi Mohan, the *karta*, as their tenant, and that she held possession of the land for several years through her *bargaits*, and latterly through the defendants Nos. 2 to 7, and that these defendants took settlement from her in good faith and paid her Rs. 700 as *nazarana*. He also held that apart from the landlord's recognition of Joy Durga, the defendants were entitled to retain possession on the double ground that they are settled *raiyats* of the village, and that they took settlement from Joy Durga in good faith, believing her to be entitled to admit them to the land.

On these findings the plaintiffs' suit was dismissed.

Before the learned Subordinate Judge on appeal it was urged that the Munsif was wrong in holding that Joy Durga's purchase had been recognized; that he had taken an erroneous view of Joy Durga's conduct in the suit; and that the circumstances did not warrant the first Court's view as to the effect of the settlement by Joy Durga. These contentions were upheld.

In this Court defendants Nos. 2 to 7 are the appellants. A preliminary objection is taken on behalf of the plaintiff Soshti that when the appeal was filed in November 1914 the name of the second plaintiff was given not as Soshti but as Judishtir, and that the mistake was not corrected until July 1916. It appears, however, that in the copy of the lower Appellate Court's decree, the name was written as Judishtir, and that being so the mistake was a pardonable clerical error for which the appellants should not be penalized.

The main argument advanced on behalf of the appellants is that the consent given to a transfer of an occupancy holding, not transferable by custom, by the *karta* of a joint Hindu family is binding on other members of the family, in short that Soshi Mohan's consent to Joy Durga's purchase binds the plaintiffs.

There is no dispute about the fact that up to some date later than Joy Durga's purchase and the delivery of possession to her, the family was and continued to be a joint Hindu family and that Soshi Mohan was its *karta*.

The learned Subordinate Judge held that the first Court was wrong about the matter of recognition on four grounds, *viz.*, (*a*) that the *dakhilas*, Exhibits E and F, purporting to have been granted by Purna to Joy Durga were not genuine, (*b*) that Purna was a mere boy during his so-called acquiescence in Joy Durga's possession; (*c*) that the presumption arising from the entry of Joy Durga's name in the Record of Rights had been rebutted; and (*d*) that the acts of a *karta* in relation to properties that are no joint family properties does not bind the other members of a family. It is with the last point that we are now concerned. Sir

Rash Behari Ghose, on behalf of the appellants, concedes that he cannot refer us to any case in which the power of the *karta* to recognize a transfer has been affirmed. On the other hand, there is no decision to the opposite effect. The powers of a *karta* are described in the case of *Chuckun Lall Singh* v. *Poran Chunder Singh* (1), and it seems to me that they must include this power to recognize a transfer. The learned Vakil for the plaintiffs seeks to avoid this conclusion by arguing that the holding that was sold belonged to the mortgagors, and that the mortgagee who bought it was not a member of the joint family, and this, I think, must be the meaning of the Subordinate Judge's words—"acts in connection with properties which are not joint family property." The fallacy of the argument, I think, lies in the fact that the rights of the mortgagors, and of the mortgagee, decree-holder auction-purchaser, do not exhaust the whole bundle of rights involved in the transaction. There is also the landlord's right to give or withhold his consent to the transfer; this I regard as part of the joint family property, and, as such, I think it comes within the scope of the control exercised by the *karta* of the joint family. If, therefore, there has been recognition of the transfer by Soshti Mohan as *karta* of the family, the plaintiffs are bound by that recognition. The learned Munsif found explicitly that there had been such recognition, and this finding is not displaced in the judgment of the lower Appellate Court: in fact the correctness of the finding does not seem to have been questioned, and the learned Judge accepted it without discussion.

I have said above that there is no dispute about the family being joint in property. I should mention, however, that in this Court we were asked on behalf of the respondents to note that the *kabuliyat* of 1876, was in favour of the three sons of Khudiram, and not of a *karta*, and that Joy Durga alone took a mortgage of the holding. These facts are not of much importance, but the question is not one which we can enter into now, because both the lower Courts find that the family was joint in property.

Another argument used for respondents is that the appellants have really changed their case, and that recognition by the *karta* is a late development, but this argument ignores the important words of paragraph 9 of the written statement where it is said that Soshi Mohan, "who was *karta* of the family at the time", settled the amount of *nazar* to be paid to Joy Durga. This is explicit enough. For the reasons given I would allow the appeal, set aside the decree of the lower Appellate Court, and restore that of the first Court, dismissing the suit with costs in all Courts.

Appeal allowed.

(1) 9 W. R. 483.

PATNA HIGH COURT.
FIRST APPEAL No. 276 OF 1915.
June 13, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Mullick.

JAGU MANDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MADHAB MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Dayabhaga—Possession of male members of family, whether possession of daughter of deceased member—Presumption—Adverse possession—Ouster, necessity of, proof of.

In a Hindu family governed by Dayabhaga one of several brothers died leaving a widow and a daughter. The widow continued to be in possession of his share of the property till her death. After her death the male members of her husband's family remained in possession of the property and the daughter remained with her husband:

Held, that the possession of the male members of the propositus family must be presumed to be on behalf of his daughter. No adverse possession could be presumed until ouster was proved. [p. 40, col. 2; p 41, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Purulia, dated the 30th April 1915.

Messrs. *Jyoti Prasad Sarvadhikari*, *Saileswar Sen* and *Lal Mohan Ganguli*, for the Appellants.

Messrs. *Bisheswar Nath Sarkar* and *Sushil K. Mittra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by Api Mandalani, who is represented in this appeal by her three sons, for partition of what she alleged to be the joint property of the family to which she and the defendants belonged. Api was the daughter of Ridu Mandal, one of the five

sons of Salaghi Mandal. Attached to the plaint was a genealogical tree which showed that Salaghi Mandal had four sons, but it is stated in the first paragraph of the plaint and it is admitted that Salaghi had five sons. The name of the son not mentioned in the genealogical tree was Sham. Ridu and his brothers were admittedly members of a joint family governed by the law of the Dayabhaga. Ridu died 30 or 40 years ago leaving a widow Khunti. Khunti died 15 or 16 years before this suit was brought, leaving her daughter Api the original plaintiff in this case. On the death of Ridu his share in the family property admittedly devolved upon his widow Khunti and on the death of the latter passed to their daughter Api. In the plaint it is alleged that Sham Mandal died childless and it seems to have been assumed from that fact, which is admitted by all parties, that the share of Ridu in the family property must have been one-fourth and not one-fifth. The defendants, however, deny that the plaintiff had a four-annas share in the property and this was equivalent to a denial that the share of the plaintiff's father Ridu was one-fourth. The third witness for the plaintiff Nanda Mandal, who is a brother of Api's husband, said that Sham died only 10 or 1[illegible] years before April 1915. He, therefore, died long after Ridu and Ridu's share in the property, if this evidence is correct, must have been one-fifth and not one-fourth. It was the business of the plaintiff to show how Ridu became entitled to a one-fourth share in the property. There is no evidence on which it can be held that Ridu was entitled to a one-fourth share. The only evidence on the point shows that he was entitled to a one-fifth share. I am of opinion that it should be held in the present case that the plaintiff is not entitled in succession to her father Ridu to more than a one-fifth share in the family property. The main defence to the suit was that the plaintiff and her mother before her had never been in possession of any share in the property. It was pleaded that the property specified at the foot of the plaint was never the joint property of the family and that the defendants had all along been in possession of the property in suit. It was pleaded that the suit was barred by limitation and it was also contended that the plaintiff was out of possession when the suit was brought and was, therefore, bound to sue for possession of the property and to pay a Court-fee *ad valorem* on the value of her share.

In this Court it is not disputed that the immoveable property specified at the foot of the plaint should be treated as joint family property in which Ridu had a share. Ridu was admittedly in possession and enjoyment of his share. When he died his share passed into the possession of his widow. The evidence of the defendant Badi shows that for 15 or 16 years after the death of Ridu, Khunti lived in the family house at Sahajuri. It is, therefore, quite clear that Khunti must be taken to have entered into possession of her husband's share. Khunti, as already stated, died 15 or 16 years before this suit was brought. The original plaintiff alleged that she had all along been in possession and enjoyment of her share and she produced evidence to the effect that she received several maunds of paddy every year and that she was in the habit of visiting her father's house from time to time. The defendants' witnesses on the other hand said that she became a leper and that she never visited her father's house and never had anything to do with the family property. The evidence that she received a certain amount of paddy annually was probably introduced into the case in order to strengthen the plaintiff's claim to a share. I would lay no stress at all on that evidence, but until the contrary is shown it must be assumed that from the death of Api's mother Khunti the defendants, her uncles and cousins, were in possession of the property for themselves and for her. It cannot be assumed that their possession was adverse to her. On the contrary according to a long line of cases it must be held, until the contrary is proved, that their possession was not adverse to her but was maintained for themselves and also for her. There is certainly no evidence that the defendants ousted Api or set up a claim adverse to her more than 12 years before the present suit was brought. It appears to me, therefore, that even if Article 127 does not apply, on the ground suggested here that Api was not a member of the joint family with her uncles and her cousins, the suit is within limitation whether Article 142 or

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Article 144 is held to be applicable. It must be taken that the plaintiff was in possession of her share until she was ousted by her uncles and cousins. As I have said, there is no evidence of ouster or the assertion of adverse claim more than 12 years before the suit and the suit must, therefore, be held to have been brought within limitation.

The only other question is whether the plaintiff should have sued for possession in view of the admission made by her husband Chandi, in the course of his evidence, that his wife used to bring five or six maunds of paddy and one or two *salis* of rice every year from her father's house but that she did not get paddy and rice for the last two or three years and so she brought this suit. Upon this statement we are asked to hold that two or three years before the suit was brought Api was ousted from her share or the defendants refused to give her a share. The defendants did not in their written statement plead ouster of the plaintiff, and I think it is impossible to hold on the statement quoted above that there was a demand by Api for her share of the property and a refusal by the defendants to give her that share. On the evidence it should, I think, be held that the original plaintiff was in constructive possession of her share up to the date of suit and was, therefore, entitled to sue for partition and was not bound to sue for possession of her share of the property. For these reasons I am of opinion that a preliminary decree should have been passed in this case declaring that the plaintiff, or rather the substituted plaintiffs, the sons of the original plaintiff, are entitled to one-fifth share of the immoveable property described at the foot of the plaint. To this extent I would vary the decree of the Court below. The claim for a share of the moveable property was dismissed and there is no appeal as to that. The parties will pay and receive proportionate costs in this Court. The order of the Court below as to costs will stand.

Appeal partly accepted.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 67 OF 1916.

January 25, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

T. A. CHIDAMBARAM CHETTY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

M. L. M. RAMANATHAN CHETTY—PLAINTIFF—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 44—*Transmission of decree for execution to Native State, legality of—Jurisdiction—Practice*—Ex parte *order for transmission—Right of party aggrieved—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 182.

Section 44, Civil Procedure Code, does not sanction the transmission of a decree of a Court in British India to a Court of a Native State. [p. 42, col. 1.]

Kasturchand Gujar v. *Parsha Mahar*, 12 B. 230; 6 Ind. Dec. (N. S.) 639; *Ratan Mahanti* v. *Khatoo Sahoo*, 29 C. 400; 6 C. W. N. 573, followed.

Long practice cannot be relied on to justify such a transmission, for, where want of jurisdiction is established, long practice will not avail. [p. 42, col. 1.]

An *ex parte* order for transmission as aforesaid is liable to be vacated at the instance of the party aggrieved within the time prescribed under Article 182 of the Limitation Act. [p. 42, col. 2]

Appeal from the order of Mr. Justice Coutts Trotter, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 111 of 1915.

The Hon'ble Mr. *S. Srinivasa Aiyangar*, Advocate-General, and Mr. *G. Krishnaswami Aiyar*, for the Appellants.

Messrs. *A. Krishnaswami Aiyar* and *M. Subbaraya Aiyar*, for the Respondent.

JUDGMENT.—In Original Suit No. 111 of 1915, the respondent obtained a decree on the Original Side of the High Court against the appellant for a large sum of money. In November 1915, an application was made for concurrent execution of this decree in Madras, Burma, Tanjore and Puducottah. As the decree was passed within a year of the application, it was granted without notice to the appellant. The decree was transmitted to the Chief Court at Puducottah on the 23rd November 1915 for execution. On the 19th October 1916, an application was made to Coutts Trotter, J., for the cancellation of the order transferring the decree to Puducottah. The application was dismissed, on the ground apparently that it was in accordance with settled practice. Hence this appeal.

NIRINJAN-DAS JETHU MAL *v.* KIRORI MAL.

Section 39 of the Code of Civil Procedure provides for the transmission of decrees for execution to Courts within whose jurisdiction either the judgment-debtor resides or his property is situate. Section 40 deals with the transmission of decrees to another Province in British India. Section 43 provides for a decree being sent to a Court established by the Governor-General in Council outside British India under the Foreign Jurisdiction Act. As supplementary to section 43, section 45 lays down that in the Courts so established, the rules which are observed in the execution of decrees in Courts in British India shall be followed. Section 44 deals with decrees of what are known as favoured Native States. That section provides that decrees of the Courts of any Native Prince or State in alliance with His Majesty may be executed in British India as if they were passed in British India. There is no converse provision that decrees passed in British India can similarly be executed in Courts established by the authority of a Native Prince or State. The absence of such a provision seems to be conclusive upon the question. Further, it is a well-known principle of jurisprudence that no country can legislate for the procedure to be followed in a foreign State. Therefore, it seems to us that the order transmitting the decree for execution is not sanctioned by the Code. There is the positive authority of *Kasturchand Gujar* v. *Parsha Mahar* (1) in favour of this view. The case of *Ratan Mahanti* v. *Khatoo Sahoo* (2) also enunciates the same principle. As regards the suggestion that a long practice should not be departed from on a question of procedure, it is enough to say that where want of jurisdiction is established, long practice would not avail. *Palmer* v. *Hutchinson* (3) and *Rajah of Ramnad* v. *Seetharam Chetty* (4).

Mr. Krishnaswami Aiyar for the respondent drew our attention to the fact that no appeal was preferred against the order transmitting the decree for execution, and argued that it is not open to us to question its validity at this stage. We are of opinion that as the order was passed *ex parte* and was without jurisdiction, the appellant is entitled, when it comes to his notice, to apply to vacate it within the time limited under Article 182 of the Limitation Act. As it relates to the execution of the decree which was sent to Puducottah in November 1915, there is no bar of limitation. See *Ajant Singh* v. *Sundar Mall* (5).

We must, therefore, hold that the order transmitting the decree was made without jurisdiction and must be set aside. We make no order as to costs.

Order set aside.

V.B.P.

(1) 12 B. 230; 6 Ind. Dec. (N. S.) 639.
(2) 29 C. 400; 6 C. W. N. 573.
(3) (1881) 6 A. C. 619; 50 L. J. P. C. 62; 45 L. T. 80.
(4) 26 M. 120.
(5) 16 Ind. Cas. 567; 17 C. W. N. 862.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2732 OF 1915.

December 12, 1916.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

NIRINJAN DAS- ETHU MAL—DEFENDANT—APPELLANT

versus

KIRORI MAL—PLAINTIFF—RESPONDENT.

Punjab Courts Act (III of 1914), ss. 21 (2), 38, 39—Additional Judge, powers of—Case not assigned by District Judge to Additional Judge—Appeal, form of

The functions of an Additional Judge as a Civil Court are confined to the cases made over to him by the District Judge acting under section 21 (2) of the Punjab Courts Act. [p. 43, col. 1.]

A Subordinate Judge does not necessarily merge in an Additional Judge, and there is no legal obstacle in the way of one and the same officer acting as an Additional Judge with respect to the business specially made over to him by the District Judge under section 21 (2) of the Punjab Courts Act, and as a Sub-Judge *qua* all other judicial work. [p. 43, col. 2.]

So that, where a Sub-Judge acting as an Additional Judge hears and decides a case not assigned to him by the District Judge under section 21 (2) of the Act, the appeal from his decision lies to the District Judge, and not to the Chief Court. [p. 44, col 1.]

Second appeal from the decree of the District Judge, Delhi, dated the 16th June 1915.

Rai Sahib Lala *Moti Sagar*, for the Appellant.

Mr. *Kirkpatrick*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit, which was tried in the first instance by Lala Murari Lal as a Subordinate Judge. It appears that he had also been invested with the powers of an Additional Judge, and the question arises whether the appeal from the decree for Rs. 892 passed by him in favour of the plaintiffs lay to the District Judge or direct to the Chief Court. Now a perusal of the relevant section of the Punjab Courts Act of 1914 makes it clear that directly a notification is made appointing a particular person to be a District Judge, a Subordinate Judge or a Munsif, he is entitled to entertain and adjudicate upon civil suits within the prescribed limits of his pecuniary jurisdiction (*vide* sections 25 and 26). The same thing cannot, however, be said with respect to an officer appointed merely as an Additional Judge. The notification itself does not define his powers, and until the District Judge acting under section 21 (2) assigns to him some civil business, he is incompetent to exercise any civil jurisdiction. His functions as a Civil Court are confined to the cases made over to him by the District Judge, and in discharge of those functions he exercises all the powers of a District Judge. There is no doubt that when he passes a decree or an order in the exercise of original jurisdiction over cases duly assigned to him, an appeal against it lies not to the District Judge but to the Chief Court.

Now, in the case before us there is nothing to show that the suit was assigned under section 21 (2) by the District Judge to Lala Murari Lal, and we must, therefore, take it that the latter when deciding the dispute between the parties was acting not as an Additional Judge, but as a Subordinate Judge. It will be observed that the jurisdiction of an Additional Judge lies within a narrow compass, and though an officer appointed to act as such ordinarily occupies a higher status than a Subordinate Judge, it is conceivable that no case exceeding Rs. 1,000 in value may be assigned to him, and in that event his jurisdiction would not be so extensive as that of a Subordinate Judge. With the exception of the *forum* to which appeals would lie from his decrees or orders, an Additional Judge as such would be no better than a Munsif of the first class. This view receives support from a judgment of this Court in *Musammat Nekhan* v. *Muhammad Khan* (1), which lays down with reference to section 75 of the old Punjab Courts Act, which section is in *pari passu* with section 21 of the new Act, that a Subordinate Judge of the 2nd class does not, in consequence of a notification appointing him to be an Additional District Judge, acquire jurisdiction to decide suits exceeding Rs 5,000 in value.

The above discussion establishes the proposition that a Subordinate Judge does not necessarily merge in an Additional Judge, and that there is no legal obstacle in the way of one and the same officer acting as an Additional Judge with respect to the business specially made over to him by the District Judge under section 21 (2) and as a Sub-Judge *qua* all other judicial work. We would by way of analogy cite the case of a Magistrate of the first class exercising enhanced powers under section 30, Criminal Procedure Code. The Criminal Procedure Code of 1898 makes the *quantum* of sentence passed in a particular case the test for determining the *forum* of appeal, but under the Code of 1872 an appeal lay to the High Court from every sentence passed by a Magistrate exercising enhanced powers, *vide* section 270, and to the Sessions Judge from a sentence passed by a Magistrate of the first class, section 29. We find that in 1881 a case came up before the Chief Court in which a District Magistrate, who was a first class Magistrate, invested with the enhanced powers, had passed upon an accused two sentences, each of which was within the competency of a first class Magistrate, and that a Division Bench in dealing with the question whether the appeal lay to the Sessions Judge or to the High Court observed that the test was whether the Magistrate was not acting in the exercise of his ordinary powers as a Magistrate, first class, but was acting in the exercise of his special powers. In view of the fact that any Magistrate of the first class could have passed the two sentences without exceeding the limits of his jurisdiction, the learned Judges held that the Magistrate must be deemed to have acted as an ordinary first class Magis-

(1) 46 P. R. 1898.

trate and that the Sessions Judge was competent to hear the appeal [*vide Tulsi Ram* v. *Empress* (2)]. This ruling applies *a fortiori* to the present case, considering that the jurisdiction of the Additional Judge is confined within the limits prescribed by section 21 (2) of the Courts Act and that every matter not covered by the said sub-section must come within the ordinary powers exercised by the officer concerned.

For the aforesaid reasons we are of opinion that Lala Murari Lal decided the suit as a Subordinate Judge, and that the appeal from the decree passed by him lay to the District Judge. With this expression of opinion we remit the appeal to the Single Bench for decision on the merits.

(2) 23 P. R. 1881 Cr.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 8 OF 1916.

February 21, 1917.

Present:—Justice Sir John Woodroffe, KT., and Justice Sir Asutosh Mookerjee, KT.

KALI CHARAN BASAK—PLAINTIFF—APPELLANT

versus

AMAR CHAND DAS—DEFENDANT—RESPONDENT.

Mortgage bond, suit on—Recital, denial of truth of—Burden of proof.

In a suit upon a mortgage-deed executed by the defendant, which contained a definite admission that the consideration recited in it had been received in cash, the defendant in his written statement set forth that the consideration for the deed was not a sum paid in cash but the admission of the defendant as the plaintiff's partner and agent in a business and that the deed was in fact a security bond:

Held, that the onus was upon the defendant to prove that the bond which he signed contained a recital which was not in accordance with the facts. [p. 45, col. 1.]

Appeal against the decree of the following judgment of Mr. Justice Roe, dated the 22nd December 1915, in Appeal from Appellate Decree No 394 of 1914: —

"This is an appeal from a decision of the District Judge of Noakhali, reversing a decision of the Munsif of Lakhipore. The facts briefly are that the defendant executed in favour of the plaintiff a mortgage-deed for a consideration of Rs. 50 upon a definite admission that this sum had been received in cash. The plaintiff sues upon this deed. The written statement sets forth that the consideration for the deed was not a sum paid in cash but the appointment of the defendant to be the plaintiff's partner and agent in a mercantile business; that the deed was in fact a security bond; and that since no account has been taken whereby it can be declared that the defendant is liable under this bond for any specific sum, no decree can be made against him. Upon these pleadings an issue was framed, "whether the bond is void for want of consideration." Upon this issue the learned Munsif held that the plaintiff's case had been disproved and that the defendant's case was the true case. The learned District Judge on appeal held that the burden of proof was on the defendant to show that no consideration passed and that in view of the fact that the defendant had examined no witness but himself, it must be held that the defendant had failed to rebut the plaintiff's case. It is not the law that the burden of proof lies on the defendant in a case such as this. In his written statement he denied consideration. It was incumbent upon the plaintiff to give at least formal evidence of the passing of the consideration. Had this formal evidence been given, the defendant would, on the terms of the document, be bound by all laws of common sense to show that the statement which he had himself signed was not a true statement. But in this case the plaintiff examined only one witness. That witness supported *in toto* the defendant's story. When the plaintiff's case closed the defendant had no case to rebut. The plaintiff was in the Munsif's Court rightly non-suited.

The appeal is allowed. The decree of the District Judge is discharged and that of the Munsif restored with costs in all Courts."

Babu *Akhoy Kumar Banerjee*, for the Appellant.—The simple question for determination in this appeal is, on whom does the onus of proving the case lie? The District Judge held, and held rightly, that when the defendant alleges that the actual facts are different from what is stated in the bond executed by him he must prove those facts. On appeal the High Court reversed the finding of the District Judge. The High Court, I submit, took an erroneous view in

the matter, and the view taken by the lower Appellate Court is consistent with the provisions of the Evidence Act. The onus of proof is upon the defendant, and the defendant has failed to discharge the onus.

Babu *Romesh Chandra Sen*, for the Respondent.—Though in a case like this onus will ordinarily lie upon the defendant, still in this particular case no question of onus arises because the plaintiff takes upon himself the onus of proving the case. See *Makund* v. *Bahari Lal* (1).

JUDGMENT.

WOODROFFE, J.—The learned Pleader who appears for the respondent states that he is unable to support Mr. Justice Roe's judgment on the question of onus as stated by him. The onus was clearly on the defendant to prove that the bond which he signed contained a recital which was not in accordance with the facts, for that bond states: "I have borrowed Rs. 50 (Rupees fifty) from your *tahabil*." Both the plaintiff and the defendant in this case gave evidence, and the District Judge rightly held as to the party upon whom the onus of proof lay. Going further, he does not accept the defendant's case, and accordingly he decreed the suit. The decision in the Allahabad case to which we have been referred [*Makund* v. *Bahori Lal* (1)] deals with a different set of circumstances, for there evidence was given only on behalf of the plaintiff, and the defendant's evidence was not taken. The High Court there reversed the decision, because the effect of the judgment under appeal was to decree a suit in the face of the evidence actually given, and notwithstanding the fact that the defendant on whom the onus of proof lay had not been given an opportunity of establishing his defence. That is not the case here, where, as I have said, both parties gave their evidence and on that evidence the Judge accepted the plaintiff's story as being a true one.

The appeal, therefore, must be decreed, the judgment and decree of the District Judge restored, and the respondent must pay the costs of the hearing before us and before Mr. Justice Roe.

MOOKERJEE, J.—I agree.

Appeal allowed.

(1) 3 A. 824; A. W. N. (1881) 86; 6 Ind. Jur. 321; 2 Ind. Dec. (N. S.) 537.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 453-B OF 1916.

March 20, 1917.

Present:—Mr. Stanyon, A. J. C.

SURAJMAL—DEFENDANT—APPELLANT

versus

PANDHARI—PLAINTIFF—RESPONDENT.

Specific performance—Minor, suit by—Appeal, second—Plea in law, whether can be taken for first time.

It is not within the competence of the guardian of a minor to bind the minor's estate by a contract for the purchase of immoveable property, and as the minor is not bound by such contract there is no mutuality and consequently the minor cannot obtain specific performance of the contract. [p. 43, col. 1.]

Mir Sarwarjan v. *Fakhruddin Mahomed*, 13 Ind. Cas. 331; 39 I. A. 1; 39 C. 232; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 11 M. L. T. 8; 21 M. L. J. 1156 (P. C.), followed.

A plea in law which goes to the root of the plaintiff's claim and arises on the facts found by the lower Appellate Court and is not affected by any facts outside those findings may be taken for the first time in second appeal. [p. 46, col. 1.]

Kanhaya Lal Kurmi v. *Musammat Satiya*, 1 N. L. R. 1, followed.

Appeal against the decree of the Additional District Judge, West Berar, Akola, dated the 8th August 1916, reversing that of the Junior Subordinate Judge, Akola, dated the 29th January 1916.

Mr. *M. V. Joshi* for the Appellant.

Mr. *Vivian Bose*, for the Respondent.

JUDGMENT.—The material facts giving rise to this appeal are few and simple. On the 4th August 1915 the defendant Surajmal bought a piece of land from one Mahadeo Ramkuwar for Rs. 600. This land adjoins the premises of the plaintiff, who is a minor under the guardianship of his mother. On the 5th September 1915 the defendant entered into an agreement with the plaintiff, through his guardian, to sell the site to him for Rs. 700; and Rs. 25 were paid to the defendant as earnest money and in part-payment. Subsequently the defendant resiled from the bargain, and, on the 11th October 1915, the plaintiff's guardian sued on his behalf to enforce specific performance of the contract. The first Court dismissed the suit for reasons which need not be mentioned here: but the lower Appellate Court reversed that decision, and has given the plaintiff a decree. The defendant has therefore, appealed, and now, for the first

time, it is pleaded that the contract cannot be specifically enforced. It is, however, a plea in law which can be taken for the first time in second appeal. It arises on the facts found by the lower Appellate Court and is not affected by any facts outside these findings: *Kanhaya Lal Kurmi* v. *Musammat Satiya* (1). It is a plea that must succeed. The matter is concluded by authority which has been overlooked by the lower Appellate Court. In *Mir Sarwarjan* v. *Fakhruddin Mahomed* (2) in a suit for specific performance by a minor of an agreement for the purchase and sale to him of certain immoveable property, entered into by the manager of the minor's estate and his guardian on his behalf, it was held by the Judicial Committee, reversing the decision of the Calcutta High Court in the same case [*Mir Sarwarjan* v. *Fakharuddin Mahomed Chowdhury* (3)], that it was not within the competence, either of the manager of the minor's estate or of the guardian of the minor, to bind the minor's estate by a contract for the purchase of immoveable property; that as the minor was not bound by the contract there was no mutuality; and that, consequently, the minor could not obtain specific performance of the contract. This decision was given despite an express finding by the High Court that the contract, if carried out, would have been beneficial to the minor.

The above case is absolutely on all fours with the present case, and the law held applicable to the former is indistinguishable from the law applicable to the latter. Therefore, I allow the appeal, and reversing the decree of the lower Appellate Court I dismiss the plaintiff's suit. But as the appeal succeeds on a ground not taken in the Courts below, I direct that each party do bear his own costs in all three Courts.

Appeal allowed.

(1) 1 N. L. R. 1.

(2) 13 Ind. Cas. 331; 39 I. A. 1; 39 C. 232; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom L. R. 5; 11 M. L. T. 8; 21 M. L. J. 1156 (P. C.).

(3) 34 C. 163; 11 C. W. N. 34; 1 M. L. T. 360; 4 C. L. J. 431.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION NO. 913 OF 1915.

June 20, 1916.

Present:—Mr. Justice Shadi Lal.

MUHAMMAD SAID AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

TIDDOO MAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of '887), Art. 31—Suit for accounts, nature of—Suit by agent against principal, cognizance of.

A suit for an account within the meaning of Article 31 of the Provincial Small Cause Courts Act is a special form of suit. It does not mean every case in which accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff. The distinguishing feature of suits falling under Article 31 of the Act is the defendant's duty to furnish detailed accounts, the plaintiff being more or less precluded by reason of the nature of the relations between the parties from putting the precise pecuniary outcome of those relations before the Court. [p. 47, col. 1.]

The plaintiffs advanced a certain sum of money to the defendants upon the security of yarn, which the defendants agreed to send to the plaintiffs for sale as commission agents. The yarn was sold by the plaintiffs and the price was credited to the defendants. Plaintiffs sued for the recovery of a certain sum alleged to be due to them from the defendants on account:

Held, that the suit was not one for an account within the meaning of Article 31 of the Provincial Small Cause Courts Act, inasmuch as it was a suit by an agent against his principal, and that it was, therefore, cognizable by a Small Cause Court. [p. 47, col. 2.]

Civil revision from the order of the Judge, Small Cause Court, Lahore, dated the 22nd July 1915.

Mr. *Mukand Lal Puri*, for the Petitioners.

Mr. *Badri Nath Kapur*, for the Respondents.

JUDGMENT.—The question, which requires determination in this application for revision, is whether the suit brought by the plaintiffs against the defendants is one for an account within the purview of Article 31 of the Second Schedule to the Provincial Small Cause Courts Act, and is consequently excluded from the cognizance of the Court of Small Causes. Now a a perusal of the allegations in the plaint shows that the plaintiffs advanced a certain sum of money to the defendants upon the security of yarn, which the defendants agreed to send to the plaintiffs for sale as commission agents. This yarn was sold by the plaintiffs and the price was credited to the defendants. The

plaintiffs sue for the recovery of Rs. 61-6-6 alleged to be due to them from the defendants on account.

There can be no doubt whatever that the mere fact, that the plaintiffs have chosen to put a definite money value upon their claim, does not determine the jurisdiction of the Court, which must depend upon the true nature of the suit. The matter is essentially one of substance, and the form, in which the claim is laid in the plaint, is of no real importance. At the same time, it is clear that a suit for an account is a special form of suit. It does not mean every case in which accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiffs. A special process is required to take an account and Small Cause Courts have no means of dealing with such an action. Therefore, it is excluded from the jurisdiction of the Small Cause Courts. But nearly every case brought in a Small Cause Court involves a certain amount of the investigation of the accounts of the parties in order to arrive at the sum to be awarded. Such cases are not suits for an account within the meaning of Article 31; *vide, inter alia, Konduru Runga Reddi* v. *Subbiah Setty* (1). The distinguishing feature of these suits seems to be the defendant's duty to furnish detailed accounts, the plaintiff being more or less precluded by reason of the nature of the relations between the parties from putting the precise pecuniary outcome of those relations before the Court, see *Maroti* v. *Balaji* (2).

Now the parties in this case stand in the relationship of agents and principals, and it is clear that an agent has no right to call upon his principal to render an account. The plaintiffs are, therefore, not entitled to sue the defendants for an account; and the present suit cannot be treated as one of that character. The judgment of the Calcutta High Court in *Kailas Chandra* v. *Kiranenda Ghosh* (3) cited by the lower Court deals with a case, in which the relation between the parties is described in the following terms:—

"The true relation between the parties is that as the defendant has from time to time accepted advances from the plaintiff, it is his duty to account for the sums received and spent by him. He is bound to show what sums have been spent in the purchase of materials from time to time."

This extract from the judgment shows that the defendant stood in the relationship of an agent to the plaintiff, and was, therefore, liable to render an account. That case is not at all parallel to the present case.

For the aforesaid reasons I hold that the suit is not one for an account, and that it is cognizable by the Small Cause Court. Accordingly I accept the application for revision, and setting aside the order of the lower Court direct it to decide the case upon the merits. The costs of this application shall be costs in the cause.

Petition accepted; Case remanded.

(1) 28 M. 394.
(2) 14 Ind. Cas. 786; 8 N. L. R. 36.
(3) 10 Ind. Cas. 883; 24 C. L. J. 187.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 415 OF 1915.

June 15, 1917.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

THE ERALIJOOL TEA COMPANY, LIMITED, AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NAGENDRO NATH CHOWDHURY—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 55—Injunction, suit for—Easement—Water rights, extent and scope of—Suit to restrain use of watercourse, where no damage caused, maintainability of—Suit by transferee from Hindu widow—Limitation Act (IX of 1908), s. 27, applicability of to transferee from Hindu widow.

Every body has a right to do any thing on his own land with regard to the diversion, storage or the uses of water in any way he chooses, provided that when he ceases dealing with it on his own land or when he has made such use of it as he is minded to make, he is not to allow or cause that water to go upon his neighbour's land so as to affect that neighbour's land in some other way than the way in which it had been affected before. [p. 53, col. 1.]

ERALIJOOL TEA CO., LTD. *v.* NAGENDRO NATH.

A person has no right to obstruct the water of a natural stream, except to the extent to which he has had prescriptive use thereof. [p. 52, col. 2.]

A plaintiff, whose natural rights in regard to watercourses are in danger of being infringed or further encroached upon by a new enjoyment on the part of the defendant, capable of being converted by user for the prescriptive period into a new right in the latter, has a good cause of action, apart from any question as to the amount of damage which he may have suffered or be likely to suffer. [p. 53, col. 1.]

A plaintiff whose title to land is based upon a grant by a Hindu widow, which may or may not be valid against the reversioners, can during the lifetime of the widow maintain a suit for a permanent injunction restraining the defendant from diverting the course of the natural flow of surface water so as to affect his land. [p. 54, col. 2.]

Obiter.- Section 27 of the Limitation Act does not apply to a donee or transferee from a Hindu widow in virtue of her powers as representing the estate, as in such a case the transferee succeeds the widow in her capacity as full owner and not as upon the determination of her interest for life. [p. 54, col. 2.]

Appeal against the decree of the Subordinate Judge, first Court, Sylhet, dated the 31st May 1915.

FACTS of the case appear from the judgment.

Mr. *S. R. Das* (with him Mr. *N. N. Sircar*, *M. C. Naire* and Babu *Ambicapada Chowdhury*), for the Appellants.—The Sub-Judge has held that by reason of putting up the bank in 1893 the defendants have increased the burden on plaintiff's land, *i.e.*, they have caused a larger volume of water to pass through the plaintiff's land. Was the Sub-Judge entitled to do that? No issue was framed as to whether the burden had increased or not. The defendants had no opportunity of giving evidence for the purpose of showing that the burden had not increased. I submit that the Sub-Judge was entirely wrong in coming to the finding that the burden had increased when there was no issue on that point. Even assuming that the burden had increased, the plaintiff would have no right to get an injunction against my clients, if this burden had increased more than twenty years before the institution of the suit and if no damage has been caused. A man is entitled to decrease or increase the volume of water falling upon another's land, provided he causes no injury thereby. Refers to *Wood* v. *Waud* (1).

(1) (1849) 3 Ex. 748 at p. 770; 18 L. J. Ex. 305; 15 Jur. 472; 77 R. R. 809; 154 E. R. 1047.

Mr. *H. D. Bose* (with him Mr. *A. N. Chowdhury* and Babu *Hemendra Kumar Dass*), for the Respondents.—Referred to *Raja of Venkatagiri* v. *Raja Muddukrishna* (2). Assuming that no damage was caused to the plaintiff by the defendants' action, still the plaintiff is entitled to an injunction, as the defendants' action was an encroachment on the plaintiffs' right and amounted to *injuria*. Refers to *Sankaravadivelu Pillai* v. *Secretary of State* (3), *Embrey* v. *Owen* (4), *Whalley* v. *Lancashire and Yorkshire Railway Company* (5), *West Cumberland Iron and Steel Company* v. *Kenyon* (6) and *Menzies* v. *Breadalbane* (7). My friend gave up the issue as to my client's title, so I need not enter into that question.

Mr. *Das*.—No, I did not give up that question altogether. I say that the plaintiff under the pretended deed of gift from a Hindu widow has no title to maintain the suit, unless it is found that the gift is valid and operative not only against the widow but against the reversioners.

Mr. *Bose*.—Can my friend say so in reply? I do not know my position.

[RICHARDSON, J.—Better let this point stand over now.]

Hollins v. *Verney* (8), *Eaton* v. *Swansea Waterworks Company* (9) were referred to. Under section 27 of the Limitation Act, the plaintiff's suit cannot be barred

Mr. *Das*, in reply.—Section 27 of the Limitation Act does not apply at all. In order to make it applicable the suit must be at the instance of the reversioners. Here the plaintiff succeeds, if at all, to the life-estate of the widow. There is no evidence of legal necessity for the gift. Refers to *Churaman Sahu* v. *Gopi Sahu* (10). It would

(2) 23 M. 15.
(3) 28 M. 72; 15 M. L. J. 32.
(4) (1851) 6 Ex. 353; 20 L. J. Ex. 212; 15 Jur. 633; 17 L. T. 79; 86 R. R. 331; 155 E. R. 579.
(5) (1884) 13 Q. B. D. 131; 53 L. J. Q. B. 285; 50 L. T. 472; 32 W. R. 711; 48 J. P. 500.
(6) (1879) 11 Ch. D. 782 at pp. 786; 787; 48 L. J. Ch. 793; 40 L. T. 703.
(7) (1828) 3 Bligh (N. S.) 414; 4 E. R. 1387; 32 R. R. 103.
(8) (1884) 13 Q. B. D. 304; 53 L. J. Q. B. 420; 51 L. T. 753; 33 W. R. 5; 48 J. P. 580.
(9) (1851) 17 Q. B. 267; 20 L. J. Q. B. 482; 15 Jur. 675; 117 E. R. 1282; 85 R. R. 455.
(10) 1 Ind. Cas. 945; 37 C. 1; 13 C. W. N. 994; 10 C. L. J. 545.

have been alright if the gift had been to the bride, the daughter of the widow, instead of the plaintiff, the bridegroom. The bridegroom might be of a higher caste, but the widow had no right to deprive the reversioners because she chose to give her daughter in marriage to a man of a higher caste. In order to succeed in this suit, the plaintiff must prove his case as well as his title.

The decided cases go to show that where there is no easement of passing water and you attempt to pass water on to your neighbour's land it is not necessary for the neighbour, who wants to restrain you by an injunction, to prove damage; but where there is an easement right in the defendant and the mode of enjoyment is only altered or the burden on the plaintiff's land is increased, damage must be proved by the plaintiff, unless the alteration or burden is so great as to make an altogether new easement. If there is an easement right in the defendant, the defendant may do anything within his own land to collect or divert the water, provided the water so collected or diverted passes into the neighbour's land through the same channel and to the same extent. The whole thing is whether the volume has so increased or the altered mode of enjoyment is so new as to constitute a new easement.

JUDGMENT.—The plaintiff and the principal defendant the Eralijool Tea Company, Limited, are the owners of adjacent tea gardens in the district of Sylhet. The other defendant is the Company's manager. In this judgment I shall speak of the defendant company as the defendant.

The plaintiff's garden is on the east and the defendant's garden on the west of a low range of hills (known as the Borail Hills) running north and south. Near the middle of this range there is a gap and the land here forms a basin towards which the drainage of the defendant's garden from the north as well as the south naturally gravitates, though there was never any natural defined channel. The slope of the ground on the plaintiff's side of the hills is similar. On this side a stream known as the Bogajan Cherra flows from north to south to a point opposite the gap where it turns due east and eventually runs into the Son Bhil some miles away. A tributory stream from the south known as the Balia Cherra meets the Bogajan not very far from the point at which the latter turns east.

The gap and the basin and some of the land to the east, which is described in the second schedule of the plaint, belong to the defendant, but the defendant's land does not extend to the Bogajan from which it is separated by land belonging to the plaintiff, being the land described in the first schedule of the plaint.

The suit was brought for a declaration, in the words of the third and principal prayer of the plaint, "that there is no *nala* or water passage for the drainage of water of the watershed and its slope towards the defendant's garden across the land of the first schedule belonging to the plaintiff". The plaintiff also asked in the fourth prayer for a permanent injunction restraining the defendants "from diverting the course of the water of the 'watershed' and its 'slope' towards their garden across the plaintiff's land along the *bundh* on *dag* No. 1 of the second schedule or by cutting *nala* across *dag* No. 2 of the said schedule or by any other means."

For a proper understanding of these prayers they must be read with paragraphs 4, 7, 8, 9 and 14 of the plaint. The plaintiff's case as made in the plaint is that the Borail Hills, including the gap, forms a natural watershed between the plaintiff's garden on the east and the defendant's garden on the west, so that if not interfered with the surface of water of the whole of the defendant's garden, including the land in the gap, would naturally find its way into the Kakra river on the west and would none of it flow to the east over the plaintiff's land into the Bogajan. The position thus taken by the plaintiff was controverted in paragraphs 4, 7, 8 and 11 of the defendant's written statement. It may be stated at once that the finding of the learned Subordinate Judge on this part of the case is against the plaintiff and in favour of the defendant. The precise finding will be mentioned later when the issues are dealt with.

In paragraphs 9, 15 and 17 of the plaint, the plaintiff refers to the artificial works construed by the defendant. The complaint

made is substantially that the defendant had by means of an artificial drain protected by an embankment diverted the surface water of his garden or a considerable part of such water and caused it to flow to the east over the plaintiff's land. The answer to these paragraphs will be found in paragraphs 9, 12 and 14 of the written statement. The most important is paragraph 9, in which the defendant claimed a prescriptive right to an easement and asserted, in the last sentence of the paragraph, that the operations undertaken on the defendant's garden had in the result "materially reduced the volume of water entering the Bogajan Cherra." On this part of the case the findings of the learned Subordinate Judge are largely in favour of the defendant but partly also in favour of the plaintiff.

Paragraphs 15, 18 and 22 - 24 of the plaint set out the damage which plaintiff alleged that he had suffered. He attributed the inundation of his land in the years 1910 and 1911 and the consequent destruction of his tea bushes and his tenants' paddy to the state of things brought about by the defendant and the anticipated similar or greater damage in the future if that state of things were allowed to continue.

The plaint also contains charges of trespass and so forth which need not now be noticed.

Upon the pleadings a number of issues were framed. Nothing need be said about the formal issues Nos. (1) to (3), nor about issues Nos. (4) and (5) which relate to adverse possession and estoppel. As the learned Subordinate Judge has found, no question of adverse possession or estoppel really arises and no such question has been argued before us.

Issues Nos. (7) to (11) relate to matters of fact, Nos. (7) to (10) referring to the land in its natural state and No. (11) to the works carried out by the defendants.

The most important issue in the case is No. (12), which relates to the easement claimed by the defendant. It is in these terms:—"Whether there was any easement right over the said drain [the drain mentioned in issue No. (11)] enjoyed by the defendants without interruption and as of right for a period of over twenty years.? If so, was that with the knowledge of the plaintiff or his predecessors?"

The next five issues Nos. (13) to (17) concern the plaintiff's title and will be made the subject of a brief reference hereafter.

The remaining issues Nos. (18) to (21) relate to the reliefs claimed. Among these No. (19) raises the question of damage as follows: —"Whether the overflow of water alleged in the plaint causes or is likely to cause damage and loss to the plaintiff's property as alleged in the plaint."

It has been necessary to refer at some length to the pleadings and issues, because the first ground urged in support of the appeal is that the learned Subordinate Judge has decided the case upon a point which is not raised by the pleadings or issues and to which the evidence was not specifically directed. But before dealing with that argument, it will be well to state more particularly the facts found and proved, about which there is now little or no dispute.

Firstly, then, the learned Subordinate Judge has found, and it is not now disputed, that apart from anything done by the defendant the natural outlet of the water collecting in the depression or basin in the gap, which the Subordinate Judge calls the Gossain Bhil, would be towards the east. When the basin fills, there being no artificial obstruction, the spill water would escape to the east and find its way by a channel, which may originally have been ill-defined, first across the defendant's land, then across the plaintiff's land into the Bogajan and so into the Son Bhil. As already mentioned, this state of things is inconsistent with the general case made in the plaint and it is now conceded that the defendant has at least a right to a free passage to the east for any overflow from the basin, though there may be a controversy whether this right is properly described as a natural right or as an easement.

We next come to the group of facts relating to the defendant's interference with natural conditions. The defendant's garden dates from the year 1882 or 1883. The part to the south was first brought under tea. In order to protect the cultivated area from the hill-streams on the east, a water channel was excavated and an embankment was constructed on its west, the effect of which was to give a northernly flow to the

water from ths hills before it reached the garden. The channel and the embankment were extended northwards *pari passu* with the extension of the area under tea. When the water ceased to be confined, it escaped into the low land on the west and thence owing to the slope of the ground into the basin in the gap.

The manager of the garden in 1891 and 1892 was Mr. R. L. Cooke, an enterprising gentleman, by whom a new system of drainage was devised and with the permission of the defendant carried out. His object was to drain the basin or part of it and to make the land fit for tea cultivation. With this object he constructed a main drain leading from the basin a north-westernly direction to the Kakra river. It was part of the plaintiff's case that the drain was a natural channel and it is shown on the map as the Magura Bhil. But whatever its name may be, it is now conclusively established and admitted that it is not a natural but an artificial channel made by the agents and servants of the defendant.

Mr. Cooke's next care was to prolong the channel and embankment on the west of the hills as far north as the gap. The channel so prolonged led into the old drain running eastward to the Son Bhil. The extended channel and embankment are shown on the map as *nala* A and embankment B, while the Subordinate Judge calls the latter the long *bundh* or L. B. Both this extension and the new drain to the north-west were completed before 1892 or in the early part of that year; that is to say, they were completed more than twenty years before the suit was brought. As regards these works that is not of much importance because so far the plaintiff takes no exception—probably no exception could be taken—to what the defendant did.

The controversy is now at any rate confined to the final work constructed by Mr. Cooke in order to complete his system of drainage. He extended embankment B across the old drain leading east so as to shut off that drain and the water of *nala* A from the basin. It is this embankment (which the Subordinate Judge calls the small *bundh* to distinguish it from the long *bundh* or embankment B) which came to be the crux of the case. The extension had not been completed before 1893 and had, therefore, not been in existence for twenty years when the suit was brought.

As to the evidence, reference may be made to the depositions of Mr. Bryning and Mohammad Idris and to five letters written by Mr. Cooke to the defendant company in the month of January to April 1892. Of the letters the most important is the last dated 4th April (Exhibit C4). This evidence shows generally what Mr. Cooke's plans were and how they were carried out, but for present purposes its principal significance lies in its bearing upon the small *bundh* and the object with which that work was undertaken.

The learned Subordinate Judge has found that the defendant has a right described as a natural right to the unobstructed flow of water from the basin to the east including the water derived from *nala* A and that he has acquired a prescriptive right to keep free of weeds and grass a channel 8 cubits in width from the basin to the Bogajan. He has found, however, that the construction of the small *bundh* was a material alteration of or interference with the natural right, which substantially increased the burden upon the plaintiff's land. He has, therefore, made a decree which, while it does not give the plaintiff all the reliefs he asked for, is generally in his favour.

In appeal it has been contended for the defendant that no case of increase of burden is put forward in the plaint and on the merits that no increase of burden has been established.

As to the merits, it is at any rate relevant to inquire why Mr. Cooke made the small *bundh* and his reason cannot be better stated than in his own words, taken from his letter of 4th April 1892. In one paragraph he describes the state of things which existed before *nala* A and the drain to the west were finished. The water came into the garden and turned "all the north land shown as land now available for extension into a lake and remaining so until it could drain off slowly into the Sone Bhil (*sic.*) but as the Sone Bhil flood level is two feet higher than the point where the old and new main drains meet each other

this north land remained practically a lake during the rains, and the water was generally standing up to the point in the area under tea marked with a cross." The plan to which Mr. Cooke was referring is not forthcoming, but "the point where the old and new main drains meet each other" is the junction of *nala* A and the old drain leading east. That point, therefore, being two feet below the Sone Bhil flood level, formerly there was during the height of the rains no flow of water eastward. The water drained off gradually as the level fell in the Sone Bhil. It may be gathered, I think, that the mere completion of *nala* A and embankment B would not alter that state of things. The water from *nala* A during the height of the rains would merely mingle with and swell the water in the basin and as I have said the right of the defendant to conduct water through *nala* A is conceded as well as his right to an outlet from the basin to the east. In the next paragraph Mr. Cooke refers to the small *bundh*, which according to his plans was to complete his system of drainage. He says this: "The new drain on the east side (*i. e.*, *nala* A already constructed) now confines the stream (from the hills on the east) and takes them into the Sone Bhil drain, the mouth of which will be closed with a strong *bundh* when the new drainage system is completed, so that the Kakra main drain will only have to carry off the garden drainage and as there is a fall of seven feet from the lowest point in Eraliyool to its junction with the Kakra it is evident that it will do this perfectly, and having no hill streams running into it, it will not silt up with sand." The object of the small *bundh* is clear. It was intended in the first place to prevent the hill streams and the silt they brought down from being carried by *nala* A into the basin and so overloading the new drain to the north-west. The only escape for the silt-laden water of *nala* A was to be by the old drain to the east and in order to improve that drain steps were taken at sometime or other after 1893 to deepen it where it crosses the lands of schedule II and schedule I.

Now, I am disposed to be of opinion that the original channel by which water escaped from the basin to the Bogajan was sufficiently defined to merit the title of a natural watercourse, though the defendant may have since acquired a further prescriptive right recognised by the Subordinate Judge's decree to keep a certain width of the channel on the plaintiff's land free of water weeds and grasses. But the question whether the channel is a natural watercourse, the defendant's right to its continued existence in its original state being then a natural right, or whether the right to the discharge of water from the basin by the channel is to be regarded as an easement is of little importance. The existence of the right is admitted and the case turns rather on its extent than its nature. As the change caused by the erection of the small *bundh* occurred within twenty years of the suit, the defendant's right at the date of the suit must be measured with reference to the state of things in 1892. On the facts set out I find it difficult to resist the conclusion that the small *bundh* materially affected the benefit which the defendant had previously enjoyed. It is not sufficient to say, as was argued for the defendant, that the new drain to the north-west diminished the volume of water which previously passed to the east. There was a change in the quality of that water, in so far as the quantity of silt suspended in it became greater. There must have been changes also in the character of the flow of the water. Almost certainly the rapidity of the current increased, at any rate at certain seasons, and probably there was a steadier flow from mouth to mouth. The flow would be irrespective of the level of the water in the basin, whereas formerly it had depended on that level. So too the holding up of the water by the erection of the small *bundh*, a change which interfered with the gravitation of the water, would, to some extent at least, counteract the effect previously attributed to the high flood level of the Sone Bhil.

As to issue No. 19, the issue relating to 'damage', I accept the finding of the learned Subordinate Judge that the evidence offered by the plaintiff falls far short of proving that the damage caused by floods in the particular years mentioned in the plaint is due to the small *bundh*. But apart from that, in my opinion, the facts are sufficient to bring the case within the principle of the Madras case cited by the

Subordinate Judge. [*Raja of Venkatagiri* v. *Raja Muddukrishna* (2).] The principle is compendiously stated by James, L. J., in the English case referred to in the judgment, *West Cumberland Iron & Steel Co.* v. *Kenyon* (5): "I have always understood that everybody has a right on his own land to do anything with regard to the diversion of water, or the storage of water, or with regard to the usage of water, in any way he chooses, provided that when he ceases dealing with it on his own land, when he has made such use of it, as he is minded to make, he is not to allow or cause that water to go upon his neighbour's land so as to affect that neighbour's land in some other way than the way in which it had been affected before." In the present case the small *bundh* so altered the nature of the original flow of water from the basin as to constitute a new state of things. The question whether the defendant is or is not entitled to the enjoyment of the flow in its altered condition depends upon user, and at the date of the suit the right had not been crystallized by user for the prescriptive period. An observation of Lord Robertson's in *White* v. *White* (11) may perhaps be applied *mutatis mutandis* to the present case:—"It is equally obvious that the conception of a mill as a growing concern, with expanding requirements, has no place in a discussion with other riparian proprietors about a servitude constituted by use . . . . I hold that the respondents (mill-owners) have no right to abstract the water of this river except to the extent to which they have had prescriptive use." That observation seems to apply when an attempt is made, as here, to superimpose a new right upon an old right and it can make no difference in such a case whether the old right is a servitude or a natural right. A plaintiff, whose natural rights are in danger of being infringed or further encroached upon by a new enjoyment on the part of the defendant, capable of being converted by user for the prescriptive period into a new right in the latter, has good cause of action apart from any question as to the amount of damage which he may have suffered or be likely to suffer [*McCartney* v. *Londonderry and Lough Swilley Railway Co.* (12)]. It is not easy to find a case precisely in point, but I may refer to the observations of Lord Herschell and Lord Watson in *McIntyre* v. *McGavin* (13) and to the principle underlying the cases of *Sampson* v. *Hoddinott* (14), *Baird* v. *Williamson* (15) and *Young* v. *Bankier Distillery Company* (16).

These considerations support the conclusion arrived at by the learned Subordinate Judge on the merits.

As to the pleadings, it is true that the plaint is founded on the theory that in its natural state the defendant's garden would drain itself towards the west and not towards the east. The theory assumes that the small *bundh* coupled with embankment is a sort of artificial watershed interfering with the natural watershed between the defendant's garden on the one side and the plaintiff's garden on the other. No doubt the theory has been shown and found to be largely erroneous. Nevertheless though the theory as a whole may be wrong, it does invite attention to the importance of the small *bundh*. That *bundh* was clearly struck at in paragraph 9 of the plaint and in the fourth of the reliefs claimed and in my opinion the defendants' right to retain it is clearly involved in the pleadings and in the important issue No. 12. In paragraph 9 of the written statement embankment B and the small *bundh* are treated as one embankment, constructed in January 1892, with the object of preventing "the passage of water both into and out of the said Bhil" (or basin). It is asserted that "prior to the year 1892" the drain to the east was a "natural outlet for the water from the land belonging to the defendant company." The right to the maintenance of the drain as altered by the embankment is claimed in substance as an easement, and it is added "that so far from the said drain and embankment prejudicially affecting the plaintiff's

(11) (1906) A. C. 72 at p. 85; 75 L. J. P. C. 14; 49 L. T. 65.

(12) (1904) A. C. 301 at p. 313; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385.

(13) (1893) A. C. 268; 1 R. 246; 57 J. P. 548.

(14) (1857) 1 C. B. (N. S.) 590; 26 L. J. C. P. 148; 3 Jur. (N. S.) 243; 5 W. R. 230; 140 E. R. 242; 28 L. T. (O. S.) 304; 107 R. R. 809.

(15) (1863) 15 C. B. (N. S.) 376 at pp. 391, 392; 33 L. J. C. P. 101; 9 L. T. 412; 10 Jur. (N. S.) 152; 12 W. R. 150; 143 E. R. 831; 137 R. R. 541.

(16) (1893) A. C. 691; 69 L. T. 833; 58 J. P. 100.

alleged property, they have in fact materially reduced the volume of water entering the Bogajan Cherra". Clearly issues Nos. 11 and 12 were framed in reference to paragraph 9 of the plaint and paragraph 9 of the written statement. The last part of issue No. 11 raises the question of the date of the construction of the small *bundh* (which on the evidence may be taken to be the early part of 1893) and issue No. 12 relates to the rights by way of easement claimed by the defendant. It is true that there is no express issue whether the construction of the small *bundh* increased the burden upon the plaintiff's land but the question here, being not merely one of excess but of a change in the mode of enjoyment, is necessarily involved in the question of the defendant's right to the easement claimed. The easement depends upon user and there is evidence on the record directed not only to the length of the user but also to the nature of the user before and after the small *bundh* was erected. Upon that evidence a decision has been arrived at and regard being had to the whole record the contention that the learned Subordinate Judge decided the case upon a point not raised by the pleadings or issues and to which the evidence was not directed cannot, as it appears to me, be supported.

We have carefully considered whether a further inquiry should be directed generally as to the effect of the small *bundh* upon the plaintiff's land. We are of opinion in the circumstances that a further inquiry would carry the matter no further and is, therefore, unnecessary.

We have also considered whether anything short of a mandatory injunction to remove the small *bundh* would suffice. But if the defendant is allowed to retain that dam, there would be a difficulty in directing the plaintiff to remove the dam which he constructed across the channel on his own land.

The conclusions arrived at are sufficient to dispose of the appeal but it may be as well to add a few words on one or two other points touched upon in the argument before us.

In the first place as to the plaintiff's title, it appears that the original owner of the property, whose daughter the plaintiff has since married, died in 1899. He was succeeded by his widow who gave the property to the plaintiff by deed dated 25th *Magh* 1316 (7th February 1910). The gift is expressed to have been made in pursuance of a promise by the widow on the occasion of the plaintiff's marriage to her daughter and on his agreeing to reside in her house as *gharjawai*, the plaintiff, it appears, belonged to a family higher in the social scale than that into which he married. The marriage took place in 1907 and he and his wife had since resided with the widow. It was argued for the plaintiff, on the authority of *Churaman Sahu* v. *Gopi Sahu* (10) and *Ramasami Ayyar* v. *Vengidusami Ayyar* (17), that the gift or transfer was binding on the reversioners entitled after the widow. If it was open to the widow as representing the husband's estate to make some such provision for her daughter, or son-in-law on their marriage, it might still be doubtful whether she acted reasonably and prudently in the exercise of her power. But neither the question of principle nor the question of fact need detain us, because as the learned Subordinate Judge has held in connection with issues Nos. 15 and 16, whether the plaintiff's title is good against the reversioners or not, he has at least a sufficient title as against the defendant to support the suit.

On the assumption that the reversioners are bound by the transfer, it was further argued for the plaintiff in connection with the question of limitation that he was entitled to the benefit of section 27 of the Limitation Act. On the facts found it is unnecessary for the plaintiff to have recourse to that section and we need not, therefore, decide the point. If an opinion had to be expressed, I should hold that the section does not apply to a donee or transferee from the widow in virtue of her powers as representing the estate. In such a case the transferee succeeds the widow in her capacity as full owner and not as upon the determination of her interest for life.

It may be mentioned that in response to a suggestion from the Court during the hearing of this appeal, the parties made an endeavour to arrive at a settlement. We have no doubt that both parties did their best to find a way out of the difficulty, but in the

(17) 22 M. 113; 8 M. L. J. 170; 8 Ind. Dec. (N. S.) 79.

result it was found impossible to reconcile their conflicting interests.

In our opinion the appeal fails and must be dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 782 OF 1916.

May 18, 1917.

Present:—Mr. Justice Mullick.

UCHAIT MANDAR AND OTHERS—PLAINTIFFS —APPELLANTS

versus

GOSAIN SINGH BAIT AND OTHERS— DEFENDANTS – RESPONDENTS.

Transfer of Property Act (IV of 1882), *s.* 68—*Mortgage, usufructuary—Mortgagee, dispossession of, from portion of mortgaged premises—Acquiescence—Interest from date of dispossession, whether can be allowed.*

Where a usufructuary mortgagee is dispossessed of a portion of the mortgaged property but continues in possession of the remainder for a considerable time, he must be deemed to have acquiesced in the dispossession and cannot claim interest from the date of dispossession, although it may have been stipulated for in the mortgage-deed. [p. 56, col. 2]

Appeal from a decision of the Subordinate Judge, Durbhanga.

Mr. *Saroshi Charan Mitra*, for the Appellants.

Mr. *Rajendra Prasad*, for the Respondents.

JUDGMENT.—In this case the defendants first party executed a usufructuary mortgage in favour of the plaintiffs on the 25th of *Savan* 1305, the date stipulated for repayment being the 30th of *Baisakh* 306, which corresponds to sometime in April 1899. In 1902 the third party defendant sued the mortgagors and the plaintiffs for declaration of title to and recovery of possession of half of this property and succeeded. The plaintiffs were thereby dispossessed of half their mortgage security. Then in 1915 the mortgagors sold to defendants second party, by a *kobala*, the remaining half of the property and the purchasers, on the strength of that *kobala*, dispossessed the plaintiffs. The second party defendants then deposited in Court the whole amount of the mortgage-mony, which was Rs. 498.

On the 15th of May 1915 the plaintiffs brought the present suit for recovery of the principal sum with interest at 2 per cent. per mensem from 1902 up to the date of the suit. There is a prayer for the sale of the mortgaged property inasmuch as it is a composite mortgage, *viz.*, a usufructuary mortgage as well as a simple mortgage.

The plaintiffs, however, have remitted a sum of Rs. 408 on account of interest and claim only Rs. 377. The precise reason for this remission is not intelligible, but it is alleged in paragraph 7 of the plaint that as the value of the mortgaged property is not sufficient, so a remission is made of Rs. 408.

The Munsif decreed the suit for Rs. 498 (which the plaintiffs have withdrawn under protest) with interest at 24 per cent. per annum and fixed six months for the payment; and in default ordered that 5 *bighas* 5 *cottas*, being half of the mortgaged property, be sold.

On appeal the Subordinate Judge found that the mortgagees had acquiesced in the dispossession of 1902 and were not entitled to claim any interest. He accordingly decreed the suit only for Rs. 498 and disallowed the sum of Rs. 377 for interest.

The present second appeal is preferred by the plaintiffs and there is also a cross-appeal by the defendants second party.

The learned Subordinate Judge has relied upon the case of *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (1). In that case the mortgagor made a usufructuary mortgage and then took the property in lease from the mortgagee. He also stipulated that he would pay interest at 24 per cent. per annum until delivery of possession. He failed to deliver possession of half the property and after the mortgagee had been in possession of the remaining half for 31 years, the mortgagor brought a suit for redemption offering to the mortgagee only the principal amount. The mortgagee refused and demanded the payment of the principal amount with interest at 24 per cent. for the whole period. Their Lordships of the Privy Council held that the mortgagee had acquiesced in the failure to deliver possession and that as the the profits from the remaining half of which he had been in possession were sufficient, he

(1) 24 A 521; 29 I. A. 148; 7 C. W. N. 97; 4 Bom. L. R. 845; 8 Sar. P. C. J. 310 (P. C.).

was not entitled to claim interest as a condition necessary to redemption at the rate stipulated in the bond. It appears from the judgment of their Lordships that the view that they took of the bond was that the interest was payable only on failure to deliver possession and that there was no contract by which the mortgagor bound himself to pay interest on dispossession after delivery of possession.

It is sought to distinguish the above-mentioned case from the present case by showing that the bond now in suit specifically provides that interest at 24 per cent. per annum shall be paid upon dispossession of the mortgagee after delivery of possession. The case of *Khuda Bakhsh* v. *Alim-unnissa* (2) was similar to that of *Partab Bahadur's* case (1). The same principle was followed in *Jhunku Singh* v. *Chatkan Singh* (3). In the latter case the condition was that if there was any defect in the mortgaged property and any manner of defect arose in the mortgagee's possession, the mortgagee would be entitled to interest; and their Lordships held that the defect referred to related to defect in the title of the mortgagor whereby the mortgagee should fail to get possession, or having got possession should lose it. They also held that the mortgagee, having allowed the mortgagors to retain possession of a part of the mortgaged property and having made no claim in respect of the stipulation in the mortgage-deed as to interest, was bound by his acquiescence.

The learned Vakil for the appellants has no case which will meet this case; but he relies on a decision of their Lordships of the Calcutta High Court in *Ananda Chandra Sen* v. *Parbati Nath Sen* (4) in which the legal meaning of acquiescence has been explained. The learned Vakil contends that the mortgagor could never have been led to believe that the mortgagee would not press his claim for interest in spite of the omission to make this claim for over 12 years, and he relies upon the principle that in order to establish the plea of acquiescence it must be shown that a decision to the contrary would amount to assisting a fraudulent transaction.

In my opinion the question is one of inference to be drawn from facts. In this case the mortgage-bond entitled the mortgagee to claim interest in the event of the mortgagor's dispossessing him from a single inch of land; and in the alternative, the mortgagee has the further right of claiming damages. So far as damages are concerned, a suit is partly barred by limitation and I think the present suit must be taken to be one entirely upon the mortgage and within the purview of section 68 of the Transfer of Property Act. The mortgagee was content to accept the income of half of the property for 12 years, namely, from 1902. We do not know whether the income of the property was more than the interest, if it was, then his claim for interest would not be maintainable.

I cannot agree with the proposition that even if the profits received were in excess of the interest claimed, the mortgagee would be entitled to claim interest upon the contract as damages.

Therefore if we consider the suit as one based solely on the mortgage-bond, what is the inference to be drawn from the conduct of the parties? The learned Subordinate Judge was of opinion that the proper inference is that the mortgagee was satisfied with the security that he got, apparently on the ground that it was sufficient to discharge the interest on his money. If it was open to the learned Subordinate Judge to draw this inference, the question becomes one of fact and not one of law. It would only be a question of law if such an inference could not possibly be drawn from the facts. In my opinion the inference could be drawn and, therefore, the finding of the learned Subordinate Judge is conclusive. But even if it was a question of law and open to revision by me in second appeal, I am of opinion that the view taken by the learned Subordinate Judge was correct. No reason has been shown for the mortgagee's failure to object to the defect in the security for so long and, in my opinion, a reasonable belief was engendered in the mind of the mortgagor that he was entitled to sell the remaining half of the security to the defendants second party.

(2) 27 A. 313; A. W. N. (1904) 273; 1 A. L. J. 715.
(3) 2 Ind. Cas. 221; 31 A. 325; 6 A. L. J. 247.
(4) 4 C. L. J. 198.

In these circumstances the decision of the learned Subordinate Judge is correct and the appeal must be dismissed with costs.

As to the cross appeal, the lower Appellate Court has approved the Munsif's decree granting costs to the plaintiffs on the ground that the defendants second party forcibly dispossessed the plaintiffs. In my opinion this discretion was judicially exercised and probably the plaintiffs would not have instituted this suit at all if this dispossession had not taken place.

The cross-appeal is, therefore, dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 820 OF 1915.

June 8, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

Srimati ANILA DEBI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MONI MOHAN MUKERJEE AND OTHERS—DEFENDANTS – RESPONDENTS.

Registration Act (*XVI of* 1908), *ss.* 72, 73, 76—*Refusal of Sub-Registrar to register document on executant's failure to appear—Appeal, whether lies—Procedure—Application under s.* 73, *dismissal of, for default—Registrar, power of, to restore.*

No appeal lies to the Registrar against the refusal of a Sub-Registrar to register a document upon the wilful failure of the executant of the document to appear before the Sub-Registrar, as such failure amounts to a denial of execution within the meaning of section 72 of the Registration Act. In such a case the only procedure open to the party presenting the deed is to apply to the Registrar under section 73 of the Registration Act to direct registration. [p. 58, col. 1.]

When an application under section 73 of the Registration Act has been dismissed for default, the Registrar has full power to restore the matter and to re-hear the case, at any rate before he has finally dealt with the matter under section 76 of the Act. [p. 58, col. 2.]

Appeal against the decree of the District Judge, 24-Pergannahs, dated the 6th April 1915, reversing that of the Subordinate Judge, Alipore, dated the 30th January 1914.

FACTS of the case appear from the judgment.

Dr. *Dwarka Nath Mitter* with him Babus *Dwijendra Nath Mukherjee*, *Narendra Nath Bose* and *Sripati Ch. Chowdhury*), for the Appellants.—The appeal arises out of a suit for setting aside a lease alleged to have been granted by the plaintiffs. Where a Sub-Registrar refuses to register a deed for want of admission of execution, no appeal lies to the District Registrar against the order of refusal. It has been held that a wilful default to appear before the Registrar would amount to a denial of execution. See *Kudrathi Begum* v. *Najibunnessa* (1), *Radhakissen Rowra Dakna* v. *Chooneeloll Dutt* (2). The appeal made to the Registrar was incompetent. In such a case the proper course is to take proceedings under section 73 of the Registration Act.

Then when the appeal before the Registrar was struck off for default, the Registrar illegally restored the appeal although he had no jurisdiction to do so. The Registrar cannot restore a case struck off for default because the Registration Act does not empower him to do so, and he cannot act outside the procedure laid down in the Registration Act. The Registrar is not a Judicial Officer and he cannot act according to the provisions of the Code of Civil Procedure. The restoration of the appeal which was dismissed for default was without jurisdiction.

Babu *Dwarka Nath Chakravarty*, for the Respondents:—The question of jurisdiction was not raised in any of the lower Courts.]

It can be raised for the first time even now. If there was a total want of jurisdiction, omission to take that objection would not give jurisdiction.

Then as regards the merits, the first Court found that there was no passing of consideration. The lower Appellate Court did not deal with this question of passing of consideration, nor did it definitely upset this finding.

The document in question was alleged to be executed by a *pardanashin* lady, and it must be proved that she properly and thoroughly understood the contents of the document. The lower Appellate Court says that it is very difficult to come to a distinct finding

(1) 25 C. 93; 1 Ind. Dec. (N. S.) 63.

(2) 5 C. 445; 5 Ind. Jur. 312; 5 C. L. R. 172; 2 Ind. Dec. (N. S.) 894.

as regards that, and because it is very difficult, therefore, the learned Judge takes it for granted or rather assumes that she properly understood the contents of the document. Considering the relations between the parties, the burden of proving good faith is, under section 111 of the Evidence Act, on the defendant, and he has failed to do so. The lower Appellate Court was not justified in saying that there was no fiduciary relation between the parties, although from the written statement and the document itself it appears that the defendant was a great friend of the plaintiff's husband and was looking after the latter's estate.

Babu *Dwarka Nath Chakravarty* (with him Babus *Mohendra Nath Roy*, *Asita Ranjan Chatterjee* and *Sailendra Nath Chatterjee*), for the Respondents, was not called upon in reply.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs against a decision of the learned District Judge of 24-Pergannas, dated the 6th April 1915, reversing a decision of the Subordinate Judge of Alipore. The suit was brought by a Hindu widow to set aside a permanent lease which was alleged to have been granted by her. The document was presented to the Sub-Registrar for registration on the 17th February 1910. The executant having been duly summoned failed to appear. Thereupon the Sub-Registrar held that there was a denial of execution by the executant and declined to register the deed. The authorities in this Court establish clearly that a wilful failure to appear before a Sub-Registrar amounts to a denial of execution within the meaning of section 72 of the Registration Act. Therefore, no appeal lay upon the decision of the Sub-Registrar to the Registrar. The only procedure open to the party presenting the deed was to apply to the Registrar under section 73 of the Registration Act to direct registration of the document. That appears to be the course which should be adopted in such a case. It is quite true that there is a document, on the record, called "Hazira of witnesses" in which the heading is Appeal No. 25 We have gone through the record and we have found that there are other documents which are headed as "applications." It seems, therefore, that perhaps a *mukhtiar* or a Pleader headed this list of witnesses as an appeal. It cannot be held to be an appeal inviting a Court to exercise a jurisdiction that it has not got, instead of one that it has got. It is quite a novel way of stating that a person exercising judicial or *quasi*-judicial jurisdiction should assume that the document presented to him was presented to be acted upon under powers that he had not got rather than under powers that he had. However that may be, we must take it as an application presented to the Registrar which he could hear and determine, and the application which was made after the denial of execution was an application under section 73. That application under section 73 was dismissed for default on the 20th September 1910. There was an application for restoring the case. It was not an application for review. It was presented to the Registrar who directed on the application the case to be restored. It has been objected to by Dr. Mitra in this case that the Registrar had no power to restore the case. This is the only point in the case which caused us any trouble. Dr. Mitra wanted to show, after calling for certain records from the lower Court, that the Registrar had conclusively exercised his jurisdiction in dealing with the case under section 76 by recording his reasons in Book No 2. It is difficult to urge that the Registrar was not competent to restore the case. Book No. 2 is not given in evidence and in its absence we cannot assume that the Registrar, when he restored the case, had ceased to have any power to deal with the case after taking evidence. The presumption is the other way. The presumption is that the Registrar had acted in a regular and proper manner. Apart from that, there is no evidence that the Registrar when he restored the case had finally dealt with the matter under section 76 and, therefore, could not proceed to hear the case on the merits. We think that on the record as it at present stands we must take it that the Registrar had full power to restore the matter and re-hear the case. The fact that the Registrar did proceed to restore the case and re-hear it gives rise to a presumption that the Registrar had acted in a regular and proper manner.

The other points raised turn on the merits. The first point is that the learned District Judge had omitted to find that the consideration money of Rs. 100 for the grant of the

land was paid. It is stated that that point was not dealt with by the learned District Judge in his judgment. That is so in so far as it is not stated directly, but the evidence shows that Rs. 100 was paid and we cannot read the judgment of the learned District Judge without coming to the conclusion from the facts placed before him that in his view this Rs. 100 was paid. In that portion of his judgment where he compares the terms of the two leases, he states that the fact of the plaintiff executing a *patta* subsequently in favour of another person for a higher *salami* and for higher rent may possibly supply the motive for this case. From this we hold that the learned Judge must have come to the conclusion that this Rs. 100 had been paid. Otherwise his statement would be meaningless. I agree with Dr. Mitra that it would have been better if the learned Judge had added a statement in his judgment that this Rs. 100 had been paid. It is quite possible that the learned Judge having to write a lengthy judgment had, by an oversight, omitted to add this statement. But no one can suggest that he meant to find that Rs. 100 was not paid.

The next point raised by Dr. Mitra is that as the lady was a *pardanashin* lady, it was necessary to prove that she fully understood the transaction. The learned Judge remarked that it was very difficult for defendant No. 1 to prove that plaintiff No. 1 did understand what she was doing and that before entering into the transaction she had proper independent advice I think, having regard to the express finding of the learned Judge, made about nine lines higher up the above sentence, that the plaintiff had fully understood the transaction, that this statement was only an unfortunate way of expressing that she fully understood what she was doing. I suppose what the learned Judge meant was that the defendant was pressed with an up-hill task and notwithstanding that he managed to reach the goal, namely, to convince the learned Judge that plaintiff No. 1 had fully understood the transaction.

Then as to the fiduciary relationship. There is no relationship established or appearing on the facts as to necessarily give rise to a fiduciary relationship. It may be that defendant No. 1 was a close friend of the lady's husband, but that does not mean that he was in a fiduciary relationship to the lady. A man might have collected rent on behalf of the lady's husband and not be in a fiduciary relationship to the lady. A case like this is not similar to that of guardian and ward or to that of *guru* and *chela*, in which the Court holds for various reasons that the relationship when established is fiduciary. No such relationship is established in this case.

The appeal fails and is dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1938 OF 1914.

May 9, 1917.

Present:- Mr. Justice Chevis and
Mr. Justice Shadi Lal.

LOK CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HAZAR KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Provision for redemption on payment of mortgage money—Sale of equity of redemption—Vendee undertaking to pay mortgage money, effect of—Interest, whether charge on property—Vendee, liability of.

One *D.* mortgaged certain land to the plaintiffs for Rs. 700. The mortgagees were to hold possession and the income was to cover the interest on Rs. 420, while the remaining Rs. 280 was to carry interest at Rs. 2-1-4 per cent. per mensem payable half yearly, with compound interest at the same rate in case of default. It was further agreed that the land should be redeemable on payment of the *zar-i-marhuna*. After *D.*'s death his son *S.* sold the equity of redemption to one *H.* for Rs. 700, out of which Rs. 60 were paid in cash and Rs. 640 were kept with the vendee to redeem the mortgage. The sale-deed provided that the vendee would be liable for any moneys that should turn out to be due to the mortgagee over and above Rs. 640. *H.* started proceedings under the Punjab Redemption of Mortgages Act and got possession of the land. The mortgagees thereupon brought a suit for Rs. 1,285 interest and compound interest on Rs. 280 against *S.* and *H.*:

Held, (1) that as there was nothing to show that *H.* knew that any interest was chargeable, he was not personally liable for it; [p. 61, col. 1.]

LOK CHAND *v.* HAZAR KHAN.

(2) that according to the terms of the mortgage-deed the mortgagor himself could have redeemed the land on payment of the mortgage money alone and his vendee could not be in a worse position; [p. 61, cols. 1 & 2.]

Aulia Khan v. *Kashi Ram*, 17 Ind. Cas. 677; 45 P. R. 1913; 25 P. W. R. 1913; 145 P. L. R. 1913, followed.

(3) that the interest was no charge on the land and the plaintiffs could not, therefore, follow the land. [p. 61, col. 2.]

Second appeal from the decree of the Divisional Judge, Attock, dated the 30th June 1914, reversing that of the District Judge, Attock, dated the 24th November 1913, decreeing the claim for Rs. 1,039 against Hazar Khan.

The Hon'ble Rai Bahadur Pandit *Sheo Narain* and Mr. *Ralli*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—In 1881 Dulla mortgaged certain land for Rs. 700. By the terms of the mortgage the mortgagees were to hold possession, and the income was to cover the interest on Rs. 420, while the remaining Rs. 280 was to carry interest at Rs. 2-1-4 per cent. per mensem, payable half yearly, with compound interest at the same rate in case of default. The land was redeemable on payment of the mortgage money, *zar-i-marhuna*. Dulla died, and his son Sultan sold equity of redemption to Hazar Khan for Rs. 700. Rupees 60 were paid to Sultan in cash snd Rs. 640 were kept by the vendee to redeem the mortgage. In the sale-deed the vendor writes: "If more than the above mentioned Rs. 640 should turn out to be due to the mortgagee the vendee will pay it, it will be no concern of mine." Hazar Khan started proceedings under the Punjab Redemption of Mortgages Act, and got possession of the land from the mortgagees on payment of Rs. 700.

The mortgagees have now brought this suit for Rs. 1,285, interest and compound interest, calculated on Rs. 280 from March 1907 to August 1913, against Sultan and Hazar Khan.

The plaintiffs seem to have intended to limit their claim to interest for six years prior to suit, though as the first Court points out they have really claimed for $6\frac{1}{2}$ years and not for 6 only. Interest for the former years the plaintiffs have not claimed as time-barred.

We would here remark that in many such cases the Punjab Redemption of Mortgages Act seems to us to inflict hardship on the mortgagee, who, as long as he is in possession, cannot be made to give up possession until he has been paid not only his principal debt but also all arrears of interest, no matter how many years' interest may be due. But when he has once lost possession in the course of proceedings under the above Act, all that he can do is to sue for any sum which he may claim as still being due to him, and here his claims to interest must be confined to the period allowed by the law of limitation. In the present case, however, there is no real hardship, as will be shown later on, the interest not being a charge on the land.

The first Court noted that Sultan was a man of straw, who had nothing left to satisfy any decree, and that Sultan had sold to Hazar Khan, a relative, who had bought with full knowledge of the mortgage. The first Court held that Hazar Khan could not be in a better position than Sultan, especially as the sale-deed threw on him the burden of satisfying the mortgage-debt. So the first Court passed a decree against Hazar Khan alone for Rs. 1,039, which it found to be the correct sum due for the six years next prior to suit.

Hazar Khan appealed to the District Judge, who, on the strength of *Muhammad Sadiq* v. *Musammat Sahib Bibi* (1), held that Hazar Khan was not liable, and so accepted the appeal and made the decree one against Sultan alone.

The plaintiffs appeal to this Court. The only point which has been argued on plaintiffs' behalf is that Hazar Khan is personally liable. Counsel quotes *Daropti* v. *Jaspat Rai* (2), *Khwaja Muhammad Khan* v. *Husaini Begum* (3), *Rakhmabai* v. *Govind* (4), *Shuppu Ammal* v. *Subramaniam* (5) and *Arumuga Goundan* v. *Chinnammal* (6). All

(1) 54 P. R. 1902; 64 P. L. R. 1902.
(2) 49 P. R. 1905; 28 P. L. R. 1905.
(3) 7 Ind. Cas. 237; 32 A. 410; 14 C. W. N. 865; 7 A. L. J. 871; (1910) M. W. N. 313; 8 M. L. T. 147; 12 C. L. J. 205; 12 Bom. L. R. 638; 20 M. L. J. 614; 37 I. A. 152.
(4) 6 Bom L. R. 421.
(5) 4 Ind. Cas. 1083; 32 M. 238; 19 M. L. J. 739; 33 M. 238; 8 M. L. T. 249.
(6) 12 Ind. Cas. 185; 10 M. L. T. 214; 21 M. L. J. 918; (1911) 2 M. W. N. 524.

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these rulings seem to us only today down that where there is no privity of contract between the plaintiff and the defendant the latter is still liable if the plaintiff is a beneficiary under any contract between the defendant and a third party. Reliance is placed on the clause in the sale-deed which recites that if more than Rs 640 turns out to be due to the mortgagees, it is the vendee and not the vendor who is to pay up. But in the first place no reference is here made to any interest, so this clause might well refer only to the principal mortgage debt; there is nothing to show that Hazar Khan knew that any interest was chargeable. And in the next place we do not think it can be said that plaintiffs were beneficiaries under this contract; the clause was inserted, in our opinion, not with the object of benefiting the plaintiffs but with the object of freeing Sultan from any further liability to pay the mortgage debt. We hold, therefore, that the District Judge has rightly refused to hold Hazar Khan personally liable for the claim to interest.

It will, however, be observed that all that *Muhammad Sadiq* v. *Musammat Sahib Bibi* (1), on which the learned District Judge relies, decides is that the purchaser of the equity of redemption is not *personally* liable, and we were at first disposed to question whether a decree could not be passed against Hazar Khan to be executed only by process against the land in question. But as Mr. Shafi points out, the deed provides for redemption of the land on payment, not of the mortgage debt *plus* interest, but simply on payment of the mortgage money, *zar-i-marhuna*. What is meant by *zar-i-marhuna* is clear from the use of the same expression in other parts of the deed; we read in one place that so much of the *zar i-marhuna* is to bear interest, and in another place we read that the *zar-i-marhuna* has been received by credit to book account. So *Aulia Khan* v. *Kanshi Ram* (7), on which Mr. Shafi relies, is just in point, and Rai Bahadur Sheo Narain owns that he cannot distinguish it. As the deed itself provides for redemption on payment of the principal mortgage debt, even the original mortgagor could have redeemed on payment of Rs, 700 and the mortgagor's vendee cannot be in a worse position. The interest is not a charge on the land. So the plaintiffs cannot follow the land.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(7) 17 Ind. Cas. 677; 45 P. R 1913; 25 P. W. R. 1913; 145 P. L. R. 1913.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 55 OF 1917.

June 6, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Mullick.

UPENDRA LAL MISRA—

APPELLANT

versus

MOTI THAKUR AND OTHERS—

RESPONDENTS.

Bengal Cess Act (IX B. C. of 1880), s. 20 (b), applicability of—Landlord and tenant—Bhaoli land—Road cess return—Recovery of rent at rate higher than that mentioned in return.

Section 20 (*b*) of the Bengal Cess Act does not apply to *bhaoli batai* holdings. [p. 63, cols. 1 & 2.]

In the case of *bhaoli batai* holdings the landlord is entitled to recover rent at a rate higher than that mentioned in the road cess returns. [p. 62, col. 2; p. 63, col. 1.]

Letters Patent Appeal from a decision of Mr. Justice Atkinson, confirming that of the District Judge, Mozaffarpur.

Mr. *Soroshi Charan Mitter*, for the Appellant.

Mr. *L. N. Sinha*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—The question for decision in this appeal is how, if at all, section 20 (*b*) of the Cess Act (Bengal Act IX of 1880) applies to suits for the recovery of the value of the landlord's share of the produce of land held on the *bhaoli batai* system.

The plaintiffs put in a return in the form prescribed by section 14 of the Act, in column 5 of which they stated that the "annual rent" was Rs. 28-12-0, presumably, as will be shown later, the value of the landlord's share of the crop on an average of the last three years. The present suit relates to about one-fifth of the holding and if section 20 (*b*) of

the Cess Act applies to the case in the manner suggested by the defendants, the plaintiffs are not entitled to recover at a higher rate per annum than Rs. 5-15-0 per *bigha*. If section 20 (*b*) does not apply, the plaintiffs are entitled to a much larger sum on account of the years in suit. The Munsif held that the section did not apply to such a case. The District Judge held otherwise and his view was accepted by Mr. Justice Atkinson.

The Act provides for the imposition of a road cess and public works cess upon immoveable property and for the assessment of those cesses upon the "annual value" of lands and on the annual net profits of mines, quarries and the like. Section 4 of the Act defines the "annual value"of any land, estate or tenure as the total rent which is payable, or, if no rent is payable, would on a reasonable assessment be payable during the year by all cultivating *raiyats* of such land, estate or tenure, or by other persons in the actual use or occupation thereof, and it is explained that when rent is payable in kind the money value thereof shall for the purposes of the Act be taken to be the annual value of the landlord's share of the crop, calculated on an average for the three years next preceding any valuation or re-valuation under the Act. Upon a proclamation being issued under section 14 of the Act, or an order being issued under section 15, and a notice being served under section 16 every holder of an estate is required to lodge a return in the form given in schedule A to the Act giving the particulars in such form set forth. Column 5 of Part II of the form is for the "annual rent." The annual rent of a *bhaoli batai* holding is a certain share of the produce. There appears to be no provision in the Act which either permits or requires the holder of an estate to enter in column 5 the "annual value" of his share of the produce of *bhaoli batai* land. But in practice that is what is done, see Rule 54 made by the Local Government under the Act which runs as follows:— "Re-valuation officers should scrutinize with special care returns for lands of which the rent is paid in kind. The annual value of these lands is frequently greatly understated and steps should be taken in such cases to obtain a fairly correct estimate." The result is that neither the rent nor the rate of rent is entered in a return under the Act in the case of *bhaoli* lands.

The question is whether the holder of an estate is debarred by section 20 (*b*) of the Act from recovering on account of any year more than the "annual value," as given in his return, of his share of the produce of *bhaoli batai* land. It may be that the holder of an estate is required to enter *bhaoli batai* holdings in his return and that if he does not do so, he is debarred by clause (*a*) of section 20 from recovering any rent for such holdings. But does clause (*b*) of section 20 apply to *bhaoli batai* lands and if it applies, what is the meaning with reference to such lands of the words "rent at any higher rate than is mentioned in such return"? The rent payable by the tenant of land held on the *bhaoli batai* system is produce of that land and the rate would appear to be the landlord's share of that produce. In theory the landlord can compel the tenant to hand over his (the landlord's) share of the produce. In practice the landlord sues for his share of the produce and in the alternative for the value of that share, or, if the suit is brought after the produce has been carried off by the tenant, the landlord sues only for the value of his share of the produce. It has, no doubt, been held in many cases that a suit for the value of the landlord's share of the produce of *bhaoli* land, whether *bhaoli batai* or *bhaoli danabundi*, is a suit for rent within the meaning of the Second Schedule to the Provincial Small Cause Courts Act, but such a suit is nevertheless a suit for the recovery of the value of the landlord's share of the produce, *i.e.*, for compensation. It is conceded that if and when the landlord can enforce his right to his share of the produce, he may take the whole of his share whatever he may have entered in his return under the Cess Act, but it is contended that if the tenant succeeds in carrying off that share, the landlord is not entitled to recover on account of the value of that share more than the sum which he has entered in his return. As I have already said, I can discover no provision of

the Act which permits or requires a landlord to enter in his return the value or "annual value" of his share of the produce of a holding. In my opinion a landlord does not, by entering that value according to the rule for determining the annual value of a holding, debar himself from recovering the actual value of his share of the produce which his tenant may succeed in carrying off.

It appears to me to be impracticable to apply section 20 (*b*) to such a suit as this. Strictly speaking the plaintiffs are not suing for rent at all but for compensation, and what they entered in their return was not the rent but the annual value of the whole or part of an estate. The rate of rent which they were entitled to recover when they made their return was, and now is, not any sum in cash but onehalf of whatever their share may be of the produce of the holding. The reference in the latter part of clause (*b*) of section 20 to the enhancement of rent suggests that the clause is intended to apply only to cash rents. Lastly we have the significant fact that the most experienced Legal Practitioners in this Court cannot remember any instance in which section 20 (*b*) of the Cess Act has been applied to such a case as this.

The conclusion at which I have arrived is that section 20 (*b*) of the Cess Act does not apply to the present case at all.

I would allow this appeal, set aside the judgment of the learned Judge of this Court and the decree of the District Judge with costs of both hearings in this Court and remand the case to the Court of the District Judge for trial on the merits.

MULLICK, J.—I entirely concur with the judgment that has just been delivered. The plaintiff is the proprietor of an estate within the meaning of the Cess Act (IX B. C. 1880) and sues for rent for the years 1318 to 1320 F. S., in respect of a *bhaoli batai* holding measuring an area of 1 *bigha* 3 *cottahs* 10 *dhurs*. He assesses the money value of his share of the produce at a total of Rs. 195-15-0.

It appears that in a return filed under section 14 of the Cess Act the plaintiff included the holding now in suit with some other holdings and showed in column 4 of part II of the return prescribed by Schedule A of the Act a total area of 5 *bighas* 13 *cottahs* 19 *dhurs* and in column 5 the annual rent of the same as Rs. 28-12-3.

Mr. Justice Atkinson, agreeing with the appellate judgment of the District Judge, has held that the plaintiff is debarred by reason of section 20 (*b*) of the Act from recovering at a rate higher than the rate mentioned in column 5. He calculates this rate at one-fifth of Rs. 28-12-0 *i.e.*, according to the ratio which 1 *bigha* 3 *cottahs* 10 *dhurs* bears to 5 *bighas* 13 *cottahs* 19 *dhurs*.

In my opinion section 20 (*b*) has no application to *bhaoli batai* holdings. The provision that the landlord may claim an enhanced rate, if it be proved that the rent has been lawfully enhanced subsequently to the lodging of the return, clearly shows the framers of the Act had only cash rents in contemplation, for in a *bhaoli batai* holding the rate of rent is half the produce and such a rate is not capable of enhancement. It is true that the definition of cultivating *raiyat* in section 4 of the Act enacts that the money value of rent payable in kind is to be calculated on the average of three years next preceding a valuation or re-valuation under the Act and rules 53 and 54 framed under the Act require the landlord and the Revaluation Officer to see that the assessment is reasonable. But the Act nowhere says that the annual money value so calculated and shown in column 5 of Part II of Schedule A is the rate of rent of the holding. Indeed the Act could not say so, for the nature of the holding requires that the rate of rent shall be half the produce.

To hold otherwise would be to put the most honest of landlords into a manifestly disadvantageous position. Suppose that the holding yielded no crops for three years preceding the valuation or that prices were exceptionally low. Is he to be debarred till the next re-valuation from recovering the proper market value of his half share of the produce although he may have acted with the utmost good faith in filling up column 5? An answer in the affirmative would obviously operate to cause the greatest injustice. If in respect of a *bhaoli* holding he dishonestly underestimates the money value of the rent, he is liable to be punished for making a false return and it is also open to the Collector to correct the valuation; but there is no provision of law which declares that she is precluded from recovering the market

value of the produce, if that market value happens to be higher than the aforesaid money value.

Indeed a claim for the money value of the produce for any particular year in which the tenant fails to make delivery of the landlord's share is in reality a claim for compensation or damages. It is not a claim for rent and it is only as a matter of convenience that the Tenancy Act permits the landlord to join such a claim to one for the recovery of produce. This view is supported by section 7, Bengal Tenancy Act, which enacts that when the tenant removes the crop before division, the compensation is to be calculated on the basis of the highest outturn from neighbouring lands of similar quality.

In the present case there is a further difficulty in the way of the tenants. The return on which they rely was submitted in 1914 and apparently did not come into operation till after the year 1320. The tenants, therefore, cannot plead this return to defeat the present claim.

But apart from this I entirely concur with the contention of the appellants that section 20 of the Cess Act has no application to *bhaoli batai* holdings.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 952 OF 1914.

January 4, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

JAHANGIRI MAL—PLAINTIFF—APPELLANT

versus

KANSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 23, 25, 77—Document presented beyond limitation—Refusal to extend time—Suit—Discretion of Registrar—Civil Courts, power of.

The Civil Courts have no right to question the propriety of the discretion vested in the Registrar under section 25 of the Registration Act. [p. 65, col. 1.]

Abdool Hoosein v. *Goolam Hoosein*, 30 B. 304; 7 Bom. L. R. 742; *Durga Singh* v. *Mathura Das*, 6 A. 460; A. W. N. (1884) 173; 4 Ind. Dec. (N. S.) 134, relied upon.

Where a deed is not presented for registration within four months from the date of its execution, as required by section 23 of the Registration Act, the Court should refuse to pass a decree directing its registration under section 77 of the Act. [p 65, col. 2.]

Noban Nusya v. *Dhon Mahomed*, 5 C. 820; 6 C. L. R. 136; 2 Ind. Dec. (N. S.) 1130, relied upon.

First appeal from the decree of the District Judge, Ambala, dated the 7th April 1914.

Messrs. *Sundar Das* and *Ganga Ram*, for the Appellant.

Messrs. *Badr-ud-din* and *Dharam Das Suri*, for the Respondents.

JUDGMENT.—This was a suit brought under section 77 of the Indian Registration Act (XVI of 1908) for a decree directing the registration of a document, which had been refused by the Registrar. The document is dated 7th January 1913, and being one not affecting immoveable property does not require compulsory registration. The plaintiff, however, insists upon its registration, and the learned District Judge has dismissed the suit on the ground that the order of the Registrar does not amount to a refusal to register, but is one simply refusing to direct the acceptance of the deed for registration.

It appears that the document was presented for registration to the Sub-Registrar on the 21st August 1913 after the expiration of the period of four months prescribed by section 23 of the Registration Act. The Sub-Registrar refused to register it on the grounds that the caste and the residence of the executants were not mentioned in the deed, that it was not signed by one of the executants, that it did not show in whose favour it had been executed, that the paper upon which it was written was torn, and that the language used therein was not idiomatic. The plaintiff preferred an appeal to the Registrar, who passed the following order:—

"Registration is barred under section 23 of the Registration Act. The document has not, on the face of it, been executed by one of the alleged executants. Other reasons for refusal also good. Dismissed with costs."

Now, it has been held by the Bombay High Court in *Gangava* v. *Sayava* (1) that when the Registrar declines to extend time prescribed by the Act, and accordingly re-

(1) 21 B. 699; 11 Ind. Dec. (N. S.) 470.

fuses to admit the document for registration, his order is to be treated not as one refusing to register within the purview of section 77, but as an order refusing to accept for registration; and that a suit under section 77 cannot be maintained. This view has, however, been dissented from by the Madras High Court in *Narasimha Nayanevaru* v. *Ramalingama Rao* (2), where the learned Judges pointed out that the aforesaid section has application not merely to cases in which the Registrar has refused to register the document, but also to cases in which the Registrar has refused to accept for registration. We consider it unnecessary to express any definite opinion upon the subject, because assuming that the suit is maintainable under section 77 of the Registration Act, we have no hesitation in holding that the Civil Court should decline to grant a decree on the simple ground that the document was not presented within the period of four months as required by section 23, and that there is no order of the Registrar extending the time. Upon the record there is not a particle of evidence that the plaintiff presented the document to the Sub-Registrar before 21st August; and that being the case, we must decline to grant the decree for the registration of the document, which decree would interfere with the discretionary powers allowed to the Registrar. It is beyond dispute that the Civil Court has no right to question the propriety of the discretion vested in the Registrar under section 25 of the Act, *vide, inter alia*, *Abdool Hoosein* v. *Goolam Hoosein* (3) and *Durga Singh* v. *Mathura Das* (4).

Mr. Sundar Das for the appellant contends that the Civil Court in an action brought under section 77 is confined to the consideration of the question whether the document was executed or not, and has nothing to do with the matter whether the presentation of the document was or was not within time. This argument appears to us to be wholly untenable, because it is clear that the Civil Court is not justified in passing a decree which would be contrary to the provisions of the Registration Act. In fact, the judgment of the Calcutta High Court in *Noban Nusya* v. *Dhon Mahomed* (5) is a clear authority for the view that when a deed has not been presented for registration within four months from the date of its execution, the Court should refuse to pass a decree directing the registration.

For the aforesaid reasons we confirm the decree of the District Judge, though not exactly on the ground stated by him, and dismiss the appeal with costs.

Appeal dismissed.

(2) 10 M. L. J. 104.
(3) 30 B. 204; 7 Bom. L. R. 742.
(4) 6 A. 460; A. W. N. (1884) 173; 4 Ind. Dec. (N. S.) 134.
(5) 5 C. 820; 6 C. L. R. 136; 2 Ind. Dec. (N. S.) 1130.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3200 OF 1915.

May 18, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Smither.

JAFAR ALI AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

HAR GOBINDA SARMA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. I, r. 10, read with s. 107—Appeal—Party, addition of—Res judicata.

H. brought a suit for rent against a tenant claiming to be the sole landlord. *J.* also brought a suit against the same tenant in respect of the same land for the entire rent. *H.* was a party defendant to the suit of *J.* Both suits were tried together as analogous and it was found by the Trial Court that *H.* was entitled to a ten-annas share and *J.* was entitled to the remaining six-annas share of the rent. No appeal was preferred in the suit of *J.* But *H.* preferred an appeal against the decree in his suit and on appeal the Appellate Court held that *H.* alone had a right to the entire rent and *J.* had no right to any portion of the rent. On second appeal by the tenant:

Held, that the decree in *J.*'s suit did not operate as *res judicata* upon the question of *H.*'s right to the rent but that under the provisions of Order I, rule 10, read with section 107, Civil Procedure Code, *J.*, who though not a party in form to the suit brought by *H.* in substance contested the suit, should be made a party to the appeal in *H.*'s suit and the appeal be heard and determined in his presence. [p. 67, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 15th March 1915, reversing that of the Munsif, Sadar, dated the 14th January 1914.

JAFAR ALI *v.* HAR GOBINDA SARMA.

FACTS of the case appear from the judgment.

Babu *Khitish Chandra Sen*, for the Appellants.—Hara Gobinda brought a suit against my clients to realise rent of the holding claiming to be the sole landlord. Jagat Chandra brought a similar suit against my clients for rent of the same holding. Both claimed to be the sole landlords. The suits were tried together and though Jagat Chandra was not a party to the suit of Har Gobinda, still in his suit he adduced evidence to prove that Har Gobinda was not the landlord, but that he, Jagat Chandra, was the sole landlord. In fact Jagat Chandra was really the person who contested the claim of Har Gobinda to be the sole landlord. The tenants, my clients, were not much concerned with the question whether Har Gobinda or Jagat Chandra was declared to be their landlord, as they are perfectly willing to pay rent to any of them or to both of them provided they have not to pay the same rent twice over. The decree made by the Munsif in the two suits did not hurt the tenants in any way, as the Munsif held that Har Gobinda was entitled to a 10-annas share of the rent and Jagat Chandra was entitled to the remaining 6-annas share of the rent. If the matter had stopped there, my clients, the tenants, would have had no complaint, but in the appeal preferred by Har Gobinda, it has been held by the lower Appellate Court that Har Gobinda alone had a right to the entire rent and Jagat Chandra had no right to any portion of it. As Jagat Chandra was not a party to the appeal he is not bound by the appellate decree. So his right to 6 annas of the rent which has been declared by the Munsif remains intact. And the result would be that the tenants would be liable for 16-annas rent to Har Gobinda and 6-annas share of the rent to Jagat Chandra, that is to say, they will have to pay 6 annas more in each rupee of the rent payable by them. That would be an obvious injustice to these poor tenants. I submit, in the circumstances, the decision in Jagat Chandra's case should be regarded as *res judicata* on the question of Har Gobinda's title to the entire rent. In the presence of Har Gobinda, it was held by the Munsif that Jagat Chandra was entitled to 6-annas share of the rent, still when Har Gobinda appealed he did not make Jagat Chandra a party respondent to his appeal. The subject-matter in the two rent suits was the same holding and the question was whether Har Gobinda or Jagat Chandra was entitled to the entire rent. The two suits were tried together and, therefore, they might be regarded as one litigation, by the result of which both the landlords ought to be bound. I submit Har Gobinda cannot in the absence of Jagat Chandra ask the Appellate Court to make a decree declaring him to be entitled to 16 annas of the rent. There are cases, *viz.*, *Rajrup Singh* v. *Ramgolam Roy* (1), *Mariamnissa Bibi* v. *Joynab Bibi* (2), *Panchanada Velan* v. *Vaithinatha Sastrial* (3), which may support the contention, which might be urged by the other side that the principle of *res judicata* does not apply here. But the facts of those cases are distinguishable from the facts of the present case. I submit that under the circumstances in which the two suits for rent were contested and tried, the decision in one suit should be held to be *res judicata* in the other.

Even if it be held that the principle of *res judicata* cannot be applied, then I submit that the case should be remanded to the lower Appellate Court with the direction that Jagat Chandra should be made a party to the appeal of Har Gobinda, and the appeal should be re-heard in his presence, so that he may be bound by the appellate decree. Under Order I, rule 10, read with section 107, Civil Procedure Code, the Appellate Court has ample power to add Jagat Chandra as a party to the appeal.

Babu *Jotish Chandra Sarkar*, for the Respondent.—The principle of *res judicata* cannot be applied. There was no "former" suit in which a decision was made as to the title of my client Har Gobinda to the entire rent, so that he could be estopped by *res judicata*. I rely upon the cases cited by my learned friend: the principle deducible from those cases shows that the doctrine of *res judicata* cannot be availed of by the tenants. As against the contention that the case should be remanded for a re hearing of the appeal, I submit it is now too late for the tenants to raise such a contention at this stage of the case. The tenants might have asked the lower Appellate Court to add Jagat Chandra as a party, but they have not done so. So

(1) 16 C. 1; 13 Ind. Jur. 139; 8 Ind. Dec. (N. S.) 1.
(2) 33 C. 1101; 10 C. W. N. 934; 4 C. L. J. 149.
(3) 29 M. 333; 16 M. L. J. 63.

hey cannot ask for a remand for the purpose of getting Jagat Chandra added as a party to the appeal.

Babu *Khitish Chandra Sen* replied.

JUDGMENT.—This appeal arises out of a suit for the years 1272 to 1274 M. S. brought by the plaintiff Har Gobinda Sarma against the tenants Jafar Ali and others. The plaintiff claimed to be the sole landlord and as such, claimed the entire rent of the holding. There was another suit brought by one Jagat Chandra Chakravarti against the same tenants and for the same period. The two suits were tried together as analogous. The same evidence was recorded in both the cases and the two suits were disposed of by the same judgment by the Court of first instance, although there were two separate decrees in the two suits.

The Court of first instance held that Har Gobinda was entitled to a 10-annas share of the rent and Jagat Chandra the plaintiff in the other suit was entitled to the remaining 6-annas share of rent.

It ought to be mentioned that Har Gobinda was a party defendant to the suit of Jagat Chandra. There was no appeal preferred against the decree passed in the suit instituted by Jagat Chandra. Har Gobinda preferred an appeal against the decree of the Court of first instance in his suit and on appeal the lower Appellate Court held that Har Gobinda alone had right to the entire rent and that Jagat Chandra had no right to any portion of the rent. In that view a decree for the entire rent was passed in favour of Har Gobinda. The result was that as against the tenant defendants there was a decree for 16-annas rent payable to Har Gobinda and another decree for 6-annas share of the rent in favour of Jagat Chandra. The tenant, defendants have appealed to this Court in the suit brought against them by Har Gobinda.

It is contended that the question whether Har Gobinda is entitled to the 16 annas of rent or only to a 10-annas share thereof, is *res judicata* by the decree in Jagat Chandra's suit to which Har Gobind was a party and in which it was held that Jagat Chandra had a 6-annas share in the rent.

We do not think that that decree operates as *res judicata* upon the question of Har Gobinda's right to the rent. It is true that he was a party to the suit brought by Jagat Chandra, but he had preferred an appeal in his suit and the object of the appeal was to get rid of the adjudication of the Court of first instance that he had only a 10-annas share of the landlord's interest. If, however, the decree of the lower Appellate Court in the suit brought by Har Gobinda and the decree of the Court of first instance in the suit by Jagat Chandra are allowed to stand, the result would be that the tenant defendants would be liable for the 6-annas share of the rent twice over. Under these peculiar circumstances the proper course would have been to add Jagat Chandra to the appeal which was preferred to the lower Appellate Court by Har Gobinda under the provisions of Order I, rule 10, read with section 107 of the Civil Procedure Code. It is true that Jagat Chandra was not made a party to the suit brought by Har Gobinda; but although he was not a party in form, in substance he contested the suit. As the learned Munsif points out, the real contest in these cases is between the plaintiffs in the two cases, both of whom say that they are the landlords. There is no question of adducing any further evidence on behalf of Jagat Chandra because the evidence in both the suits was the same and the two suits were tried together. We think, therefore, that Jagat Chandra cannot be prejudiced by being added as a party to the appeal in the suit brought by Har Gobinda and that in order to effectually and completely dispose of the matters in controversy between the parties, this course should be adopted.

We accordingly set aside the decree of the lower Appellate Court and send the case back to that Court with the direction that Jagat Chandra be made a party to the appeal and the appeal be heard and determined in his presence.

We express no opinion whatever on the merits of the case as between parties.

Costs will abide the result.

Decree set aside; Case remanded.

KIRPAL SINGH *v.* KEDARNATH BOSE.

PATNA HIGH COURT.

MISCELLANEOUS APPEAL No. 267 OF 1916.

June 14, 1917.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

KIRPAL SINGH AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

Baboo KEDARNATH BOSE AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 69—Execution—Sale postponed sine die—*Fresh proclamation, necessity of—Irregularity—Substantial injury.*

Where in execution proceedings the Court adjourns the sale *sine die* and thereafter no fresh sale proclamation fixing a new and definite date for holding the sale is issued, it is a material irregularity within the meaning of Order XXI, rule 69, in publishing and conducting the sale and the sale is liable to be set aside if substantial injury resulting from the material irregularity is proved. [p. 69, col. 1.]

Appeal from an order of the Subordinate Judge, Monghyr, dated the 19th September 1916.

Mr. *Parmeshwar Dyal*, for the Appellants.

Mr. *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.—The respondents in miscellaneous appeal obtained a decree against the father of the appellants on foot of a mortgage executed in 1894. The mortgage-decree is dated the 26th of December 1906 and in this year 1917, the mortgage decree is still unsatisfied. Many applications for execution have been made from time to time. The present application is the last of a series of many and is dated the 18th of November 1914. On the 26th of January 1916, the sale proclamation was duly published and the date fixed for the sale was the 13th of March 1916. The present appellants objected to the form of the proclamation inasmuch as it did not set out the value of the property as estimated by them. Accordingly an application was made to the Calcutta High Court, and the High Court at Calcutta was pleased to order that the Subordinate Judge should insert in the sale proclamation the value of the property estimated by the judgment-debtor. The sale proclamation was amended and then duly published in accordance with the requirements of the order of the Calcutta High Court. The decree-holders valued the property at Rs. 6,100 and the judgment-debtors valued it at Rs. 12,000. The sale was about to be held on the 13th of March, being the date fixed in the sale proclamation, but immediately before the 13th of March the present appellants applied to this Court to stay the sale. Notice was allowed to issue by the Registrar to stay the sale pending a formal application being made to this Court for a stay of the sale. The date of the order of the Registrar was 7th of March 1916, and it required the respondents to show cause why the sale should not be stayed. The matter came before the learned Chief Justice and Mr. Justice Jwala Prasad of this Court on the 17th of March. These learned Judges came to the conclusion that there was no ground whatsoever for staying the sale and they directed that the sale should proceed forthwith. The order of the Registrar reached the Subordinate Judge on the 10th of March and the Subordinate Judge adjourned the sale *sine die*. The order of the 17th of March made by the Divisional Bench of this Court rejecting the application for stay reached the Subordinate Judge on the 21st of March; and the learned Subordinate Judge, in obedience to the order of this Court, proceeded with the sale of the property there and then on the 21st of March 1916 and the property was sold to the decree-holders for the sum of Rs. 7,250 for the four denominations of property set out in the sale proclamation. There appear to have been present at the sale the decree-holders and four other persons.

This application is now made to us by the appellants, the judgment-debtors, to set aside the sale on the ground that there was a material irregularity in the publishing and conduct of the sale which resulted in substantial injury to the petitioners by reason of the property being sold at a very low price. The learned Subordinate Judge, as I have observed, on the 10th of March adjourned the sale *sine die* and thereafter he issued no fresh sale proclamation fixing a new and definite date for holding the sale. It appears to us that the learned Subordinate Judge under Order XXI, rule 69, should have, strictly speaking, issued a fresh proclamation, after the receipt of the order of the High Court of the 17th of March, on the 21st of March·

and we think that in not issuing a fresh proclamation there was an irregularity in the publication and conduct of the sale.

The question we have to decide is whether from that irregularity substantial injury resulted to the appellants before us. If substantial injury resulted to the appellants by reason of this irregularity, then according to the authorities it appears reasonably clear that the sale ought to be set aside and a fresh sale held.

It is contended on behalf of the appellants that by reason of this irregularity there were few bidders at the sale; that no one knew the hour at which the sale would take place and that the price offered by the decree-holders was an inadequate price for the property sold. The appellants allege that the property is worth about Rs. 12,000. This estimate of the value of the property is based upon the evidence of the plaintiff and three other witnesses, none of whom, I think, would carry conviction, so far as their evidence is concerned, to the mind of any Court. The appellant is naturally inclined to inflate the value of the property as much as possible; therefore one must view his evidence with some suspicion. But even if we take his evidence as given, and review the prices which have been paid by the purchasers for each lot that was advertised for sale, I do not think that the margin of difference is such as would warrant any Court in holding that the property was sold for an inadequate price.

Property No. 1 was valued by the appellant approximately at Rs. 3,000, while the price paid for it is Rs. 3,800; property No. 2 was valued by the judgment-debtor at Rs. 1,000 and it fetched Rs. 600; property No. 3 was valued by the judgment-debtor at Rs. 3,250 and it realised Rs. 2,225; property No. 4 was valued by the judgment-debtor at Rs. 890 and it realised Rs. 625. Comparing these figures given by the judgment-debtor himself with the prices paid by the purchasers, can it be said that the property was sold for an inadequate consideration or that the plaintiffs, by reason of the non-publication of a second proclamation, suffered substantial injury as a result? If we total the figures estimated by the judgment-debtor for the four denominations of property, the total comes to Rs. 8,140 as against the sum of Rs. 7,250 realised by the proceeds of the sale. Both witnesses Nos. 2 and 3 estimate the value of the property that was sold at Rs. 13,000 or thereabouts. Neither of them know what properties have been sold, although they live in the vicinity of the judgment-debtor's property; and from the cross-examination of these witnesses it appears that they are persons whose evidence cannot be accepted as trustworthy. Witness No. 2 says: "I did not know of the sale and do not know what properties have been sold". He further says: "I did not go to Pochu Singh, and have no concern with him. I have neither sold nor purchased any land". It is clear from the evidence of this witness that he has no intrinsic knowledge of the value of land and, therefore, his evidence is of no value as corroboration of the appellants' evidence.

Witness No. 3 is likewise a person who does not impress us as being a witness that can be relied upon. He states that the property is worth Rs. 13,000. He says his income is Rs. 5,000 or 6,000 a year; but he further states that all the property belongs to his father and is in his father's name and that he does not know what share he has in the family property. He does not know how much or what property has been sold; and finally he says that he has come to depose at the request of Hito Babu Pleader. It appears to us that this witness also is untrustworthy and unconvincing. The next witness, witness No. 4, we do not think puts the case very much further.

On the other hand witness No. 3 for the decree-holders appears to carry a reasonable sense of conviction by his evidence. He is a four-annas *malik* in the *jagir* of which 6 annas have been sold; he has also purchased land close to the 6 *bighas* in Sher Muhammad Tendail which has been sold; he used to look after the cultivation of the judgment-debtors' land during their minority and he appears to have a knowledge of the value of land, having himself purchased land within a reasonable time before the present sale took place. He says that he thinks Rs. 3,000 an ample price for lot No. 1 of the property sold;

Rs. 550 for lot No. 2; Rs. 1,200 for lot No. 3; and Rs. 400 for lot No. 4. If we take the evidence of this witness as reasonably trustworthy, it would appear that the price paid by the purchasers was substantially more than the actual value of the land as estimated by this witness. It is certainly almost equivalent to the value given by the judgment-debtors themselves.

The learned Judge who decided this case does not appear to have had present to his mind the proper legal considerations bearing upon the facts of the case. He says: "I do not think that his plea of inadequacy of price can have the effect to set aside the sale." In our opinion, it would certainly have that effect if substantial injury had been caused to the judgment-debtors by reason of inadequacy of price following from the non-publication of a fresh proclamation. We hold that there was in this case an irregularity; but we further hold that substantial injury has not resulted to the judgment-debtors-appellants by reason of inadequacy of price.

The amount of the mortgage decree is Rs. 11,000 odd, so that the amount realised by the sale is insufficient to satisfy the decree-holders' debt. These appellants have been induced for some reason or other to embark upon a sea of litigation. Throughout these execution proceedings these appellants, and those who are behind them, have endeavoured to defeat and delay the execution of the decree-holders' mortgage decree. In 1907 a regular Suit No. 428 of 1907 was instituted by *Musammat* Bindawati claiming the mortgaged properties as her *mikliat* right. This lady was grandmother of the appellants. That suit was dismissed. In 1910 a regular Suit No. 43 of 1910 was instituted by the judgment-debtors to set aside the mortgage decree. That suit was also dismissed. Subsequently when the execution of the mortgage decree was proceeding, regular Suit No. 444 of 1914 was instituted to set aside the decree in the Court of the Additional Subordinate Judge of Monghyr but was dismissed. After the prayer for injunction was rejected, an appeal was taken to the Calcutta High Court and was also dismissed. After the dismissal of the said appeal by the High Court objections were taken in this execution proceeding, which were disallowed both by the lower Court and by the High Court. Then an application for the issue of an injunction was again filed in the Court of the Additional Subordinate Judge at Monghyr on the 5th February 1916 and again rejected by that Court and by the High Court. It is clear, therefore, that at every step the judgment-debtors have endeavoured to defeat and delay the execution of the mortgage decree and we understand that they contemplate further litigation. With this, however, we are not concerned We have only to determine whether or not upon the facts stated in the petition the sale ought to be set aside. Upon a careful consideration of the case we have come to the conclusion that although there was an irregularity in the publishing and conduct of the sale that nevertheless no substantial injury was caused to the appellants by reason of that irregularity; and that, therefore, the sale ought not to be set aside.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 420 OF 1914.

January 9, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

RUP CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FAZAL ILAHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Lease in favour of two lessees—Joint or divisible—Suit by one lessee for his share, maintainability of.

Where a lease is executed in favour of two persons in equal shares, the contract is a divisible one and each of the lessees is competent to bring a suit for the one half share contracted to be leased to him. [p. 71, col. 1.]

Shiam Lal v. *Ram Piari*, 4 Ind. Cas. 706; 32 A. 25; 6 A. L. J. 947, distinguished.

Second appeal from the decree of the Divisional Judge, Shahpur Division, at Sargodha, dated the 19th January 1914.

Mr. *Nanak Chand*, for the Appellants.

Mr. *L. M. Datta*, for the Respondents.

JUDGMENT.—The facts of the case, out of which this second appeal arises, are that defendants Nos. 1 and 2 contracted to lease certain land to Dittu Ram major and Sohan Lal minor. Dittu Ram died and plaintiffs-appellants are his reversioners and legal representatives. Sohan Lal, after attaining his majority, executed a release in favour of the lessors as regards his share and plaintiffs brought the present suit for possession under the lease of one half the property as representing their share. The first Court granted the decree asked for, but on appeal the learned Divisional Judge held that as a contract with a minor is void and as the present contract is a joint and indivisible one, therefore it was void as a whole and the plaintiffs could not sue under it. The Judge cited *Shiam Lal* v. *Ram Piari* (1) as in some respects similar to the present case. It is very clearly distinguishable from that case, in which it was merely held that the contract so far as the minor was concerned was void. In our opinoin the decision of the lower Appellate Court is not maintainable, because the lease is not a joint and indivisible contract as stated by the learned Divisional Judge. A reference to it shows that it was executed in favour of Dittu and Sohan Lal in equal shares. Under these circumstances we can see no reason why each of the lessees should not be allowed to bring a suit for the one half share contracted to be leased to him. Mr. Nanak Chand on behalf of the appellants has cited certain authorities in support of the proposition that a contract entered into by a minor can be enforced by him. There are conflicting rulings of the High Courts on this point and in the view we take of the case it is not necessary for us to decide it. We hold that the contract was a divisible one and that, therefore, the plaintiffs can sue upon it.

We, therefore, accept the appeal, set aside the order of the lower Appellate Court, and remand the case to that Court for re-decision of the appeal in accordance with law. Stamp in this Court will be refunded and other costs shall be costs in the case.

Appeal accepted.

(1) 4 Ind. Cas. 706; 32 A. 25; 6 A. L. J. 947.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 94 OF 1916.

February 21, 1917.

Present:—Justice Sir John Woodroffe, KT., and Justice Sir Asutosh Mookerjee, KT.

JAMINI MOHAN BHATTACHARJEE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NARENDRA MOHAN CHAKRABARTY—DEFENDANT No. 1—RESPONDENT.

Appeal decided without reference to admissible evidence—Procedure—Remand.

Where a District Judge decided an appeal holding erroneously that a copy of a *chitta*, which was admitted without objection in the first Court, was not admissible in evidence:

Held, that, as the District Judge had come to his conclusions without considering evidence which was legally admissible, the case should be remitted to him for re-consideration. [p. 72, cols. 1 & 2.]

Appeal against the decree of Mr. Justice Newbould, dated the 3rd April 1916, in Appeal from Appellate Decree No. 2197 of 1914.

FACTS will appear from the following judgment of Mr. Justice Newbould:—

"The learned District Judge appears to have been wrong in excluding from his consideration the copy of the *chitta* (Exhibit 1) on the ground that the original had not been produced. The question whether or not secondary evidence in any case should be admitted is one which ought to be decided by the Judge of the Court of first instance. There were circumstances in this case which justified the first Court in allowing this *chitta* to be proved by a copy, and the lower Appellate Court has not shown that the discretion given to the first Court was not properly exercised. But the appeal in this case must fail on the point of limitation. The lower Appellate Court has found that 'the evidence indicates that the appellant,' that is, the present respondent, 'was in undisputed possession of the land from the time of the settlement up to 1314 and he has, therefore, acquired a good title by adverse possession.' This is a clear finding of fact against the plaintiffs which is sufficient to justify the dismissal of their suit. The appeal, therefore, fails and is dismissed with costs."

Babu *Mohini Mohan Chakravarty* (with him Babu *Nishi Kanta Ghatak*), for the Appellants. —The case has been decided without taking into consideration a very important document

produced by the plaintiff-appellant, which the District Judge held to be inadmissible in evidence but which the High Court in second appeal held as admissible in evidence. When the document in question, *viz.*, the *chitta* was held admissible in evidence, there ought to have been a remand for a decision after taking into consideration that document.

Then when the case came before the High Court in second appeal, a new point of adverse possession was raised, although the point was taken neither in the pleadings nor in any of the issues. The question of adverse possession ought not to have been decided against the plaintiff.

Babu *Sasadhar Roy* (Senior) for the Respondents.—The *chitta* produced is not a certified copy of the original, so it cannot be admissible in evidence. Apart from the question of an uncertified copy I would go so far as to say that even the original is not admissible in evidence. The latest decided case on this point is *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (1). Moreover, it has been found that the plaintiff has been out of possession for more than the statutory period, and the *chitta* cannot prove plaintiff's possession within that period. So the omission to admit the *chitta* into evidence has not materially prejudiced the plaintiff's case.

Secondary evidence as regards the *chitta* cannot be given unless and until the plaintiff follows the procedure laid down in section 65 of the Evidence Act.

As regards adverse possession there was an issue as to whether the plaintiff's case was barred. That is, I submit, sufficient for the purpose of deciding the question of adverse possession.

JUDGMENT.—The District Judge held that the *chitta* (Exhibit 1) was inadmissible, though it is stated to have been admitted without objection in the first Court. It has, however, been held to be admissible by this Court in the judgment under appeal, and in so holding, we think, the learned Judge was right. It follows, therefore, that when the District Judge gave his judgment he came to his conclusions without considering evidence which was legally admissible. As we are not Judges of fact, the case should have under those circumstances been remitted to the District Judge for re-consideration. We must do that now, and remand the case to the District Judge for re-hearing to consider the case taking into account this document, the *chitta*, and in so re-hearing the case the learned Judge will determine whether the issue of adverse possession arises upon the pleadings, and if so, whether it is sustained in law and fact.

The appellant is entitled to the costs of the appeal before us. As regards the costs of the appeal before Mr. Justice Newbould, they will follow the decision of the District Judge on remand.

Case remanded.

(1) 29 C. 187 at p. 201; 29 I. A. 24; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P. C.).

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 149 OF 1916.

June 13, 1917.

Present:—Mr. Justice Maung Kin.

Shaik THAIR MAISTRY—

APPLICANT

versus

K. N. L. A. CHETTY FIRM—

RESPONDENT.

Mortgage—Personal covenant to pay interest independently of principal—Suit for interest where personal remedy for principal barred, maintainability of.

Where a mortgage-deed contains a personal covenant to pay interest independently of the principal, a suit for the recovery of interest will lie although the personal remedy for the principal is barred by limitation. [p. 73, col. 2.]

Yashvant v. *Vithal*, 21 B. 267; 11 Ind. Dec. (N. S.) 181; *Ram Din* v. *Kalka Prasad*, 7 A. 502; 12 I. A. 12; 4 Sar. P. C. J. 619; 4 Ind. Dec. (N S.) 440; *Dhondiram* v. *Taba Savadan*, 27 B. 330; 5 Bom. L. R. 198, distinguished.

Mr. *Palit*, for the Applicant.

Mr. *I. Khan*, for the Respondent.

JUDGMENT.—The suit is for the recovery of arrears of interest for the pericd 1st March 1916 to 3rd August 1916, on balance of principal Rs. 1,800 at Rs. 1-8-0 per cent. per mensem alleged to be due on a registered deed of mortgage, dated 17th May 1917.

The only question which it is necessary to decide is whether, as more than six years have elapsed since the date of the mortgage,

a personal claim for interest can be preferred.

The lower Court was of opinion on the authority of *Yashvant* v. *Vithal* (1) that the plaintiff could bring this suit, if the document contained a personal covenant to pay interest independently of the principal. Then turning to the terms of the mortgage-bond the lower Court said: "The present document has two distinct agreements—(1) to pay Rs. 2,000 on demand and (2) until payment thereof to pay interest at Rs. 1-8-0 per cent. per mensem on the 17th day of each month and every month on Rs. 2,000 or any sum remaining unpaid". It, therefore, held that Article 63 was applicable and that the period would be three years from the time the interest became due. There is no question that there is a separate agreement to pay interest apart from that to pay the principal, but Mr. Palit for the applicant cites the Privy Council case of *Ram Din* v. *Kalka Prasad* (2) and argues that notwithstanding that fact the suit would be time-barred. In that case the suit was by the mortgagee to enforce a mortgage, to recover the amount due thereon, for principal and interest, out of the mortgaged property, and also to recover the same from the mortgagor personally. It was held that, as regards the personal remedy, Article 65 of the Limitation Act applied. But there was no question such as is involved in the case before me.

Next, Mr. Palit argues that the personal remedy as regards the principal is barred by Article 65 of the Act, and that a suit for interest due on a time-barred debt must also be barred and cites as authority for this argument the case of *Dhondiram* v. *Taba Savadan* (3) in which the head-note is: "In an account, interest cannot be allowed on items that are barred by limitation. Interest is but an accessory, and when the principal is barred the accessory falls along with it". This is not justified by what we find in the judgment:—"Next it is objected that interest has been allowed on time-barred debts. This seems to be the fact and we think the objection is well founded. The interest is claimed not by virtue of an independent contract for its payment but under Act XXXII of 1839 which provides that upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think proper, allow interest to the creditor. But this does not authorise the allowance of interest where the debt on which it is claimed is irrecoverable. Interest in cases like the present is but an accessory and when the principal is barred, the accessory falls along with it."

In the present case the claim for interest was made on a distinct agreement. I, therefore, think that this Bombay case does not apply and that although the personal remedy for the principal is barred in this case, the suit for the interest stands on a different footing as held by the lower Court.

The application is dismissed with costs.

Application dismissed.

(1) 21 B. 267; 11 Ind. Dec. (N. S.) 181.

(2) 7 A. 502; 12 I. A. 12; 4 Sar. P. C. J. 619; 4 Ind. Dec. (N. S.) 440.

(3) 27 B. 330; 5 Bom. L. R. 198.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 76 OF 1917.

June 22, 1917.

Present:—Mr. Justice Beachcroft and Mr. Justice Walmsley.

GOBINDA CHUNDRA PAL, LUNATIC, BY HIS NEXT FRIEND PADMA LOCHUN PAL, AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

KAILASH CHANDRA PAL—JUDGMENT-DEBTOR—RESPONDENT.

Res judicata—*Execution proceedings—Civil Procedure Code (Act V of 1908), O. XXXIV, r.* 14—"*Bring the property to sale*," *meaning of.*

Where on an application for execution by way of sale of certain properties, the Court ordered attachment of the properties and issue of notice to the judgment-debtor for the settlement of the sale proclamation, and inspite of the judgment-debtor's objections to such execution, ordered issue of the sale proclamation in his presence, but did not in express terms pass any order for sale or decide that execution could be enforced by sale:

Held, that the orders of the Court would not operate as *res judicata* on the question of the decree-holder's right to execution by sale of those properties, so as to estop the judgment-debtor from raising the same question on a subsequent application for execution by way of sale of the same properties. [p. 75, col. 2.]

The words "bring the property to sale" in Order XXXIV, rule 14, Civil Procedure Code, include not only all the steps preliminary to the sale, but the sale itself. [p. 76, col. 1.]

GOBINDA CHUNDRA PAL *v.* KAILASH CHANDRA PAL.

Appeal against the order of the Subordinate Judge, 1st Court, Dacca, dated the 22nd February 1917.

Babus *Provash Chandra Mitter* and *Tara Keswar Pal Chowdhury*, for the Appellants.

Dr. *Sarat Chandra Bas'k*, for the Respondent.

JUDGMENT.

BEACHCROFT, J.—This is an appeal from an order of the Subordinate Judge of Dacca, dismissing the appellant's application for execution.

On the 18th April 1899 the respondent executed a mortgage-bond in favour of the predecessor of the appellant, and on the same day executed a security bond in his favour. The security bond covered thirty-seven properties which were included in the mortgage-bond. In due course decrees were obtained on both bonds. In the decree made in the suit on the security bond on the 25th April 1907, the following words are important, "this suit be decreed *ex parte*, that the defendant do pay to the plaintiffs the aforesaid Rs. 55,000 claimed and Rs. 1,832 the cost of this suit, plaintiffs' lien to the properties mentioned in the security bond is declared, but the plaintiffs cannot get a decree for sale of the said properties mentioned in the security bond as properties mortgaged and that the plaintiffs' prayer to the above effect is rejected." The decree, therefore, was a money decree with a declaration of plaintiffs' lien on the properties.

In execution of his decree on the mortgage bond the decree-holder purchased nine of the properties covered by both bonds. We have not been told whether the mortgage decree has been satisfied or not, it is immaterial to the present appeal, but apparently it had not at the date of the present application for execution.

A sum of Rs. 11-2-0 only had been recovered on the decree on the security bond prior to the present application for execution, which was filed on the 11th December 1912. In the application the amount due was shown to be Rs. 85,353-10-6 and there was a request for an order for attachment and sale of the properties. The Court ordered attachment of the properties returnable on the 8th February 1913 and on that date ordered notice for settlement of sale proclamation. On the 22nd February the judgment-debtor appeared and asked for time to file objection and time was given till the 1st March. In the meantime on the 24th February, on the application of the decree-holder, issue of sale proclamation was ordered on the valuation given by the decree-holder, the 9th April being fixed as the date for sale. On the 1st March the judgment-debtor filed his objection. There was, as is usual, an allegation that the application for execution was illegal and not maintainable, but the main objection seems to have been as to the valuation of the properties. This petition of objection was supplemented by another on the 23rd June, in which the judgment-debtor urged that the application could not be entertained as the mortgagee could never sell the equity of redemption—an objection apparently based on the repealed section 99 of the Transfer of Property Act—and that as some of the properties covered by the bond had already been sold in execution of the mortgage decree there should be a rateable distribution of the debt over all the properties.

The last mentioned point was apparently the only point pressed when the objection came to be decided, at least it is the only point touched on in the order of the Subordinate Judge made on the 21st February 1914.

This order was followed by the appointment of a Commissioner to value the properties. The matter then came to this Court on appeal by the decree-holders. On the 19th January 1916 a Division Bench held that in view of the provisions of Order XXXIV, rule 14, the execution could not proceed, and dismissed the application for execution. There was an application for review and on the 19th December last the Court held that as no cross-appeal had been filed the application for execution should not have been dismissed. The appeal was dismissed with this reservation: "We express no opinion on any question which may arise as to any proceedings in execution which the applicant may think fit to take."

When the case went back to the Subordinate Judge the decree-holder applied for an order in the presence of the judgment-debtor that Order XXXIV, rules 14 and 15, had no application. The Subordinate Judge upheld the contention of the judgment-debtor that those rules did apply and dismissed the appli-

cation for execution. The present appeal is against that decision.

Four grounds are urged, (1) that it was no longer open to the judgment-debtor to object to the execution because the order for sale having been passed and not appealed against, it was binding on the parties even though it may have been erroneous; (2) that rules 14 and 15 of Order XXXIV do not apply, because rule 15 applies only to the charges specified in section 100 of the Transfer of Property Act, and in this case the charge being created by judicial order was not such a charge; (3) that the charge being created by judicial order rule 14 of Order XXXIV in terms had no application because the decree-holder was not a charge-holder before he got his decree; (4) that the decree-holder had applied for and got an order for sale, therefore, the objection came too late as under rule 14 the objection must be taken before the property is brought to sale.

The first point taken is that the matter is *res judicata* and the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) is cited to support the contention. In my opinion the similarity between the present case and the case cited is of the most shadowy character. It is true that the judgment debtor, when his petition of objection was heard, did not argue the question of validity of the proceedings nor raise the question by way of appeal or cross-appeal on the decree-holders' appeal, but there the similarity ends. In the case cited the judgment-debtor was served with a notice under section 216 of the Code of Civil Procedure. The Court had to decide whether execution was barred and by its order for proceedings to continue impliedly decided that it was not. In the present case the order for attachment was made as a matter of routine on the application for execution. Similarly the order for issue of sale proclamation was made in the absence of the judgment-debtors, though they had appeared in the proceedings. The question of the validity of the execution proceedings was not at any stage dealt with and decided though raised, possibly because it was not argued. In fact there is not in terms any order for sale or deciding that execution could be enforced by sale, there are only the routine order of attachment and the order which would follow as a matter of course for settlement of the sale proclamation and for the issue of the proclamation. These cannot in my opinion be treated as impliedly deciding that execution could proceed by way of sale as, it is obvious, the Subordinate Judge never considered the question. And when these facts were pointed out to the learned Pleader for the appellant, he urged that the judgment-debtor, having acquiesced in the order and accepted the benefits of orders subsequently passed, could not be allowed to question the original order, in other words, a plea of estoppel. I do not think the decree-holder can raise a plea of estoppel when he must have known that he had himself induced the Court *ex parte* to pass an order to which he was not entitled.

Not only do the principles of *res judicata* and estoppel not stand in the way of the judgment-debtor's plea, but it would be a startling result if a decree-holder should be able in execution proceedings to get a relief which his decree expressly declares that he shall not have. It is true that what he asked for in his suit and what was refused was a mortgage sale, while his application in execution was for attachment and sale under Order XXI, but the practical result is the same. The decree in effect said that he could not have a sale of the property without a suit under section 67 of the Transfer of Property Act and he is seeking to avoid the effect of that decree by an order in execution.

The next argument addressed to us was that rules 14 and 15 of Order XXXIV did not apply to this case as the decre-holder's charge was not one within the meaning of section 100 of the Transfer of Property Act, in that it had not been created either by operation of law or by act of parties, but by judicial order, *viz.*, the decree in the suit. The fallacy in this argument is that the charge is not created by the decree. The decree only declares the existence of the charge, it was in fact created by the act of parties. And the same answer applies to the argument based on the opening words of Order XXXIV, rule 14 read with rule 15, namely, that the decree-holder was not a charge-holder at the time that he obtained his decree. In fact he was, though his rights had not previous to the decree obtained judicial recognition.

(1) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.)

KIRPA RAM *v.* ASA SINGH.

The fourth ground depends on the view that the words "bring the property to sale" in Order XXXIV, rule 14, mean nothing more than obtain an order for sale. In my opinion they include not only all the steps preliminary to the sale, but the sale itself. In fact the view urged on behalf of the appellants would be impossible of application, for objection could not be made before the judgment-debtor got notice and on the appellant's own argument in connection with the first ground it must be taken that the order for sale was made before the order of 8th February, when notice was issued for the purpose of settling the sale proclamation under Order XXI, rule 66.

In my opinion all the grounds urged fail and the appeal should be dismissed with costs. We assess the hearing fee at five gold *mohurs*.

WALMSLEY, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 919 OF 1914.

January 10, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

KIRPA RAM AND ANOTHER—DEFENDANTS —APPELLANTS

versus

ASA SINGH—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), ss. 77, 72—Order refusing registration—Suit - Limitation - "Date of the making of the order", interpretation of.

Where a Registrar, under section 72 of the Registration Act, orders that either a new and clear sale-deed should be executed, or a note should be added making an ambiguous passage quite clear, the order is tantamount to a refusal to register within the meaning of section 77 of the Act. [p. 77, col. 1.]

The expression "making of the order" in section 77 of the Registration Act means, not merely recording the order of refusal in writing, but communicating it to the party concerned so as to bind him by it. [p. 77, col. 1.]

Abdul Ali v. *Mirja Khan*, 28 B 8; 5 Bom L R. 622, relied upon.

If, however, the party affected by the order acts in such a way as to prevent the officer from communicating it to him within a reasonable time after he has written it, the date of the order would be the date when it could have been brought to the knowledge of the party. [p. 77, col. 1.]

On the other hand, where the party affected by the order, instead of being negligent, makes every endeavour to learn the contents of the order, but is frustrated in his effort, the date of the order must be taken to be the date on which he obtains knowledge of the contents thereof. [p. 77, col. 2]

Second appeal from the decree of the Additional Divisional Judge, Lohore, dated the 7th March 1914.

Lala *Mehr Chand*, for the Appellants.

Lala *Tirath Ram*, for the Respondent.

JUDGMENT.—This was a suit under section 77 of the Indian Registration Act brought by the respondent, Asa Singh for a decree directing the registration of a sale-deed executed in his favour by the appellant, Kirpa Ram. The lower Courts have decreed the claim and their decision is challenged by the appellant on the ground that the requirements of the said section have not been complied with.

The relevant facts are as follows:—On the 13th February 1913 the deed in question was executed, and was then presented for registration by the executant. The Sub-Registrar refused to register it on the ground of what he considered to be an ambiguity in the description of the southern boundary of the property sold. On appeal the Registrar set aside the order of the Sub-Registrar, and sent the document back on the 5th March with the remark that the alleged ambiguity was explained by a foot-note to the deed itself. He accordingly accepted the appeal, and directed the registration. The Sub-Registrar, instead of obeying the order, made a reference to the Registrar reiterating his previous objection, and on the 8th March 1913, the Registrar accepted the objection and ordered that (1) either a new and clear sale-deed should be executed, or (2) a note should be added making the ambiguous passage quite clear.

The Courts below have found that the order of the 8th March was passed, not only in the absence of the plaintiff, but without giving him notice to attend to hear the order. It is, further, clear that the application made by him on the 15th March 1913 for copies of the various orders referred to above was refused and his second application presented on the 17th March met with no better fate. The requisite copies were eventually supplied on the 6th May 1913, and the present suit was instituted on that very day.

The first objection taken on behalf of the appellant is that no order was passed by the Registrar refusing to order the

document to be registered, and that a suit under section 77 is, consequently, incompetent. Now the Sub-Registrar's order is in express terms an order refusing to register the document, and not one refusing to accept it for registration; and the Registrar, though he did not in so many words say that he declined to register the deed, clearly intended that he was not prepared to register the document as it stood. There can be little doubt that his order was tantamount to a refusal in the event of the plaintiff's non-compliance with the direction contained therein. In cases of this kind the Court must have regard, not only to the actual wording of the order, but also to its substance and intent; and applying this test, we consider that the order of the 8th March 1913 must be treated as one refusing to register the document.

The next question is whether the suit was instituted within thirty days after the making of the order of refusal. As observed above, the Courts below have found that the order in question was passed in the absence of the plaintiff and without any previous notice to him, and that he was even denied the means of ascertaining the contents of the order. It has been further held that the plaintiff did not become aware of the nature thereof until the 6th May, when the necessary copies were supplied to him. Upon these findings we have no hesitation in holding that the present suit, which was instituted on the 6th May, is clearly within limitation. As observed by the Bombay High Court in *Abdul Ali* v. *Mirja Khan* (1), the expression "making of the order" in section 77 means, not merely recording the order of refusal in writing, but communicating it to the party concerned so as to bind him by it. Any other interpretation would lead to the absurdity that a suit might be barred by time before the person entitled to impeach the order came to know of its existence. If the party affected by the order acts in such a way as to prevent the officer from communicating it to him within a reasonable time after he has written it, it may be that the date of the order would be the date when it could have been brought to the knowledge of the party. But in the present case it is quite clear that the plaintiff, instead of being negligent, made every endeavour to learn the contents of the order, but he was frustrated in his effort.

Indeed, the learned Pleader for the appellant admits that the *terminus a quo* is the date of the plaintiff's knowledge, and on the finding of the lower Appellate Court we must hold that the plaintiff became aware of the order for the first time on the 6th May when he instituted the suit.

On both the points the appeal fails and is accordingly dismissed with costs.

Appeal dismissed.

(1) 28 B. 8; 5 Bom. L. R. 622.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2653 OF 1915.

June 7, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

BROJENDRA KUMAR SAHA AND OTHERS —PLAINTIFFS—APPELLANTS

versus

KALI NATH SAHA AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Partnership, dissolution of—Declaration of title to shares purchased by firm, maintainability of—Specific Relief Act (I of 1877), s. 42—Decree in such suit, form of—Execution - Civil Procedure Code (Act V of 1908), O. XXI, r. 34.

A suit for a declaration of the plaintiffs' title to a half share in a certain number of shares in a Limited Company purchased out of a fund belonging to a firm, which was carried on by the plaintiffs and the defendants but was subsequently dissolved, is maintainable without an adjustment of accounts of the partnership business, where none of the parties say that any question of accounts remains open, other than the question as to the ownership of the shares. [p. 79, col. 2.]

In such a suit the Court has no power to direct by its decree the Limited Company to register the plaintiffs' names as shareholders, but it should instead direct the defendants to execute a transfer of a half of the shares in suit in favour of the plaintiffs, and to lodge the transfer together with share certificates with the Company for registration. [p. 79, col. 2.]

Such a decree is executable on defendants' failure to obey its direction in the manner provided for in Order XXI, rule 34, Code of Civil Procedure. [p 79, col 2.]

Appeal against the decree of the Additional Subordinate Judge, Nadia, dated the

BROJENDRA KUMAR SAHA *v.* KALI NATH SAHA.

2nd of August 1915, reversing that of the Munsif, Kushtia, dated the 19th of May 1914.

FACTS material to the report will appear from the following judgment of the lower Appellate Court:—

"This appeal arises out of a suit for declaration of plaintiffs' right to a moiety of 10 shares of the Bengal Paper Mill Company and for direction to the said Company to register their names in their books and for recovery of dividend drawn out by the principal defendants. Plaintiffs' case is that they and the defendants Nos. 1 to 6 had a partnership business, that with the funds of their firm the above shares were purchased in the name of defendant No. 1 who was the managing partner and that the firm ceased to exist since *Aghran* 1314. That the plaintiffs received their share of the dividend up to June 1908, and after that the defendants, though asked, did not consent to plaintiffs' names being registered in respect of the moiety of the shares nor paid them any dividend, hence the suit.

The defence of the principal defendants is that the suit is barred by limitation, that they are not in possession of the share certificate and that the suit is not maintainable without a suit for account.

The Court below decreed the suit and allotted five shares giving numbers to the plaintiffs, in respect of which the Mill Company was directed to register their names, and allowed a partial claim of the dividend. The plaintiffs also preferred cross-appeal in respect of the disallowed portion of the dividend.

The following points arise for decision here:—

1. Is the suit barred by limitation?
2. Is the suit maintainable in the present form?

DECISION.

Point No. 1.—That the plaintiffs have a half share in the 10 shares in question is not denied. As to limitation, it is urged on the side of the appellants that Articles 48 and 49 are applicable which relate to recovery of specific moveables, and the limitation is 3 years from the time when it came to the knowledge of the plaintiff that the moveable is in possession of the defendant. I concur with the learned Munsif in holding that those Articles do not apply to the present case, for the shares in a Company cannot be called moveable property far less 'specific moveable property' within the meaning of these Articles. These Articles contemplate moveables in specie, *i. e.*, which can be specified by identical delivery of the property [*vide Surat Lall Mondal* v. *Umar Haji* (1) and *Agandh Mahto* v. *Khajah Aliullah* (2)]. In the present case, Article 120 is applicable so far as it relates to the shares for which the limitation is 6 years. The cause of action arose in June 1908, when the plaintiffs ceased to get dividend from the defendants. I, therefore, hold that the suit is within time.

Point No. 2.—It is urged that the suit for a particular item of property of the joint partnership business is not maintainable without a suit for accounts. The shares in question were admittedly purchased by the funds of the firm belonging to both the parties, and it is also admitted that the firm was dissolved in *Aghran* 1314 and that the shares were purchased in the name of defendant No. 1, the managing partner. I am of opinion that such a suit as this cannot be maintained unless there has been an adjustment of accounts of the partnership business. The learned Munsif observes that there is no satisfactory evidence to show that 'there was no settlement of accounts when the partnership was dissolved', and he threw the onus upon the defendant to show the negative. That he has not done properly. The onus is upon the plaintiffs to show that there was a settlement of accounts after dissolution, and it is in that case only that the plaintiffs had a right to bring this suit, otherwise not. It might be a fact, as the lower Court remarks, that the defendants gave a share of dividend to the plaintiffs after the dissolution, but that does not indicate that there was an adjustment of accounts. It might be that some property was acquired in the name of some partner and others in the name of another partner, so unless there has been an accounting of all assets and liabilities of the firm, no particular partner can claim his specific share to a particular property of the

(1) 22 C. 877; 11 Ind. Dec. (N. S.) 580.
(2) 11 C. W. N. 862.

firm. This is a most common principle of law governing partnership business. The plaintiffs' case, therefore, is bound to fail when they could not show that there was settlement of account of the firm after dissolution.

The result, therefore, is that the appeal be allowed with costs, the judgment of the Court below be reversed and the plaintiffs' suit be dismissed with costs."

Babu *Manmatha Nath Roy*, for the Appellants.—The plaintiff is the appellant, and the appeal arises out of a suit for declaration of plaintiff's right to a half share in the ten shares in the Bengal Paper Mill Company, Limited, as well as for other consequential reliefs. The contentions of the defendant were mainly two, *viz.*, (1) that the suit was barred by limitation, (2) that it was not maintainable in its present form, in other words, the plaintiff could not have any such declaration prayed for by him without a suit for accounts, although it was admitted by the defendant in the written statement that the shares had been purchased with a joint family fund arising from joint family business. As regards the question of limitation the Courts below found in favour of the plaintiff, but while the Court of first instance gave a decree in favour of the plaintiff holding that such a suit was competent, the lower Appellate Court dismissed the suit on the ground that the plaintiff could not bring such a suit without a suit for accounts. I submit the learned Judge has erred in applying the principle of the law of partnership in force in British India to the facts of the present case. The suit is maintainable especially in view of the admissions of the defendants in their written statement. Account or no account, why should the plaintiff be refused a declaration of his title to a moiety of the shares in suit? Referred to *Karri Venkatareddi* v. *Kollu Narasayya* (3), *Vallamkondu Subbiah* v. *Malupeddi Venkataramiah* (4), *Durga Prosonno Bose* v. *Raghu Nath Dass* (5), Lindley on Partnership, pages 592 and 536.

JUDGMENT.—This is an appeal by the plaintiffs against a decision of the learned Additional Subordinate Judge of Nadia, dated the 2nd August 1915, reversing a decision of the Munsif at Kushtia. The plaintiffs brought the suit for a declaration that they were entitled to a half of the shares in the Bengal Paper Mill Company, Limited, and for consequential reliefs. The plaintiffs' case was that the shares had been purchased out of the fund belonging to a firm which was formerly carried on by the plaintiffs and defendants Nos. 1 to 6 but was subsequently dissolved, and that, therefore, the plaintiffs were entitled to a half of the shares.

The Court of first instance decreed the suit, as it was not disputed that the plaintiffs were entitled to a half of the ten shares in question. The learned Judge in the lower Appellate Court dismissed the whole suit, holding that the plaintiffs could not get a half of the ten shares unless there had been an adjustment of the accounts of the partnership business. In this case none of the parties says that any question of account remains open other than the question as to the ownership of the ten shares. The plaintiffs are clearly entitled to a half of the ten shares. Defendant No. 1 shall execute a proper transfer of a half of these ten shares.

The decree of the Court of first instance directed the Bengal Paper Mill Company to register the plaintiffs' name. This the learned Judge had no power to do. The decree should, therefore, instead of directing the Company to register the plaintiffs' names, direct the first defendant to execute a transfer of a half of the ten shares in favour of the plaintiffs and to lodge the transfer together with the share certificates with the Company for registration. If he fails to obey that, the plaintiffs can proceed to execute the decree in the manner provided for in Order XXI, rule 34, Civil Procedure Code.

The decree passed by the learned Additional Subordinate Judge must be set aside and the appeal decreed in the terms already mentioned. The respondents must pay to the appellants the costs incurred by them in this Court and in the lower Courts.

Appeal decreed.

(3) 1 Ind. Cas. 384; 32 M. 76; 4 M. L. T. 456; 19 M. L. J. 10.

(4) 31 M. 343; 4 M. L. T. 195; 18 M. L. J. 347.

(5) 26 C. 254; 3 C. W. N. 299; 13 Ind. Dec. (N. S.) 767.

RATIPAL *v.* BIPIN CHANDRA CHATTERJI.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 105 OF 1916.

February 14, 1917.

Present:—Mr. Lindsay, J. C.

RATIPAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu BIPIN CHANDRA CHATTERJI—PLAINTIFF, NARPAT SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908, *s.* 11, *Expl. V, O. II, r.* 2—Res judicata—*Causes of action different—Limitation Act (IX of* 1908), *Sch. I, Art.* 142 *—Possession within limitation, want of—Burden of proof—Adverse possession—Jungle land—Presumption as to owner's possession.*

Where the causes of action for a prior and subsequent suit in respect of the same property are different, the provisions of Order II, rule 2, Civil Procedure Code, do not stand in the way of the entertainment of the subsequent suit. [p. 82, col. 1.]

Where a Court abstains from granting a relief on the ground that in its opinion no such relief is claimed, such abstention does not in a subsequent suit operate as *res judicata* under Explanation V, section 11, Civil Procedure Code. [p. 82, col. 2.]

Where in a suit for recovery of possession after dispossession of the plaintiff, his possession within limitation is questioned, it is for him to prove such possession. [p. 82, col. 2.]

Where it is difficult or impossible, as in the cases of expanses of jungle land, to ascertain who is in actual possession, the presumption in that possession follows title. Mere casual acts of cutting wood in a large tract of jungle or occasional acts of cultivation need not be treated as an ouster of the owner's possession, such possession as the property is capable of. There must be some clear assertion of adverse title, or some conduct from which may be inferred an intention to exclude the actual owner. But once it is shown that acts of adverse possession were committed to the knowledge of the owner, the said presumption does not arise. [p. 83, cols. 1 & 2.]

Thakur Sheo Narain Singh v. *Bodal Singh*, 8 O. C. 177, explained.

Appeal from the decree of the Additional Judge, Fyzabad, dated the 13th March 1916, modifying the order of the Subordinate Judge, Fyzabad, dated the 8th December 1914.

Mr. *Muhammad Wasim*, for the Appellants.

Babu *Jiban Krishna Banerji*, for Respondent No. 1.

JUDGMENT.—The memorandum of appeal in this case sets forth numerous grounds of attack upon the decree of the lower Appellate Court, but Mr. Wasim who has argued the case for the appellants has confined his attention to two questions only. He has contended, (1) that the suit was barred under the provisions of Order II, rule 2, as well as by the principle of *res judicata* (section 11 of the Code of Civil Procedure), and (2) that the suit was barred by limitation.

I may also mention that the appellants' learned Advocate admitted that the only dispute now between his clients and the plaintiff-respondent was with respect to the trees in suit: it was conceded that the plaintiff's lessor is the owner of the soil of the plots specified in the plaint and was entitled to have possession over the soil.

In order to decide the questions thus arising for determination, it is necessary to refer to a certain litigation which took place in the year 1905. It is admitted that this earlier litigation was between the parties to the present suit or persons who are now legally represented by the present litigants. Exhibit A 1, a certified copy of the plaint, shows that in 1905 a suit was brought by Thakurain Sri Ram Kuar, the owner of *Mauza* Basawan, against a large number of defendants. She claimed to recover possession of an area of 122 *bighas* 4 *biswas* described as jungle land (*arazi jangal*), consisting of a number of plots which were specified by numbers and areas in paragraph No. 9 of the plaint. She alleged that she was the owner of the village with the exception of a few plots which had been decreed to the defendants: that the defendants had no concern with the plots in suit: that the defendants had at various times between November 1899 and November 1905 unlawfully cut down *dhak* jungle standing on the plots in dispute and had thereby dispossessed her. She asked for a decree for possession and also claimed a small sum by way of damages. She asserted that her cause of action dated from November 1899, when the defendants first interfered with her possession. The defendants resisted the claim and Exhibit A 2 is a certified copy of the written statement put in by them.

In the 10th paragraph of this statement the defendants pleaded that they had been in possession of the area in dispute since the time of the native rule: that they were the old proprietors of the village and that the suit of the plaintiff was barred by limita

tion. In the 11th paragraph they went on to say that the area claimed by the plaintiff contained not merely jungle but groves planted by the defendants and their predecessors, comprising thousands of trees from possession of which they could not be ejected.

The suit was decided by the then Subordinate Judge of Fyzabad. A certified copy of his judgment dated the 1st December 1905 is on the record and marked Exhibit A 4. From this it appears that four issues were framed for the trial.

The first related to the question of the plaintiff's title and her possession within the period of limitation. This was decided in the plaintiff's favour. The Subordinate Judge found that the defendants had applied for sub-settlement at the first Regular Settlement and had lost their case He found that the case had been decided by a compromise between the *talukdar* and one Kalka representing the defendants before him, and that all these defendants had got from the Settlement Court was a decree for certain specified plots which did not comprise any of the areas in suit before him.

The second issue read as follows:—

Did defendants Nos. 1 to 7 plant groves on the land in suit?

With regard to this the Subordinate Judge remarked that there was no need for him to give any finding as the issue did not fall "within the scope of the pleadings." He went on to explain that in his opinion the plaintiff was only claiming possession of the land specified in paragraph No. 9 of her plaint and was not laying any claim to "the trees standing thereon."

It may be observed here that paragraph No. 9 of the plaint gave particulars by numbers and areas of twenty plots, making up the total area of 122 *bighas* 4 *biswas*.

The third issue, which dealt with the effect of the planting of groves by the defendants (in case it were proved), was left undetermined presumably for the same reason: and on the fourth issue the Subordinate Judge, though holding that the plaintiff could claim damages, dismissed the claim for want of proof of the extent of the injury done to the plaintiff's rights.

The judgment concludes with the following declaration:—

"Plaintiff is decreed possession of 122 *bighas* 4 *biswas* jungle land as detailed in the plaint but the claim for damages is dismissed. The rights of defendants to retain possession over the trees in their possession will not be interfered with by this decree, as they were not the subject of this suit."

Turning now to the present suit which has been brought by the lessee of the plaintiff in the earlier suit, we find that the claim is for recovery of possession of an area of 127 *bighas* odd specified in the last paragraph of the plaint. A comparison of the two plaints shows that a number of the plots now in dispute were in dispute in the previous litigation and Mr. Wasim has informed me that the area common to both suits amounts to 110 *bighas* odd.

In paragraph No. 2 of the present plaint it is alleged that the area in suit is *dhak* jungle but contains other trees as well as *dhak* trees, it is also alleged that the plaintiff had been in possession of this area.

The cause of action is set out in the 3rd paragraph of the plaint, the assertion being that the defendants had been cutting down trees in the jungle since the year 1911. The plaintiff, therefore, asked for possession and also for damages.

The defendants pleaded that there was no cause of action for the suit, that they were the old *zemindars* of the village and entitled for that reason to cut the jungle. They further claimed to be owners of certain trees in the lands in dispute which had been planted by themselves or their predecessors, as also of other trees which had grown up spontaneously. They denied that the plaintiff had ever been in possession, pleaded limitation and set up the earlier litigation of 1905 as a bar to the entertainment of the suit with reference to the provisions of Order II, rule 2, of the Code of Civil Procedure.

The first Court, on a consideration of the legal effect of what was decided in the earlier suit, decreed the claim in so far as it related to possession of the soil of the plots in dispute; it dismissed the claim for the trees and also the claim for damages.

The lower Appellate Court has given the plaintiff a decree for possession not only

of these lands but also of all the trees standing thereon, with the exception of a *mahua* tree growing in plot No. 54. It has also given a decree for damages, with a direction that the amount of the same is to be ascertained in the course of the execution proceedings.

The first matter to be dealt with then is the question whether or not this second suit was maintainable. Mr. Wasim argues that it is not for two reasons, namely, (1) the provisions of Order II, rule 2, and (2) the provisions of section 11 of the Code of Civil Procedure.

As regards the first part of this argument the contention is that the plaintiff had in the earlier suit a cause of action which entitled her to claim relief in the shape of possession over all the trees standing upon the lands then in suit. The act or acts of dispossession alleged in that suit, it is said, constituted an ouster not merely from the soil but from all that was growing on the soil. The judgment of the Subordinate Judge in the previous suit is referred to for the purpose of showing that the plaintiff was claiming relief only in respect of the soil, and certainly that was the interpretation which the Subordinate Judge put upon the plaint and so it is contended that having omitted to sue in respect of, or having intentionally relinquished a portion of her claim, the plaintiff or her present representative-in-interest cannot now bring a fresh suit to enforce the portion of the claim formerly omitted or relinquished. But Order II, rule 2, clearly shows that what is barred is the bringing of a second suit to enforce another claim based upon the same cause of action; and from what has been set out above it is obvious that the present suit is based upon a cause of action distinct from that set out in the plaint of the earlier suit. There the cause of action consisted of various acts of trespass committed in the years 1899 to 1905: here the cause of action set up is said to have arisen out of other acts of trespass done in the year 1911 and thereafter.

The causes of action for the two suits being different, I hold that Order II, rule 2, does not stand in the way of the entertainment of the present suit.

The next part of the argument relates to the principle of *res judicata* and here the learned Counsel seems to rely chiefly on the language of Explanation V, section 11 of the Civil Procedure Code, which says that any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused. If this be the argument I think it must fail. I confess I have had some difficulty in understanding the judgment in the earlier case, a difficulty shared by the Judge of the lower Appellate Court. But this much is clear, namely, that the Subordinate Judge who disposed of the earlier suit was of opinion that the plaintiff in her plaint was not asking for any relief in respect of the trees standing on the lands then in suit and it was for this reason that he purposely abstained from coming to any finding upon the issue relating to the rights of the defendants in respect of the trees mentioned in their written statement. If, as the Subordinate Judge thought, there was no claim to such relief, it follows that his abstention from deciding the issue did not amount to a refusal of any relief claimed: there can be no refusal, express or implied, of something which has never been asked for.

Apart from this argument and on the general principles of *res judicata*, it appears to me that there was no hearing and decision in the previous suit of the issue relating to the rights of the defendants on the trees and this being so, it cannot be held that the earlier judgment operates as *res judicata* in this case.

I hold, therefore, that the present suit was not barred by the rule of *res judicata*.

There remains the question of limitation. The suit being one for recovery of possession after dispossession of the plaintiff, it was for the latter to show that he had been in possession of the trees in dispute within twelve years prior to the date of the suit.

Has he done so? The contention for the appellants is that he has not and that consequently the suit should have been dismissed on the plea of limitation which was clearly raised in the statement of defence.

The Court of first instance held that the

suit was time-barred and that the defendants had by adverse possession acquired an absolute title to the trees standing on the plots in suit. The Subordinate Judge on coming to this conclusion relied upon the statements contained in the plaint in the earlier suit, statements admitting that the defendants had been asserting adverse possession by cutting bundles of *dhak* timber during the year 1899-1905. He has also referred to the language of the judgment in the earlier suit, which he takes as showing that the then Subordinate Judge found these defendants were in possession as owners of the trees and that their right to retain possession of them was not to be affected by the judgment. I may here observe that I doubt whether this is a correct interpretation of the first judgment, though I am at the same time constrained to admit that it is almost impossible to arrive at any satisfactory construction of that document. The Subordinate Judge has also referred to the evidence of the plaintiff's own brother, in which he admitted that he acted as manager for the plaintiff and that since the taking of the lease in 1906 he had not been able to dispose of any of the jungle produce or of the fruit of the trees because the tenants threatened would-be purchasers. Reliance was also placed upon certain *khataunis* filed by the plaintiff himself to show that the defendants were recorded as being in possession of trees situated in some of the plots in dispute and lastly he referred to the absence of any evidence on the part of the *talukdar* to show that any revenue had been received by her on account of the sale of fruit or timber.

The lower Appellate Court has decided that the plaintiff (or the *talukdar*) had possession within twelve years of suit. This decision has been based partly upon a presumption which he raised in favour of the *talukdar's* possession as founded upon her title. No doubt where the matter is uncertain, where it is difficult or impossible, as in the cases of expanses of jungle land, to ascertain who is in actual possession, the rule is that possession follows the title and that is nothing more than was meant by the judgment of Mr. Ross Scott in *Thakur Sheo Narain Singh* v. *Bodal Singh* (1), to which the learned Judge refers. Mere casual acts of cutting wood in a large tract of jungle or occasional acts of cultivation need not be treated as an ouster of the owner's possession, such possession as the property is capable of. There must, as Mr. Scott observes, be some clear assertion of adverse title, or some conduct from which may be inferred an intention to exclude the actual owner.

And all that is true. But when we find as in the present case that acts of adverse possession with respect to this jungle area were committed so far back as November 1899, there can be no ground for raising any presumption in favour of the plaintiff based upon the title of the *talukdar*. The statements made by her in the plaint in the earlier suit are in themselves the clearest possible proof that the defendants were asserting adverse rights over the jungle timber, and asserting them to her knowledge. She treated those acts as acts of ouster and put them forward as the cause of action which supported her claim for recovery of possession. Neither she nor her representative, the plaintiff in the present case, can now be heard to say that her possession must be presumed and that the suit is within time by reason of possession to be adduced from nothing else than such a presumption.

The learned Judge of Court below is, in my opinion, wrong when he says that the defendants only began to assert adverse possession when they defended the suit in 1905: that is clearly not the case in view of the *talukdar's* own admissions in that suit.

Next he refers to the decree which was passed in 1905. No doubt the *talukdar* did get a decree for possession and there is equally no doubt that the decree was executed by delivery of possession. But possession of what? The decree speaks for itself. The Subordinate Judge who passed the decree awarded possession merely of the soil, being of opinion that the question of possession of the trees on the soil was not in issue. And so all that we have is that in pursuance of the decree all that passed and was intended to pass was possession of the soil. The judgment expressly declared that there was no adjudication as to the rights in any trees and that there was to be no disturbance of the defendants' posses-

(1) 8 O. C. 177.

sion over any trees they had in their possession at that time.

No doubt the learned Judge has been much puzzled by the tenor of this judgment of 1905 and he says, and I agree with him, that ordinarily it would be anomalous to hold that an order for possession of jungle land did not involve an order for possession of the jungle trees growing on it. But we have to take the earlier judgment as we find it and, right or wrong, it has become final between the parties. The judgment was based upon the assumption that the plaintiff was claiming only possession of the land and, to use the very words of the judgment, *not of the trees standing thereon:* that is, I take it, of *any trees, dhak* or otherwise. And so I feel constrained to hold that whether it was anomalous or not, the Subordinate Judge who decided the suit in 1905 decreed nothing but possession of the soil apart from any trees which were standing upon it. The plaintiff submitted to the judgment and she must bear the consequences. I am unable to hold that the execution of the decree of 1905 can be treated as evidence of the possession of the plaintiff or his lessor within limitation.

With regard to the admission made by the plaintiff's brother to which reference has been made above, the learned Judge disposes of it by saying that at best it amounts to an admission of being out of possession since 1906 when the lease was executed and, therefore, no proof that there was want of possession within 12 years from the date of the present suit which was filed in 1913. But it has to be treated more seriously when it is remembered that we have further admissions of dispossession as far back as the year 1899, *i.e.*, fourteen years before this suit came into Court.

I have after much deliberation come to the conclusion that the suit was time-barred and that the decision of the Court of first instance on this point was correct.

I accept the appeal, set aside the decree of the lower Court and restore the decree of the Subordinate Judge, the appellants to get their costs here and in the Court below.

Appeal allowed.

CALCUTTA HIGH COURT.

REFERENCE No. 3 OF 1917.

July 2, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

Sheikh SAHEBJAN KHANSAMA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sheikh ABDUL JALIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession Certificate Act (VII of 1889), *s.* 4—*Rent, arrears of, due to deceased landlord, suit for recovery of* —*Succession certificate, necessity of.*

A Succession certificate is necessary for the recovery of arrears of rent in respect of homestead land by the heirs or the legal representatives of a deceased landlord to whom the rent was due. [p. 86, col. 1.]

The words "land used for agricultural purposes" in section 4 of the Succession Certificate Act govern the words "rent, revenue or profits" that precede them. [p. 85, col. 2.]

Reference under Order XLVI, rule 1, of the Code of Civil Procedure, in Small Cause Court Suit No. 290 of 1917 of the Court of the Munsif, 2nd Court, Sealdah, exercising the powers of a Court of Small Causes.

FACTS appear from the following Letter of Reference made by the Munsif, 2nd Court, Sealdah, exercising powers of a Small Cause Court Judge, to the Registrar, Appellate Side, Hon'ble High Court, Fort William, Bengal, dated the 3rd May 1917:—

"SIR,

I have the honour to bring to your notice that I have been empowered by the Local Government to try suits for homestead lands up to the value of Rs. 50, under the Small Cause Court Procedure, and that in the Suit No. 290 of 1917, instituted in my Court by the plaintiffs, as legal representatives of one Amina Bibi deceased, to recover arrears of rent at the rate of Rs. 3 a month, in respect of 12 *cottas* of homestead land due from 1322 *Kartik* to 1323 *Magh* amounting to Rs. 48, the defendants appear and contend *inter alia* that the plaintiffs are not entitled to get any decree without the production of the succession certificate under Act VII of 1889. The plaintiffs' Pleader on the date of trial files a petition stating that no certificate is required as the word "debt" in sub-section 2 of section 4 of the said Act excludes rent. He urges that the word "rent", as appears in that sub-section, includes rent of all denominations, *i.e.*, rent for

homestead land, house rent and also rent for agricultural land and that the word "rent" has no connection with the words "payable in respect of land used for agricultural purposes" after the words "revenue or "profits" in that sub-section. His argument is that as the word "rent" has been separated by a comma from the words "revenue or profits", it should be taken in its comprehensive sense.

The plaintiffs' Pleader further asks me in that application to refer this matter for the decision of the Hon'ble High Court.

From the ruling reported as *Nagendra Nath Basu* v. *Satadal Basini Basu* (1), it is not clear if the arrears of rent claimed were in respect of agricultural land or homestead land. So a reasonable doubt is entertained.

In my humble opinion the word "rent", as appears in that sub-section, has been used in a restricted sense and it implies only rent payable in respect of land used for agricultural purposes, like the words "revenne and profits" of that sub-section. The presence of the comma after the word "rent' does not make any difference as to its correct interpretation, as it has been held by their Lordships in the Privy Council decision reported as *The Maharani of Burdwan* v. *Krishna Kamini Dasi* (2) that it is an error to rely on punctuation in construing Acts of Legislature. In this view of the matter, succession certificate is necessary in the present case.

The very question once came before the Hon'ble Judges of the Bombay High Court, but no pronouncement was made if the word "debt" in sub section 2 of section 4 of the Succession Certificate Act included rent payable in respect of land not used for agricultural purposes. Their Lordships in *Ranchor las Nathubhai* v. *Bhagubhai Parmanandas* (3) found that the rent sued upon became due after the death of deceased partners and no certificate was, therefore, necessary.

The matter is an important one and involves fiscal question. I, therefore, request you to be so good as to place the facts of this case before the Hon'ble Judges of the Hon'ble Court for favour of their opinion on the question stated below.

Under rule 1, Order XLVI of the Civil Procedure Code of 1908, the question for reference is,

Is succession certificate necessary for recovery of arrears of rent in respect of homestead land by the heirs or legal representatives of the deceased landlord to whom the rent in question was due?

Further proceedings of the Small Cause Court Suit No. 290 of 1917 have been stayed pending the opinion of the Hon'ble Judges on the question submitted. The record of the said suit will be transmitted to the Hon'ble Court, if necessary."

JUDGMENT.

FLETCHER, J.—This is a reference made by the learned Munsif of the Second Court at Sealdah, exercising the powers of a Small Cause Court Judge, under the provisions of Order XLVI, rule 1 of the Code of Civil Procedure, 1908, and the question referred by the learned Munsif is this: Is succession certificate necessary for the recovery of the arrears of rent in respect of homestead land by the heirs or the legal representatives of a deceased landlord to whom the rent in arrears was due? The question turns solely upon the definition of the word 'debt' contained in the 4th section of the Succession Certificate Act (VII of 1889). The word 'debt' as used in that section is defined as including any debt except rent, revenue or profits payable in respect of land used for agricultural purposes. The only question is, do the words "land used for agricultural purposes" govern the words rent, revenue or profits or whether rent, apart from the question whether or not it is derived from agricultural land, is excluded from the definition of debt as given in that section. It seems to me quite clear on the ordinary grammatical construction of the section that the words 'land used for agricultural purposes' govern the words rent, revenue or profits. It is only in respect of rent, revenue or profits payable in respect of land used for agricultural purposes that a succession certificate is not necessary. The two cases referred to in the reference, one as *Nagendra Nath Basu* v. *Satadal Basini*

(1) 3 C. W. N. 294; 26 C. 533; 13 Ind. Dec. (N. S.) 944.

(2) 14 C. 365 at p. 372; 14 I. A. 30; 11 Ind. Jur. 275; 4 Sar. P. C. J. 772; 7 Ind. Dec. (N. S.) 242.

(3) 18 B. 394; 9 Ind. Dec. (N. S.) 771.

Basu (1) and the other as *Mokhoda Dassee* v. *Nundo Lal Haldar* (4), do not seem to be opposed to this view. So far as one can gather from the reports of those cases, the land in these cases was land used for agricultural purposes and, therefore, clearly the rent in respect of that land was excepted from the definition of 'debt' in the 4th section of the Succession Certificate Act. Accordingly, we answer the reference as mentioned above, namely, that succession certificate is necessary for the recovery of arrears of rent in respect of homestead land by the heirs or the legal representatives of a deceased landlord to whom the rent was due.

NEWBOULD, J.—I agree.

Answer accordingly.

(4) 27 C. 556; 4 C. W. N. 669; 14 Ind. Dec. (N. S.) 365.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 268 OF 1916.
May 15, 1917.
Present:—Mr. Justice Mullick.
Musammat JANAKDULARI KOER—
PLAINTIFF—APPELLANT
versus
Sri SHEOJI MAHARAJ AND OTHERS—
DEFENDANTS—RESPONDENTS.

Bengal Survey Act (V B. C. of 1875), s. 62, applicability of—Suit for declaration of title and confirmation of possession.

If a plaintiff, suing for declaration of title and confirmation of possession or, in the alternative, for recovery of possession of land which has been the subject of survey proceedings, has been in possession all along and has never been dispossessed, then the suit is one for declaration of title and confirmation of possession and section 62 of the Survey Act is a bar to the suit, provided the proceedings of the Assistant Superintendent of Survey were otherwise regular. But if there has been dispossession of the plaintiff since the decision of the Assistant Superintendent of Survey, then the suit is one for declaration of title and for recovery of possession to which the Survey Act has no application. [p. 88, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Messrs. *Muhammad Mustafa Khan* and *Raghunath Singh*, for the Appellant.

Mr. *Rajendra Prasad*, for the Respondents.

JUDGMENT.—The land in suit covers an area of 6 *bighas* 3 *cottas* 1 *dhur* and falls within survey plots Nos. 29, 31, 75, 471, 98, 470, 472, 484 and 469. The plaintiff claims the land as falling within her *Mauzas* Kudwa, Chak Chaturbhuj and Patriha, while defendants Nos. 1 to 14 claim the land as falling within the boundary of their village Sheochak.

The plaintiff prays for declaration of title and confirmation of possession; or, in the alternative, recovery of possession.

It is alleged that in 1317 F. S. the Survey Officers, deputed to carry out the Record of Rights, made a demarcation by which the disputed lands fell within the boundary of Sheochak.

It is further alleged that although the lands have always been, and still are, in the possession of the plaintiff, the defendants, emboldened by the survey proceedings, are offering resistance to the plaintiff.

The Munsif found that the plaintiff had never been in possession and dismissed the suit. He also decided the question of title in the defendants' favour.

The learned Subordinate Judge agrees with the Munsif in dismissing the suit, but the Subordinate Judge has written a most unsatisfactory judgment which renders it necessary that I should remand this case.

The learned Subordinate Judge's judgment on the question of title is completely unintelligible and in spite of the endeavour made by the learned Counsel who appears on behalf of the respondents to explain the learned Subordinate Judge's meaning, I am still not satisfied that the judgment can be affirmed.

The plaintiff, in support of her case, relied on three decrees made respectively in Suits Nos. 207 and 208 of 1880 and No. 359 of 1875. In those suits the present defendants Nos. 1 to 14, or their predecessors, were plaintiffs and sued the predecessors of the present plaintiff for certain lands and were unsuccessful.

The case of the present plaintiff is that those lands are the lands now in suit and that, therefore, the defendants are barred by *res judicata* from contesting the plaintiff's title.

The learned Subordinate Judge, so far as I can see, does not come to any conclusion as to whether the lands now claimed are identical with the lands which formed the subject-matter of those decrees and although he purports to dispose of this appeal

on a consideration of those decrees, I am unable to follow his argument.

Does he find that the lands now in suit are the lands in respect of which the plaintiff then succeeded? If not, then the learned Subordinate Judge must state his reasons for coming to that conclusion. It is not sufficient to say at the concluding part of his judgment that he finds that the finding of the Assistant Superintendent of Surveys is correct as to the boundary between the two *mauzas*.

I understand that an *amin* was deputed to demarcate the disputed lands and to compare them with the decrees above mentioned; but I find no mention whatsoever in the learned Subordinate Judge's judgment of this *amin's* report.

The learned Subordinate Judge must come to a clear finding upon all the issues and dispose of the case according to law.

Then, with regard to plot No. 75, an objection was taken before the Subordinate Judge for the first time to the effect that the suit in respect of this plot was barred by section 62 of the Survey Act (V of 1875).

The first point to be considered is whether there was any dispute within the meaning of part 5 of the Act before an officer performing the duties of the Collector under the Act. The next question is whether that officer determined the boundaries in accordance with section 41.

We have no information before us—at least it does not appear from the judgment of the learned Subordinate Judge—whether the Assistant Superintendent of Survey was an officer acting under Act V of 1875. Nor does it appear whether any dispute existed as required by section 40 and if so, who were the parties to that dispute.

The judgment of the Assistant Superintendent of Survey has been shown to me by the learned Counsel for the respondents, but that judgment does not disclose whether the officer was acting under Act V of 1875 and whether the present plaintiff and the present defendants were parties to a dispute as regards plot No. 75.

It may be that the learned Subordinate Judge is quite right as to the facts, but these facts must be established before Act V of 1875 can operate as a bar. When the case goes back on remand, as it must, the learned Subordinate Judge must, upon the evidence before him, come to a finding upon these important points.

Then, assuming that there was a dispute and a valid order under section 41, the question arises whether the order of the Assistant Superintendent of Survey is a bar to the present suit as regards plot No. 75, by reason of section 62 of the Act.

It appears that it was admitted before the learned Subordinate Judge that with regard to the other plots the appeals allowed by part 5 had been exhausted and the plaintiff was competent to bring the present civil suit for possession. But with regard to plot No. 75 it appears to have been found by the learned Subordinate Judge that the plaintiff's agent withdrew his objection before the Revenue Officer and as the appeal allowed by the Act has not been made, it is urged that it is not competent now for the plaintiff to bring the present suit which, in effect, is intended to set aside the order of the Assistant Superintendent of Survey.

The first reply to this is that the learned Subordinate Judge has come to no finding upon the issue whether the plaintiff is bound by the withdrawal of the objection on the part of Sheo Shankar Lal. The learned Munsif held that she was not, but the learned Subordinate Judge has come to no finding upon this point.

The next objection to applying section 62 of the Survey Act is that if this is a suit for recovery of possession upon declaration of title, then the suit is not barred, upon the authority of *Kala Chara Tea Company Limited* v. *Sukul Singh* (1) and *Kasturi Singh* v. *Rajkumar Babu Bissun Pragas Narain Singh* (2).

The learned Counsel for the respondents, however, urges that this is not a suit for recovery of possession but that it is a suit for confirmation of possession pure and simple; and if that view is taken of the case, then section 62 is a bar under the authority of *Biseswari Koeri* v. *Ram Partap Singh* (3).

The learned Subordinate Judge, therefore, must come to a clear finding whether there

(1) 13 C. 280; 6 Ind. Dec. (N. S.) 686.
(2) 8 C. W. N. 876.
(3) 4 Ind. Cas. 547; 14 C. W. N. 363.

was in fact a dispossession of the plaintiff after the decision of the Assistant Superintendent of Survey.

If the plaintiff has been in possession all along and has never been dispossessed, then the suit is one for declaration of title and confirmation of possession and section 62 of the Survey Act will be a bar provided the proceedings of the Assistant Superintendent of Survey were otherwise regular. But if there has been dispossession of the plaintiff since the decision of the Assistant Superintendent of Survey, then this will properly be a suit for declaration of title and for recovery of possession; to which the Survey Act will have no application. The learned Subordinate Judge must find clearly what is the nature of the suit.

These are the main points argued before me and I regret that owing to the unsatisfactory nature of the Subordinate Judge's judgment this case must be remanded.

I set aside the judgment and decree of the lower Appellate Court and remand the case to be re-heard and disposed of according to law within one month after the record reaches the lower Court.

For the sake of convenience I will set out for the guidance of the Subordinate Judge the scope of this remand order:—

(1) The lower Court will decide the issues framed, having particular regard to the point whether the lands in suit are covered by the decrees on which the plaintiff relies.

(2) If there has been any dispossession by the defendants since the Assistant Superintendent's order, neither section 41 nor section 62 of the Survey Act will be any bar to the plaintiff's claim.

(3) If there has been no dispossession but the plaintiff proves her title, then a suit to set aside the Assistant Superintendent's order being barred by limitation, the plaintiff will be entitled to no relief. The present suit will in that event be regarded as unnecessary and she will continue to remain in possession. Although she may have proved her title, she cannot get a decree for confirmation of possession inconsistent with the order of the Assistant Superintendent so long as that order stands. It follows from this that as regards plot No. 75 an exception must be made and she will be entitled, if the present suit is within six years of the publication of the Record of Rights, to obtain a declaration that the Record of Rights is wrong and for confirmation of possession in respect of plot No. 75 if the Subordinate Judge finds that Sheo Shankar was not authorised to withdraw the objection before the Survey and Settlement authorities and that the order of the Assistant Superintendent as regards this plot was without jurisdiction and a nullity.

(4) Neither party will be permitted to adduce additional evidence.

Decree set aside; Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 388 OF 1914.

March 9, 1916.

Present:—Mr. Stuart, A. J. C.

SILWANTA SHUKUL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHABIR SHUKUL AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901) s. 233 (k) – Jurisdiction of Civil and Revenue Courts—Title, question of—Partition proceedings, effect of.

A Civil Court has no jurisdiction to enter into a question of title already adjudicated upon by a Revenue Court during the course of partition proceedings conducted by it. [p. 89, col. 1.]

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 14th May 1914, upholding the order of the Additional Munsif, Sultanpur, dated the 15th November 1913.

Babu *Ishwari Prasad*, for the Appellants.

Pandit *Gokaran Nath Misra*, for Respondent No. 3.

JUDGMENT.—The property in dispute in this case consists of shares in the villages of Shukul Dulaicha, Sarayyan Khilanpur, and Kaithwara, and of a house. The appellants' case is that this property belonged to a certain Rameshar who died about 1908, and they claimed a share in this property as his heirs. The lower Courts have found that Rameshar was a recorded co-sharer in respect of the shares in suit in Shukul Dulaicha and Sarayyan Khilanpur,

but that in the course of the proceedings in a regular partition conducted in 1900 by a Revenue Court under the provisions of the Land Revenue Act the shares in Shukul Dulaicha and Sarayyan Khilanpur passed from the possession and ownership of Rameshar and were given to another sharer. They further found that the possession of Rameshar over the share in Kaithwara and over the house had not been proved within the period of limitation. The suit was dismissed accordingly.

The learned Counsel for the appellants has argued that the partition proceedings of 1900 in no way affect the title of his clients. The matter stands as follows:—Rameshar was a recorded co-sharer. When the partition proceedings took place, he had to be made a party to the same as a recorded co-sharer. He was thus a party to the proceedings. He obtained no share in the *mahal*. It was for him to object on a question of proprietary title. He did not take any such objection. The finding of the Revenue Court against him on the point is final, and the point is not one within the jurisdiction of a Civil Court according to the provisions of section 233 (*k*), Act III of 1901. The question of title having been decided adversely against Rameshar by the Revenue Court, and the Civil Court having no jurisdiction in the matter, it stands to reason that persons claiming as representatives of Rameshar are under the same disability as Rameshar himself. With regard to this property the Civil Court has no jurisdiction, as the Courts below have rightly held. The learned Counsel for the appellants did not in his arguments press his case with regard to the property in Kaithwara and to the house. The decision of the lower Courts is clearly correct with regard to those properties. I have further to note that the lower Courts appear to me to have decided correctly the question of custom.

I, therefore, dismiss this appeal. The appellants will pay their own costs and those of the respondents.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 154 OF 1916.

November 23, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Lala JAI NARAIN—DEFENDANT—APPELLANT

versus

Lala BANKEY LAL AND OTHERS—PLAINTIFFS RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *ss.* 47, 92, *O. XXI, r.* 42, *O. XXXVIII, rr.* 5, 6—*Decree directing accounts, non-compliance with—Application for security and attachment under O. XXXVIII, rr.* 5, 6—*Appeal—High Court, power of, to rectify technical error—O. XXI, r.* 42, *applicability of*—Ejusdem generis, *principle of.*

On non-compliance by a trustee with an order for furnishing accounts under section 92 of the Civil Procedure Code, the decree-holders made an application purporting to be under the provisions of rules 5 and 6 of Order XXXVIII requesting the Court to call upon the trustee to furnish security or, in the alternative, to attach his immoveable property. The Court ordered the trustee to file security in a sum of Rs. 80,000 and in the meantime issued an order for conditional attachment of his property:

Held, (1) that the Court did not commit any error of substance by directing the trustee to furnish security before it ordered attachment as provided by rules 5 and 6 of Order XXXVIII of the Civil Procedure Code; [p 91, col. 1.]

(2) that the mistake being a merely technical one the High Court, sitting as a Court of Appeal, had power to rectify it and could treat the order passed under Order XXXVIII as passed under rule 42 of Order XXI of the Civil Procedure Code; [p. 90, col. 2.]

(3) that an enquiry into the state of accounts under section 92 of the Civil Procedure Code with a view to ascertaining the liability of the trustee, if any, towards the trust fund was an enquiry into a matter *ejusdem generis* with an enquiry into the question of mesne profits and was thus covered by rule 42 of Order XXI of the Civil Procedure Code. [p. 91, col. 1.]

First appeal from the order of the District Judge, Mainpuri, dated the 18th August 1916.

Messrs. *Gulzari Lal*, *Satya Charan Mukerji*, The Hon'ble Mr. *Moti Lal Nehru* and Mr. *P. L. Banerji*, for the Appellant.

Mr. *G. L. Agarwala*, for the Respondents.

JUDGMENT.—This is a first appeal on the execution side against an order passed under the following circumstances. The appellant Lala Jai Narain was the trustee or manager of a certain endowment and a

suit was brought against him under the provisions of section 92 of the Code of Civil Procedure. This suit ended in a decree in favour of the plaintiffs. One of the directions given by the decree was that Lala Jai Narain defendant should furnish accounts, within a stated period, showing his dealings with the trust property and hand over that property, together with any sum in his hands due to the endowment, to the committee of management appointed under the decree. The order for furnishing accounts was not complied with and has not yet been complied with. The plaintiffs decree-holders came to the Court below with an application purporting to be under the provisions of Order XXXVIII, rules 5 and 6 of the Code of Civil Procedure. They stated that they had information that Lala Jai Narain was preparing to dispose of his immoveable property in order to defeat the claims of the newly appointed managers of the endowment. They asked the Court to call upon him to furnish security, or in the alternative to attach the immoveable property belonging to the judgment-debtor, of which certain details were given in a schedule appended to the application. The Court heard both parties and, by the order now under appeal, directed Lala Jai Narain to file security in a sum of Rs. 80,000 and in the meantime issued an order for conditional attachment of the property detailed in the application.

The appeal coming up for hearing to day, a preliminary point was taken on behalf of the decree-holders, to the effect that the order of the Court below, although passed upon an application wrongly purporting to be made under Order XXXVIII, rules 5 and 6, was really passed under Order XXI, rule 42 of the Code of Civil Procedure, and was not appealable as an order. In rejoinder to this it was contended on behalf of the appellant, among other things, that even if the order could be treated as one under Order XXI, rule 42, it would be appealable as a decree, being an order between the decree-holders and the judgment-debtor falling within the scope of section 47 of the Code of Civil Procedure, and, therefore, amounting to a "decree" under the definition. It became clear in the course of argument that this preliminary point was closely connected with the questions raised in the memorandum of appeal against the merits of the order itself and that it was expedient for us in any case to hear the parties on the appeal. This we have done, and in the view we take of the case we do not think it necessary to pronounce separately upon the question raised by the preliminary objection. Undoubtedly the decree-holders, that is to say, the present respondents, thought that they were moving the Court below to take action under Order XXXVIII of the Code of Civil Procedure. Whether or not such action was possible at all would depend on whether the application could be said to have been made at any stage of a suit and, therefore, on the further question whether the decree passed in the suit under section 92 of the Code of Civil Procedure was a final decree disposing of that suit, or was of the nature of a preliminary decree. In any case the order of the Court, if treated as passed under rule 6 of Order XXXVIII of the Code of Civil Procedure, would be open to question on more than one of the grounds put forward in the memorandum of appeal. It seems to us, however, that we need not enter into a technical question of this sort, if we are satisfied that the worst that could be said against the respondents is that they had not correctly specified the particular rule under which they desired to invoke the assistance of the Court. We expressly asked the appellant to argue the case from this point of view, namely, whether the order in question was or was not one which the Court could lawfully and with justice—regard being had to the merits of the case—have passed under the provisions of Order XXI, rule 42 of the Code of Civil Procedure. If we are satisfied that it was so, we have undoubtedly power, sitting as a Court of Appeal, to rectify any merely technical error committed in the Court below and to maintain the order in question in substance, while making it clear that in our opinion it must be treated as an order passed under Order XXI, rule 42 aforesaid. The conclusion we have come to is that the order in question can and should be so treated. The conditions necessary for calling into operation the provisions of this rule were undoubtedly satisfied.

Whether the decree in question be recorded as a preliminary decree, or as a

decree finally disposing of the suit, does not seem to be material when the matter is looked at from the right point of view. The reference in Order XXI, rule 42, to a decree directing enquiry into mesne profits shows that a decree may be either a final or a preliminary decree and yet fall under the operation of this rule. Beyond question the decree under consideration did direct an enquiry into the state of accounts as between Lala Jai Narain and the trust fund, with a view to the ascertaining of the liability, if any, of the said Jai Narain towards that fund. This was certainly an enquiry into a matter *ejusdem generis* with an enquiry into the question of mesne profits. Lala Jai Narain could have avoided the application now made against him, in the simplest manner possible, by complying with the terms of the decree. He certainly cannot be permitted to defeat this portion of the decree by the simple process of refusing to comply with the order directing him to furnish accounts. The Court must have some jurisdiction over him in the matter, and the provisions of Order XXI, rule 42, seem on the face of them wide enough to permit the Court to take action under it in the circumstances. Strictly speaking, under the terms of this rule, the power of the Court is limited to ordering attachment of the property of the judgment-debtor, as in the case of an ordinary decree for payment of money. But it cannot be said that the Court below committed any error of substance in offering Lala Jai Narain the option of furnishing security for a specified amount before it ordered attachment. Indeed we are disposed to think the order should be so framed as to leave it open to the judgment-debtor to satisfy the Court, even now, by furnishing security in a reasonable amount. We have gone into the merits of the case so far as they bear on this particular application. Lala Jai Narain has appealed against the decree passed in the suit under section 92 of the Code of Civil Procedure and that appeal is pending. This, however, does not exempt him from the liability to comply with the provisions of the decree, in the absence of any stay order from the Appellate Court. We think that the Court below, on the facts laid before it, was within its jurisdiction in directing the attachment of the judgment debtor's property and was under the circumstances justified in passing such an order. We propose to maintain that order with the following modifications. It will further be provided that the attachment will only continue in force until Lala Jai Narain complies with the provision of the decree in the matter of furnishing account and handing over any money which may be found due, provided that the attachment may be removed on Lala Jai Narain's furnishing proper security, for an amount which we think it sufficient upon full consideration to fix at a sum of Rs. 50,000, to the satisfaction of the Court below, for his due compliance with any decree that may eventually be passed by this Court on the regular appeal. Under all the circumstances we think it sufficient to leave the parties to bear their own costs in this appeal, subject to this provision, that the costs of the respondents, including the fee certified by their Advocate, may be paid out of the trust funds.

We may note that one of the difficulties we have had in dealing with this appeal has been the absence of a formal order in the Court below, and in our opinion such formal order ought to have been drawn up and its presence on the record would have been of material assistance to us

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 45 OF 1916.

March 20, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

TIPAN PRASAD SINGH—DEFENDANT—APPELLANT

versus

RAMJI RAM—PLAINTIFF—RESPONDENT.

Landlord and tenant - Suspension of rent—Dispossession of tenant from portion of tenancy.

The landlord's eviction of a tenant from a substantial portion of the land of his tenancy leads to a suspension of the entire rent due for the period of eviction. [p. 95, col. 1.]

Courts should be reluctant to relax this rule. [p. 95, col. 1.]

TIPAN PRASAD SINGH *v.* RAMJI RAM.

Dhunput Singh v. *Mahomed Kazim Ispahani*, 24 C. 296; 12 Ind. Dec. (N. S.) 864, distinguished.
Godai Molla v. *Aminuddi Howladar*, 21 Ind. Cas. 957; 18 C. L. J. 509, approved.

Appeal against the decree of Mr. Justice Newbould, dated the 25th January 1916, in Appeal from Appellate Decree No. 434 of 1913.

FACTS material to the report will appear from the judgment of Newbould, J., which was as follows: —

"This appeal arises out of a rent suit. The plaintiffs sued to recover rent from the defendant for 30 odd *bighas* of land at an annual rental of Rs. 215-5-0 for 12 annas *kist* of 1315, the whole of 1316 and the 12-annas *kist* of 1317. The defendant defended the suit on the ground that the land, for which rent was claimed, formed a portion of a larger holding from 27 odd *bighas* of which he had been dispossessed by the plaintiffs and that consequently he was not liable to pay any rent for the period during which he was dispossessed by his landlord from a part of his holding. He also pleaded that the suit, being one for rent of part of a holding, was not maintainable. The Munsif, who heard the suit, granted the plaintiffs a decree in full. On appeal before the learned District Judge of Patna, the plaintiff-respondent withdrew his suit for rent for the period subsequent to the delivery of possession to the plaintiff-appellant of the 27 odd *bighas* of land of which he had been dispossessed, that is, for the three *kists* of 1317, and the lower Appellate Court granted him a decree for the remainder of his claim. Against this decree the present appeal has been preferred.

The following is an account of the litigation that has taken place between the parties. To prevent confusion I shall refer throughout to the parties, who are now represented by the present plaintiffs and defendant, respectively, as the plaintiffs and the defendant.

In 1898 the defendant-appellant, purchased at a sale in execution of a decree a holding that had formerly belonged to Ambica Prasad Singh and others. The defendant obtained possession of these lands on the 19th May 1902. In the year 1899 the plaintiffs-respondents brought two suits for rent against the defendant-respondent, and others. The suit against the defendant was numbered 212. In this suit the plaintiffs claimed arrears of rent on account of a *jama* of Rs. 278 odd for 66 odd *bighas* of land. On the 22nd June 1900, the plaintiffs obtained a decree in this suit for a *ama* of Rs. 263 odd for 62 odd *bighas* of land and the decretal amount was paid by the defendant. In the other rent suit of 1899, which was numbered 208, the defendant disclaimed all interest in the lands and the suit was dismissed as against him and decreed against the other defendants with whom now we are not concerned. In execution of their decree in Suit No. 208, the plaintiffs-appellants on the 25th September 1902 dispossessed the defendant-respondent of about 27 *bighas* of land, which were part of the holding which was the subject of Rent Suit No. 212. In 1904 there were proceedings before the Assistant Settlement Officer of Patna for the settlement of fair rents under section 105, Bengal Tenancy Act, in respect of a number of holdings in the plaintiffs-appellants' estate. The defendant was then holding 30 odd *bighas* of land at a rental of Rs. 215 odd and he prayed that his rent should be reduced in view of the fact that there had been a decree in the area of his holding. The Assistant Settlement Officer held that there had been no reduction of the defendant's holding by diluvion, encroachment or otherwise and disallowing the plaintiffs' application for enhancement, he settled the existing rent as a fair rent. This decision of the Assistant Settlement Officer, dated the 25th May 1904, was upheld on appeal by the District and Special Judge of Patna on the 4th October 1904. An appeal to the High Court was dismissed, on the ground that no appeal lay, on the 13th March 1906. This case is reported as *Ram Bishen Raut* v. *Rajaram* (1). Before this litigation in connection with the settlement proceedings was concluded, the defendant brought a suit for recovery of possession of the 27 odd *bighas* from which he had been dispossessed by the plaintiffs. The date, on which this suit was instituted, cannot be ascertained from the papers on the record. It was stated at the hearing of this appeal that it was instituted in 1904 but in the judgment in Rent Appeal No. 74/3 of 1911, it is mentioned that this title suit was brought after the decision of a rent suit on

(1) 33 C. 832.

the 9th December 1905. Whatever may have been the date of institution, this title suit was decreed in the defendant's favour on the 22nd December 1906 and this decision was affirmed by the High Court on the 24th June 1909 thereby? other litigation between the parties to which my attention has been drawn was two rent suits, in which the plaintiffs obtained decrees for the rent as fixed by the Assistant Settlement Officer. The first of these was that already referred to, which was decided on the 8th December 1905 and in this case the amount decreed was realised. The second was brought in 1908, that is, after the decision of the title suit. This suit was contested on the same ground that the present suit has been and the Munsif held that the plaintiffs had dispossessed the defendant from a substantial portion of his holding and would not recover rent for the remainder. This decision was reversed on appeal by the Subordinate Judge of Patna, and the plaintiff's claim was decreed in full on the 22nd August 1911. The learned Subordinate Judge held that the original entire *jama* had been divided *viz.*, (1) one *jama* of Rs. 215 and odd for 30 *bighas* and odd and (2) another *jama* for the remaining lands, possession of which was recovered by the plaintiff by his regular title suit. A second appeal to the High Court was preferred against this decision. By consent of parties the Bench which heard the appeal, Fletcher and Richardson, JJ., directed that the decree appealed from should be reversed in this manner. Execution for the amount of rent found to be due to the plaintiffs should not issue against the defendant until after the ascertainment of the mesne profits directed to be ascertained and paid to the defendant in his title suit. Their Lordships refrained from expressing either assent or dissent with the view of the lower Appellate Court that the *jama* had been divided into two. This decree of the High Court is dated 8th May 1915 and is subsequent to the decision of the Munsif and District Judge in the present case.

The important facts of the case resulting from the litigation described above are as follows:—There was originally a holding of 63 *bighas* of land which was purchased by the defendant. After he had obtained possession he was dispossessed by his landlords, the plaintiffs, of about half the holding. Subsequently the 30 odd *bighas*, which remained in his possession, were treated as a separate holding and assessed to a fair rent in settlement proceedings. After these settlement proceedings and on the basis of them, the landlord twice recovered decrees for rent against the defendant. It appears to me that these facts justify the decision of the learned District Judge that the plaintiffs are entitled to rent claimed by them up to the date when the defendant recovered possession of the land decreed to him in the title suit. The decision of the Assistant Settlement Officer assessing the 30 odd *bighas* of land to rent had the force of a decree and after that decision these lands must be regarded as a separate holding, at any rate until the defendant was restored to possession of the land from which he was dispossessed.

But if these 30 odd *bighas* are regarded as a portion of the original holding the defendant is, in my opinion, nevertheless bound to pay rent to the plaintiffs. I cannot accept the contention of the learned Counsel for the respondent that the doctrine of non-liability of a tenant for rent after dispossession by his landlord from a part of his holding is a doctrine of English Law that should not be extended to India. The doctrine has been repeatedly accepted by this Court. In 1870 it was treated as an indisputable proposition of law in *Kadumbinee Dossia* v. *Rasheenath Biswas* (2). In 1913 the late Chief Justice sitting with Mookerjee, J., described it as a rule founded upon policy which they had no desire to relax: *Godai Molla* v. *Aminuddi Howladar* (3). The leading case on the subject is *Dhunput Singh* v. *Mahomed Kazim Ispahani* (4). This case, while it affirms the general rule on which the plaintiffs-appellants rely, also makes an exception which is applicable to the present case. In that case it was held that if the landlord's interference with the tenant's enjoyment is in respect of only a certain portion of the dismissed land, the rent for which is separately assessed, there should be apportionment. In the case of

(2) 13 W. R. 338.
(3) 21 Ind. Cas. 957; 18 C. L. J. 509.
(4) 24 C. 296; 12 Ind. Dec. (N. S.) 864.

Sarip Jan Bibi v. *Aftabuddin* (5) doubt was expressed at page 118 whether this exception could be defended in principle. But in the decision that such an exception exists to the general rule has never been overruled and I am bound to follow the decision in *Dhanput Singh's* case (4). The present case clearly falls within this exception and this is sufficient to support the decision of the lower Appellate Court.

I, therefore, dismiss this appeal with costs."

Babu *Monmotha Nath Roy*, for the Appellant.—The appeal arises out of a suit for rent brought by the plaintiff-landlord against the defendant-appellant. The defence was that as the landlord evicted the defendant from a portion of the holding the rent was liable to be suspended. The suit has been decreed in all the Courts on the application of the principle laid down in *Dhunpat Singh* v. *Mahomed Kazim Ispahani* (4). I submit that the principle laid down in that case has been misconstrued. It cannot in any way support the contention of the plaintiff. The question for determination is. Is the landlord entitled to realise the rent for the years 1315 to 1317 B. S.? That would depend upon one single fact, *viz.*, was there any eviction of the tenant by the landlord from any part of the holding. The finding is that the tenant was evicted by the landlord. So the rent of the holding is liable to be suspended, and the decree for rent should not have been passed.

Babu *Bejoy Kumar Bhattacharjee* for Dr. *Dwarka Nath Mitter*, for the Respondent.—The Courts below were justified in passing a decree for rent on the basis of the principle laid down in *Dhunput Singh* v. *Mahomed Kazim Ispahani* (4).

[MOOKERJEE, J.—That case is distinguishable from the present case.]

On the findings arrived at by the lower Courts the defendant cannot claim suspension of rent.

The landlord, at least, is entitled to apportionment of rent; he can claim rent for that quantity of land of which the tenant has been found to be in possession.

JUDGMENT.—This is an appeal, under clause 15 of the Letters Patent, against a judgment of Mr. Justice Newbould in a suit for arrears of rent. The plaintiff sued to recover rent from the defendant for the last three quarters of 1315, 1316 and the first three quarters of 1317. He subsequently withdrew his claim in respect of the first three-quarters of 1317 with liberty to bring a fresh suit on the same cause of action. The District Judge overruled the contention of the defendant that the rent had been suspended by reason of eviction and decreed the claim for the last three quarters of 1315 and the whole of 1316. This judgment of the District Judge has been affirmed by Mr. Justice Newbould. The facts found may be briefly narrated. The defendant was a tenant under the plaintiff in respect of 57 *bighas* of land. The plaintiff dispossessed the defendant from 27 *bighas*. In 1904 the defendant instituted a suit for recovery of possession on declaration that the disputed lands were included in his tenancy. In that suit an issue was raised, whether the lands were part and parcel of the tenancy of the present defendant or whether it was included in another holding alleged to have been purchased by the landlord at an execution sale. The Subordinate Judge found in favour of the tenant and gave him a decree for recovery of possession; on appeal to this Court, that decree was affirmed. The tenant executed the decree and obtained possession of the 27 *bighas* on the 13th October 1909. In these circumstances there is, *prima facie*, no room for doubt that the rent remained suspended during the entire period of eviction, which includes the period for which rent is now claimed.

The landlord, however, contends that inasmuch as in a proceeding under Chapter X of the Bengal Tenancy Act, the Settlement Officer had assessed fair rent on the land in the occupation of the tenant after he had been evicted from 27 *bighas*, there was a severance of the tenancy; in other words, the tenant now held two tenancies, one of 30 *bighas* and the other of 27 *bighas*. But the proceedings before the Settlement Officer could not have this effect, as no question of sub-division of the tenancy did or could arise before him; on the other hand, the effect of the decision of the High Court in 1909 obviously is that there is still a tenancy of 57

(5) 8 Ind. Cas. 30; 13 C. L. J. 115.

bighas and the defendant, on execution of that decree, is now in occupation of all the lands comprised therein. There is thus no escape from the position that the tenant remained evicted during the years in suit from a substantial portion of the land of his tenancy and the inference is irresistible that the entire rent has been supended. Reliance, however, has been placed on behalf of the landlord on *Dhunput Singh* v. *Mahomed Kazim Ispahani* (4). That case has obviously no application to the circumstances of the present litigation. It affirms the proposition now well settled [*Chandra Kanta Dass* v. *Ramanath Barman* (6), *Rai Charan Sar Mazumdar* v. *Administrator-General of Bengal* (7), *Saroda Prosad Bhattacharjee* v. *Manmotho Nath Mitter* (8), *Rasseswari Chowdhurani* v. *Sorendra Mohun Tagore* (9)] that if there is interference by the landlord with the possession of the tenant even in respect of a portion of the property there should be no apportionment of rent; but it also lays down that if the interference is in respect of only a certain portion of the demised property the rent of which is separately assessed, there should be apportionment. The present case is clearly not of this description. The decision in *Dhunput Singh* v. *Mahomed Kazim Ispahani* (4) contemplates cases where there are in essence two tenancies included in one lease and the tenant is dispossessed from the lands of one of these only. We may, in this connection, refer to the observations on this decision in the case of *Saripjan Bibi* v. *Aftabuddin* (5) and *Mahammad Zeaullah Miah* v. *Sukliannessa Bibi* (10). We may add finally that we are entirely in accord with the opinion expressed by Sir Lawrence Jenkins, C. J., in the case of *Godai Molla* v. *Aminuddi Howladar* (3), that the Court should be reluctant to relax the rule that eviction of tenant by the landlord leads to suspension of the entire rent.

The result is that this appeal is allowed, the decree of the Court below set aside and the suit dismissed with costs in all the Courts.

(6) 6 Ind. Cas. 478; 11 C. L. J. 591.
(7) 2 Ind. Cas. 169; 36 C. 856; 9 C. L. J. 578; 13 C. W. N. 853.
(8) 28 Ind. Cas. 371; 19 C. W. N. 870.
(9) 5 Ind. Cas. 105; 11 C. L. J. 601.
(10) 5 Ind. Cas. 352; 11 C. L. J. 606; 14 C. W. N. 446.

Our judgment will in no way affect the order of the District Judge whereby the plaintiff was allowed to withdraw his claim in respect of 1317 with liberty to institute a fresh suit in respect of the same cause of action—indeed, that portion of the order of the District Judge was not assailed before us.

Appeal allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 405 OF 1915.

May 8, 1917.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

SHAMA PERSHAD SAHI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHEOPARSAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (*VII of* 1870), *s.* 7 (*IV*) (c)—*Court-fee—Declaratory decree with consequential relief, suit for—Plaintiff, duty of, to fix reasonable value upon consequential relief—Court, interference by, where ridiculous value is fixed—Civil Procedure Code* (*Act V of* 1908), *O. VII, r.* 11 (b).

Where a consequential relief is sought in addition to a declaratory decree, the plaintiff is bound to fix upon the consequential relief a reasonable value. If he puts upon the consequential relief a ridiculous value, then the Court must step in and fix a reasonable value for him. [p. 96, col. 1.]

Umatul Batul v. *Nauji Kuar*, 6 C. L. J. 427; 11 C. W. N. 705, relied upon.

Appeal from the decision of the Subordinate Judge, 1st Court, Mozaffarpore, dated the 21st May 1915.

Rai *Tribhuban Nath Sahai*, for the Appellant.

Messrs. *Chandra Shekhar Banerji* and *Ganesh Dutta Singh*, for the Respondents.

JUDGMENT.—In these two cases the appellants are Mitakshara sons. They sought in two suits in the Court of the Subordinate Judge to set aside decrees made upon mortgages entered into by their father and to obtain possession of their individual shares in the joint family property. In one case they valued their shares in the joint family property at Rs. 11,000 and in the other case at Rs. 5,400, the decrees sought to be set aside being for Rs. 11,647 in one case and Rs. 10,810 in the other. They averred that inasmuch as their suits were for recovery of

possession of property, they were entitled to maintain them on payment of a Court-fee upon a sum equal to ten times the Government revenue on the property.

The learned Subordinate Judge differed from them and was of opinion that the Court-fee to be paid was to be calculated on the suit as a suit for a declaratory decree with consequential reliefs [section 7, clause 4 (*c*), of the Court Fees Act]. He, therefore, declared that the consequential relief was obviously the total amount of the decrees and called for *ad valorem* fees upon the sum decreed in each case. This the appellants declined to pay, and appeal to this Court against the order made.

Reliance is placed in appeal upon the decision of the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* (1). In that case nothing was decided save that a Court-fee of Rs. 10 is to be paid upon a suit to set aside an order of a Civil Court refusing to release an attachment under section 283 of the Civil Procedure Code.

Reliance is next placed upon the decision in *Ganesh Bhagat* v. *Sarada Prasad Mukerjee* (2), in which it was held that in a suit to set aside a decree the valuation should be based upon the extent of the plaintiff's interest in the decree.

The later decision is no doubt in point, but the whole basis of the case-law upon the subject, beginning with *Baidya Nath Adya* v. *Makhan Lal Adya* (3) and exhaustively dealt with in *Umatul Batul* v. *Nauji Kuar* (4), is that when a consequential relief is sought in addition to a declaratory decree, the plaintiff is bound to fix upon the consequential relief a reasonable value. If he puts upon the consequential relief a ridiculous value, then the Court must step in and fix a reasonable value for him. This rule is based upon section 54 of the old Code, now Order VII, rule 11 (*b*). Such a case must be dealt with on its own merits. In the case before us the plaintiff has actually valued the relief sought at Rs. 11,000 in one case and Rs. 5,400 in the other. Rs. 11,000 is obviously a reasonable valuation, nor can we say that Rs. 5,400 is an unreasonable valuation, in view of the fact that the decree was a decree upon a mortgage and that the whole of the mortgaged property has been sold and that as far as we know from the written statement there is no other property but the mortgaged property which can be sold. We cannot allow the plaintiff to now turn round and say that if he had known that he would be made to pay an *ad valorem* Court-fee on the value which he put on the relief sought, he would have valued that relief less highly. We must direct that the Court-fee to be paid in these cases be the *ad valorem* Court-fee on Rs. 11,000 in one case and Rs. 5,400 in the other.

Payment of the deficit Court-fee in the lower Court must be made on or before the 15th of July. The record may be sent down at once.

Case sent back.

(1) 35 C. 202; 7 C.L.J. 36; 12 C. W. N. 169; 10 Bom. L R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 503; 14 Bur. L. R. 41; 35 I. A. 22 (P. C).

(2) 30 Ind. Cas 111; 42 C. 370; 19 C. W. N. 895.

(3) 17 C. 680; 8 Ind. Dec. (N. s.) 994.

(4) 6 C. L. J. 427; 11 C. W. N. 705.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 613 OF 1916.

March 6, 1917.

Present:—Mr. Justice Shadi Lal.

RADHA MOHAN—RECEIVER—PETITIONER

versus

GHASI RAM AND OTHERS—DEBTOR AND CREDITORS—RESPONDENTS.

Provincial Insolvency Act (III of 1914*)*, *s.* 46—*"Aggrieved person", meaning of—Receiver, whether "aggrieved person."*

The words "person aggrieved" in section 46 of the Provincial Insolvency Act do not mean a man who is disappointed of a benefit which he might have received if some other order had been passed. A "person aggrieved" must be a man who has a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something or wrongly refused him something or wrongly affected his title to something.[p. 97, col. 1.]

A Receiver appointed by the Court under the Provincial Insolvency Act is not an aggrieved person within the meaning of section 46 of the Act and is, therefore, not competent to apply for the revision of an order annulling adjudication. [p. 97, col. 1.]

Petition, under section 46 of Act III of 1907, for revision of the order of the

Additional District Judge, Delhi, dated the the 29th March 1916, reversing that of the Judge, Insolvency Court, Delhi, dated the 31st January 1916, rejecting application.

Mr. *M. N. Mukerji*, for the Petitioner.

Rai Sahib Lala *Moti Sagar*, for the Respondents.

JUDGMENT.—The learned Additional District Judge has passed an order annulling the adjudication of insolvency of Ghasi Ram; and the only person, who opposed the said order and now files an application for revision, is the Receiver appointed by the Insolvency Court to realize the assets. The first question, which I have to determine, is whether the Receiver is a person aggrieved within the meaning of section 46 of the Provincial Insolvency Act. Now, it is quite clear that the order of the Court below affects the Receiver only in so far as the amount of his commission for the work already done is concerned; and the amount was fixed at Rs. 100 by an order of the first Court dated the 22nd February 1916. He may have his remedy against that order, if he is dissatisfied with it, but I do not think he can be treated as a person aggrieved *qua* the order of the lower Appellate Court annulling the adjudication.

The words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been passed. A "person aggrieved" must be a man who has a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, or wrongly refused him something, or wrongly affected his title to something, *vide Ex parte Sidebotham, In re Sidebotham* (1). Having regard to the circumstances mentioned above, I am of opinion that the petitioner cannot be deemed to be a person aggrieved. I accordingly dismiss the application for revision with costs.

Application dismissed.

(1) (1880) 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 783; 28 W. R. 715.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 625 AND 792 TO 803 OF 1916.

May 21, 1917.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

IN No. 625

HARDAYAL MAHTON AND OTHERS—APPELLANTS

versus

WAZIR MAHTON AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 60, object of—Landlord and tenant—Rent suit—Tenant, whether can plead right of third person to receive rent.

Section 60 of the Bengal Tenancy Act must be strictly interpreted, for if it is not so interpreted, the object for which it was enacted will not be attained; that object being to coerce proprietors to register their names under the Land Registration Act. The object is of great importance for the efficient administration of land revenue. [p. 98, cols. 1 & 2.]

Girish Chandra Chongdar v. *Satish Chandra Sarkar*, 12 C. W. N. 622, doubted.

Sadhu Charan Pal v. *Radhika Mohan Roy*, 8 C. W. N. 695, relied upon.

Appeal from a decision of the District Judge, Patna.

Messrs. *Muhammad Mustafa Khan* and *Ganesh Dutta Singh*, for the Appellants.

Mr. *Bimla Charan Sinha*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—These appeals arise out of seven suits for rent. The appeals are by the tenants. On the 9th October 1904 one Narain Prasad executed a conveyance of certain villages to one Dhiraj Mahato. Certain disputes arose between these two persons, Narain alleging that the conveyance was a fictitious conveyance. The result was that an agreement was executed on the 13th July 1909 between Dhiraj Mahato and Narain Prasad. By this agreement Narain gave up his claim in respect of certain of the villages and Dhiraj made a conveyance of other villages to Narain in the name of one Parshad Narayan. This did not, however, terminate the dispute, for in November 1911 proceedings were instituted under section 145 of the Code of Criminal Procedure, which resulted in an order by the Sub-Divisional Officer of Behar placing Narain in possession of certain villages situated in the Behar Sub-Division. The heirs of Dhiraj Mahato then instituted a title suit for a declaration of their title,

which succeeded on the 30th March 1916. Against that decision Narain has appealed, and there is a cross-appeal by the heirs of Dhiraj. The suits out of which these appeals arise were suits for rent in respect of lands situated in the Barh Sub-division which are, therefore, not covered by the order of the Sub-Divisional Officer of Behar, passed in November 1911. The plaintiffs are the heirs of Dhiraj. The tenants' case was that they had paid the rents for the years in suit to Narain, and it has been found that in fact the tenants have failed to prove that they have made any such agreement. The suits have been held to be defeated by the provisions of section 60 of the Bengal Tenancy Act, to the effect that the tenants in such a case shall not be entitled to plead that the rent is due to any third person. The provision is very clear, as was pointed by Mr. Justice Geidt, in the case of *Sadhu Charan Pal* v. *Radhika Mohan Roy* (1), it was enacted in order to secure the complete registration of the names of all the proprietors. The contention before us is, that inasmuch as the plaintiffs succeeded in their title suit on the 30th March 1916, that is, subsequently to the judgment of the District Judge in appeal dated the 28th February 1916, we should not take notice of that decision of the plaintiffs' title and hold that the tenants were entitled to do what section 60 forbids, that is, to set up a title in a person who has not been registered under the Land Registration Act. The case of *Girish Chandra Chongdar* v. *Satish Chandra Sarkar* (2) is relied upon for this purpose. That was a stronger case than the present one, for in that case the plaintiffs' title had been determined by the Civil Court before the institution of the suit for rent. In the present case the question of title had not been determined until after the judgment of the learned District Judge in first appeal. With great respect to the learned Judges who decided that case, we have great doubt whether the case was correctly decided. In our opinion section 60 must be strictly interpreted for if it is not so interpreted, the object for which it was enacted will not be attained; that object being to coerce proprietors to register their names under the Land Registration Act. The object is of great importance for the efficient administration of land revenue. The result is that in this case we must hold that it was not open to the tenants to plead in defence that the rent was due to any person other than the plaintiffs who had their names registered in the Land Registration Act. The result is that these appeals are dismissed with costs.

ATKINSON, J.—I agree.

Appeals dismissed.

(1) 8 C. W. N. 695.
(2) 12 C. W. N. 622.

PRIVY COUNCIL

APPEALS FROM THE MADRAS HIGH COURT.

May 3, 1917.

Present:—Lord Buckmaster, Lord Parker of Waddington, Lord Parmoor, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

KANDUKURI BALASURYA PRASADHA ROW AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Madras Irrigation Cess Act (*VII Mad. of* 1865), *ss.* 1, 2—*Water cess—Irrigation—Permanent Settlement—Extent of* zemindar's *or* inamdar's *right of user under engagements with Government—River or stream belonging to Government—"Free of separate charge"—Madras Land Encroachment Act* (*III Mad. of* 1905), *s.* 2—"*Standing and flowing water.*"

The Government claimed under the Madras Irrigation Cess Act to levy water cess upon permanently settled lands (*zeraiti* and *inam*) in so far as the user of Government water for irrigation exceeded the user at the time of the Permanent Settlement, whether in respect of the area irrigated or in respect of the fact that two crops were raised instead of one:

Held, (1) that the effect of the Permanent Settlement was to vest the then existing irrigation channels in the *zemindars* through or within whose *zemindaris* the same respectively passed or were situate; [p. 111, col. 1.]

(2) that the right of user from such irrigation channels which passed by the Permanent Settlement could be measured only by the physical conditions existing at that time, and not by the extent to which the water was in fact used: and that assuming that the river with which the channels connected belonged to the Government, the *zemindar's* right of taking water from it was limited only by the size of the channels and the nature of the sluices and works by which water was diverted from the river into the channels. The Government could not complain if the amount of water taken was

within this limit. Once the water was lawfully taken into the channels, Government had nothing further to do with the matter. [p. 111, col. 2.]

Whether or not there are other cases which the first proviso to section 1 of Madras Act VII of 1865 was intended to meet, it at least covers the case of engagements with the Government arising out of the Permanent Settlement. If by virtue of such settlement a *zemindar* is entitled to take and use water from any such source of supply as mentioned in the Cess Act and this right is part of or appurtenant to the property in respect of which he pays a single *jama* or *peishcush*, no cess can be levied under the Act in respect of the water which he is so entitled to take and use. [p. 107, col. 2.]

Semble.—The second proviso to the section is intended similarly to safeguard the *ryots'* rights under the periodical temporary settlements. [p. 107, col. 2.]

Consolidated appeals from a decree of the Madras High Court, dated the 9th September 1910, reported as 8 Ind. Cas. 67, confirming one and modifying two decrees of the District Judge, Ganjam.

FACTS of the case are sufficiently set forth in their Lordships' judgment. The suits out of which the appeals arose were brought by the appellants to recover monies claimed by the respondent as water cess and paid by their predecessor under protest. The suits were dismissed by the first Court, whose decision was confirmed (with modifications in two cases) by the High Court. The judgment of the latter Court, which contains a fuller statement of the facts, is reported as *Kandukuri* v. *Secretary of State* (1).

Mr. *Upjohn*, *K.C.* (with him Sir *W. Garth*), for the Appellants.—The Act under which Government claim to make these charges was passed in 1865, but it is only recently that it has been sought to apply it in this way; and then only under a misinterpretation of Madras Act III of 1905. Government have acted on the view that section 2 of that Act gives them a right to water itself. The High Court have adopted this view: they say "so far as this case is concerned, the provisions of section 2 amount to a declaration that subject to easement and usual rights of other landholders, all standing and flowing waters which are not the property of any one else are the property of the Government". The High Court have overlooked the fact that the section is only intended to deal with the bed of standing and flowing water: all that it vests in Government is the bed. Section 1 and other sections of the Act support this view. Flowing water cannot be the subject of property except by an Act of the Legislature, but the High Court's construction of section 2 treats *zemindars* as possible owners of it. The Act contains no other provisions as to water and no penalties to enforce Government's right to "standing or flowing water." The words "standing and flowing water" merely sweep in other things "than rivers, streams and water-courses" and they are followed by the words "and all lands."

[Sir Walter Phillimore.—In old conveyances "all waters" was inserted to mean beds of other waters than specified.]

The title and preamble of the Act show that it is merely a declaratory Act as to land.

I submit that the alleged right of property in the water claimed by the respondent does not exist. The law of India as to water rights is in general accordance with the law of England, which does not recognise any such right and the authorities cited in the Indian cases are mainly English. *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (2); *Kali Kissen Tagore* v. *Jodoo Lal Mullick* (3); *Perumal* v. *Ramasami Chetti* (4); *Debi Pershad Singh* v. *Joynath Singh* (5), referred to.

The Indian Easements Act of 1882 (Act V of 1882) is declaratory of the common law: *vide* section 7, illustrations (*f*) to (*j*).

In addition to claiming a right of property in the water itself, Government relies upon its general right and duty as Sovereign to regulate matters of irrigation. I am not concerned to deny this right or duty: but I submit that it does not extend to empowering Government to interfere with the legal rights of private individuals, whether these latter are owners or tenants: *Ponnusami Tevar* v. *Collector of Mydura* (6); *Kristna Ayyan* v. *Vencatachella Mudali* (7); *First Assistant*

(1) 8 Ind. Cas. 67; 34 M. 295; (1910) M. W. N. 595; 20 M. L. J. 823; 8 M. L. T. 389.

(2) (1879) 4 A. C. 121; 6 I. A. 33; 4 C. 633; 3 Sar. P. C. J. 856; 3 Ind. Jur. 179; 2 Shome L. R. 194; 2 Ind. Dec. (N. S.) 402.

(3) 6 I. A. 190; 5 C. L. R. 97; 4 Sar. P. C. J. 61 (P. C.).

(4) 11 M. 16 at p. 22; 4 Ind. Dec. (N. S.) 11.

(5) 24 I. A. 60 at p. 68; 24 C. 865; 1 C. W. N. 401; 7 M. L. J. 120; 7 Sar. P. C. J. 202; 12 Ind. Dec. (N. S.) 1245 (P. C.).

(6) 5 M. H. C. R. 6 at pp. 11, 12, 19, 22, 25.

(7) 7 M. H. C. R. 60 at p. 64.

Collector of Nasik v. *Shamji Dasrath Patil* (8); *Ramachandra* v. *Narayanasami* (9); *Sankaravadivelu Pillai* v. *Secretary of State* (10); *Ambalavana Pandara Sannathi* v. *Secretary of State* (11), Peacock's Easements in British India (2nd Edition, 1909), pages 113, 114.

Madras Act VII of 1865 does not apply to a case like this but only to cases where Government undertakes a scheme of irrigation for the benefit of the public. Here the Government merely came in as one of several landholders, and what it did was done by it as landlord for the sake of its own tenants. The Act only refers to channels constructed by the Government as Government, and does not include any channel which the Government made by arrangement with its tenants for their benefit. The channels here were not, so far as the evidence goes, made by Government at all: and the repairs were made by the *zemindars* as well as by Government.

Section 1 of the Act contains a proviso that it is not to interfere with any engagement by which the *zemindar* is entitled to irrigation free of separate charge. I submit that it is not a proper inference from the facts admitted and proved that Government only granted the right of irrigation to the extent that the land was then being cultivated. It is conceivable that the area cultivated might be increased without taking more water: is it said this cannot be done without paying cess?

[LORD PARMOOR.—The Government engagement may be to give you no more than the quantity of water required to irrigate so much wet land.]

That is quite possible *a priori*: but in measuring the extent of the engagement it is necessary to look at the state of things at the time of the grant and what happened after the grant.

I submit that from the facts and terms of the grants to the *zemindar*, and from the further fact that no attempt was made to charge these cesses till quite recently, there should be inferred a grant to the *zemindar* of as much water as he could get, subject to his not prejudicing the rights of other persons having similar *sanads*: and that Government did not grant only so much water as was required for the land then being cultivated. Further, even if Government did not contemplate an extension of the land cultivated, the law is that the owner of a dominant tenement with a right to a flow of water can use that flow for any purpose connected with his tenement.

The preamble to the Act states that Government had just completed large irrigation works in certain Districts: and that it is right and proper Government should get a return on account of the increased profits derivable from lands irrigated by such works. The provisions of the Act should be construed accordingly. It does not apply when the irrigation channels were neither constructed by nor belong to Government. The mere ownership of part of the irrigation works is not sufficient to bring it into operation: there must be a complete work of irrigation constructed by Government for the public benefit. Here Government did not get the ownership even of parts of the channel till after the settlement: and such expenditure as it incurred was for the benefit of its own estates.

"Constructed" in section 1 must apply to "channel, tank or work." "From" in the same section connotes a *source*; it is not the same as "through." The channels here do not belong to Government, nor were they constructed by Government. No case has been put forward under section 1 (*b*): nor has the opinion of the Revenue Officer, therein mentioned, been proved. The provisions in section 1 (*b*), which were introduced by Act V of 1900, support the view that clause (*a*) only applies to an entire work of irrigation.

It was the policy of Government, as laid down by Regulation XXV of 1802, to promote the "progress of agriculture" by fixing the revenue in perpetuity: it would be against such policy to amerce the *zemindar* for raising a second crop.

An easement passing by an implied grant is not restricted to what is necessary for the use of the tenement conveyed: it is

(8) 7 B. 209; 4 Ind. Dec. (N. S) 141.
(9) 16 M. 333; 2 M. L. J. 279; 5 Ind. Dec. (N. S.) 939.
(10) 28 M. 72; 15 M. L. J. 32.
(11) 28 M. 539; 15 M. L. J. 251.

enough that it is convenient for that use: *Watts* v. *Kelson* (12). Reference was also made to *Secretary of State* v. *Perumal Pillai* (13); *Chidambara Rao* v. *Secretary of State* (14); Indian Easements Act, 1882 (Act V of 1882), section 13; *Maria Susai Mudaliar* v. *Secretary of State* (15); *Lutchimee Doss* v. *Secretary of State* (16); *Secretary of State* v. *Swami Nautheswarar* (17) and *Secretary of State* v. *Ambalavana Pandarasannidhi* (18) (now under appeal).

Sir *W. Garth* followed and pointed out that the expenses of repairing the channels were not borne exclusively by Government as had been suggested, but that the *zemindars* contributed.

Mr. *P. O. Laurence*, *K. C.* (with him Sir *Erle Richards*, *K. C.*, and Mr. *Kenworthy Brown*), for the Respondents.—In India the main public user of water is for irrigation: in England for drainage and navigation. Hence a Customary Law has grown up in Madras (and perhaps in Bombay also) that Government has a right to regulate and dispose of the water of rivers for irrigation. The right is a right to take away the water and dispose of it for the benefit of non-riparian land. The Act of 1905 did not make new law. The ownership of rivers and streams has always been in the Government. The Act of 1865 was passed on that basis. The English Law of riparian ownership had been applied to that right, but its application is limited.

Government recognise that rights, not to the water itself, but to the use of the water, can be acquired by riparian owners. Three main rights have been established, qualifying the general right of Government to flowing water.

1. The right of *ryots* under Government to have a supply of water for their irrigation; limited by this, that so long as Government gives them the customary amount it can be given from any channel.

2. The natural right of the riparian owner to the use of the water adjoining his land—not *qua* owner of the bed, but by being in contact with the water.

3. Easement rights, which may be acquired by persons using water for extraordinary purposes as against the riparian owners, both above and below, to use so much of the water as to damage them.

But these rights do not in any way destroy the right of Government to the property in the water; they are something like the right to dig gravel on another man's land.

It is strange to us that there should be ownership of water running from one man's land to another's but such is the law of India.

[Sir Walter Phillimore.—Flowing water may be compared to an animal *ferae naturae*, which is only the subject of ownerships when kept within bounds.]

[Mr. Ameer Ali.—Government took away all the water of the Sone and turned it into their own canal.]

[Sir Walter Phillimore.—Could they do that without an Act of Parliament?]

Yes.

[Lord Buckmaster.—If your view is correct, all the discussion as to the ownership of the Vamsadhara river becomes unnecessary. Everybody who uses the water, whether it comes from a channel or from anything else, will have to pay for it, not because it comes from the channel but because it is the property of the Government].

That is my proposition. Government have contended for centuries that they own the water, and Act III of 1905 says so in so many words. The right of the English riparian owner to have the whole flow past his land is inconsistent with the right of Government, always allowed in India, to stop or dam or divert the water.

Even Act VII of 1865 contemplated ownership of running water. A river is a natural stream. "Natural stream" is defined in the Indian Easements Act, 1882, section 7, Illustration (*i*) (Explanation). "Stream" was inserted in section 1 of Act VII of 1865 after "river" to indicate that the body of water only was intended, not necessarily the bed or banks. The water belongs to Government quite irrespective of the bed of

(12) (1871) 6 Ch. App. 166 at p. 175; 40 L. J. Ch. 126; 24 L. T. 209; 19 W. R. 338.
(13) 24 M. 279 at p. 282; 11 M. L. J. 117.
(14) 26 M. 66.
(15) 14 M. L. J. 350.
(16) 3 Ind. Cas. 456; 32 M. 456; 6 M. L. T. 242; 19 M. L. J. 470.
(17) 6 Ind. Cas. 199; 34 M. 21; 7 M. L. T. 407; 20 M. L. J. 763; (1910) M. W. N. 495.
(18) 8 Ind. Cas. 357; 34 M. 356; 9 M.L.T. 47; (1911) 1 M. W. N. 19.

the river: *Robert Fischer* v. *Secretary of State* (19).

Whether or not this was so before 1905, Act III of that year puts the matter beyond doubt. It recognises the ownership of flowing and standing water. The ownership of flowing water cannot be shown to be in any one else, so it must be in the Government.

[LORD BUCKMASTER.—But it must be assumed appellants have acquired the right to take the water and if that be so, the Act of 1905 would not apply].

Easement rights do not destroy the right of property. Till the water is taken, the property in the whole is in Government. The right to take limits the owner's right.

[SIR WALTER PHILLIMORE.—The whole cake is the Government's; the slice out of the cake must be proved. Government may be entitled to charge for the water even though the other man may have the right to take it.]

Act VII of 1865 applies, whether or not the person taxed is entitled to take or could be prevented from taking. It was not till 1900 that the *ryots* were excepted. It was for this very reason that the proviso was inserted that the cess should not apply when the engagement gave a right to take free of charge.

When the Act of 1865 refers to a river or stream belonging to Government, the right intended is the right not to the bed but to the paramount control. It is the right of administration.

Three propositions were established by *Robert Fischer* v. *Secretary of State* (19):—

1. Riparian owners cannot recover from Government without proof of damage.

2. The rights of Government are higher than those of private owners.

3. The rights of Government are irrespective of the right to the bed.

Whenever Government controls the distribution, the stream (tank, etc.,) "belongs to" Government.

Since the decision under appeal there have been two further cases on this very point:—*Secretary of State* v. *Kannepalli Janakiramayya* (20), on appeal from the judgment reported as *Secretary of State* v. *Kannepalli Janakiramayya* (21) and *Secretary of State* v. *Maharaja of Bobbili* (22).

[LORD PARMOOR.—The Act of 1905 recognises ownership of flowing water in private hands as well as in those of Government. It may give Government a right subject to other existing rights of private individuals.]

Flowing water in a natural stream may conceivably be granted by Government to a private person: *Fitzhardinge (Lord)* v. *Purcell* (23).

But in India, except by grant from Government, there can be no such ownership in private persons

[LORD PARKER.—If the right to use the water depends upon ownership, there is no reason why it should not pass under the grants.]

I put it on the ground of prerogative right. In India it is the duty of Government to control the distribution of water.

[LORD BUCKMASTER.—There is no authority on the construction of section 2 of Act III of 1905, but if it does not vest the property in flowing water in the Government, what does it mean?]

I submit it is conclusive.

[LORD PARKER.—If Government's right were a matter of ownership, it could pass by the grant—if of prerogative, it could not: your position may be better if it were not a matter of ownership.]

If on the proper construction of the Act the ownership of the flowing water in a river is confined to cases where Government owns the bed, then on the evidence three out of the four channels in question took off from points where the river was on Government land.

As to the alleged engagement by which the *zemindars* are said to be protected, it is material to consider the original frame of Act VII of 1865. Originally, the cess was charged on *ryots* although they were entitled to water. By the revenue system of Madras,

(19) 2 Ind. Cas. 325; 32 M. 141 at p. 160; 5 M. L. T. 149; 19 M. L. J. 131.

(20) 30 Ind. Cas. 609; 29 M. L. J. 389; 2 L. W. 763; 18 M. L. T. 277; (1915) M. W. N. 671.

(21) 18 Ind. 770; 37 M. 322; 13 M. L. T. 235; 24 M L. J. 365; (1913) M. W. N. 225.

(22) 32 Ind. Cas. 279; 30 M. L. J. 163; 19 M. L. T. 6; 3 L. W. 119; (1915) M. W. N. 1025.

(23) (1908) 2 Ch. 139; 77 L. J. Ch. 529; 99 L. T. 154; 72 J. P. 276; 24 T. L. R. 564.

the tax is imposed on the user of the water, whether that user is of right or not, unless the land falls within the second proviso to section 1: Baden Powell's Land Tenures, Volume III.

It follows that the engagement of Government with the *zemindars*, which exempts them from liability to pay cess, must be an engagement to give water free of tax The *peishcush* being fixed, the *zemindars* were in the same position for all time as *ryots* are for the period between settlements. The measure of their user must be the same. My submission is that Government have to supply free so much and no more water as was supplied at the time of the Permanent Settlement. The *peishcush* fixed at the Permanent Settlement represented the assessment due for only one crop: it does not exempt the *zemindar* from water rate in respect of the second crop.

[LORD PARKER.—If the tax was fixed on the produce of one crop, then any new crop that came in after the Permanent Settlement would not be assessable. If your construction of Act VII of 1865 would make it violate the Permanent Settlement, that is a very strong reason for adopting another construction.]

In *Secretary of State* v. *Perumal Pillai* (13) the claim of Government to levy water rate in respect of a second crop was disallowed only because the water came from the *zemindar's* own tank: the judgment recognised, however, that the cess would be payable if the water were shown to belong to Government: *Secretary of State* v. *Perumal Pillai* (13). In the present case the water was supplied from a Government source.

[LORD BUCKMASTER.—The Permanent Settlement is for the object of ensuring the best possible use of the land.]

Yes, in a limited sense.

[LORD BUCKMASTER.—I should say in an unlimited sense; that is what it was for. First you find all sorts of things exempted, *e. g*, professional income: then you get the man encouraged to increase cultivation and promise that his profit shall not by any means be taken away. Now you seek to tax the means by which he improves the property.]

[SIR WALTER PHILLIMORE.—Do you say they are taking more water?]

Yes, there are concurrent findings of fact.

[LORD BUCKMASTER.—The findings are that there is more irrigation, not that more water is taken. The two are totally different. Your case is that he is using the water for a more extended object: it does not in any way depend on the volume of water.]

There was more land irrigated, and more water used for irrigation. The question is what irrigation they had, not what was the volume of water flowing through the channels.

Even allowing that there was an implied engagement in the *sanads* that the *zemindars* should have water for further cultivation, there was no such engagement that they should have it free of charge. There is no express exemption from future taxation.

[LORD BUCKMASTER.—According to you this land has never been exempt from taxation, but Government have not thought fit to levy the tax.]

There is no evidence that the *peishcush*, at the settlement of the Northern Sircars in 1803, was fixed so as to include future extensions of cultivation. It was fixed on the produce, and was a share of the produce. (Reference was made to the Fifth Report, page 6 and to the Instructions to Collectors No. 17 in Appendix 18 to that Report).

The *onus* is on a person claiming under a *sanad* to show that any land is included in it, and he has to show that the land has been assessed. Canals were never assessed. The permanent land tax did not include free of charge any water that was not being delivered at the time of the Permanent Settlement. The tax was calculated on so much wet land and so much dry—possibly on so much land with second crop.

The *sanad* certainly does not include the bed of the river and probably does not include the channels. The *onus* is on the other side to show that it does: *Jagadindra Nath Roy* v. *Secretary of State* (24).

The *zemindar* had no title prior to the Permanent Settlement: and it was only those lands which were revenue bearing at the time of the settlement which were confirmed to him: there was no conveyance.

(24) 30 I. A. 44 at p. 52; 7 C. W. N. 193; 30 C. 291; 5 Bom. L. R. 1; 8 Sar. P. C. J. 412 (P. C.).

[LORD BUCKMASTER.—The whole point of the Permanent Settlement was that the *zemindar* might improve his land and increase cultivation without paying more. To make dry land wet may be equivalent to taking in fresh land.]

The water cess does not come under the head of land tax at all. I admit that for current wet land it would be double taxation to put on the cess, but it is not so with land hitherto dry.

[LORD BUCKMASTER.—But the potentialities of the dry may have been taken into account. There was to be no increase in the fixed *jama*, whatever change or improvement took place. You do not tax the water, you tax irrigation by the water, therefore, you tax the land.]

[Mr. *Upjohn*.—The tax is in terms levied on the land.]

It is a perfectly new form of taxation. The land tax is assessed on the produce: it was taken on the produce of each year. The water rate is distinct.

In so far as the *inam* lands are concerned, appellants sue as *inamdars*, not as *zemindars*. *Inam* lands were excluded from the Permanent Settlement: they are outside the *zemindari*. The Government or previous Sovereign had parted with the *inam* lands, and their only interest was that they were owners of the quit rents. A channel within an *inam* grant will not belong to the *inamdar* unless specially granted: *Ambalavana Pandira Sannathi* v. *Secretary of State* (11).

[LORD BUCKMASTER. - The Judges there say the channels were not granted but the wells were: I cannot see it myself. Possibly it may be that an *inam* grant leaves Government the reversion, and in the case of *zemindari* nothing is left.]

If a river belonging to Government only means so much of the river of which Government owns the bed, I am still within sub-section (*a*) of section 1 of Act VII of 1865 as to three of the channels, which all take off where Government owns the river bed. The case of the Mobagam channel is different. In England the law is that half of the bed of the river passes by a grant of the riparian land: *Non constat* that this is so in India.

[Mr. *Upjohn* referred to the pleadings. This point is not open to them, no issue was raised and it is a question of fact.]

It depends on the presumption that half the bed belongs to the riparian owner: that is a question of law. It has never been laid down that such a presumption applies in India. In the case of big rivers grave doubts as to its application were expressed by Lord Hobhouse in *Ramalakshmamma* v. *Collector of Godavari* (25) and the subject is discussed at length in *Srinath Roy* v. *Dinabandhu Sen* (26), where Lord Sumner doubted whether English Law was applicable to rivers generally. I submit that it does not apply and that it is not proved against me that the bed of the river does not belong to Government even where the Mobagam channel breaks off.

Sir *Richards*, *K. C.*, followed.—The Government gave a user limited in extent. The Settlement of the Northern Sircars is described in Baden Powell's Land Systems, Volume III, pages 6,7,17, 128. The purchasers of *haveli* lands were not in the position of the Bengal *zemindars*. In Southern Madras there were no *zemindars*, and the attempt to create them failed. Hence the *ryotwari* system was introduced, under which the individual *ryots* were settled with. The settlement with the *zemindars* in the Northern Sircars was on the same principle. The *sanads* given to them were not a grant of full water rights (Reference was made to the Standing Orders of the Board of Revenue, 1913, Volume 1.)

The evidence shows that appellants have used more water than they did in the past. There are concurrent findings to this effect. Further, the matter is one as to which they have special knowledge, and the burden of proof is on them: Indian Evidence Act (I of 1872), section 106.

As to the *inamdars*, the rights of the actual cultivators were not affected by the Permanent Settlement with the *zemindars*, Regulation IV of 1822. If, therefore, the *inamdars* rely upon any "engagement", it must

(25) 26 I. A. 107 at pp. 111, 112; 22 M. 464; 1 Bom. L. R. 696; 3 C. W. N. 777; 7 Sar. P. C. J. 534; 8 Ind. Dec. N. S.) 332 (P. C.).

(26) 25 Ind. Cas. 467; 41 I. A. 221; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 901; 42 C. 489 (P. C.).

be an engagement made not at the Permanent Settlement, but at that of 1888.

Mr. *Upjohn*, *K. C.*, replied.

JUDGMENT.

LORD PARKER OF WADDINGTON.—These are consolidated appeals from a decree of the High Court of Madras, dated the 9th September 1910, and made in three actions, in each of which Kandukuri Maha Lakshmamma (who has since died and is now represented by the appellants) was plaintiff and the Secretary of State for India was defendant. The plaintiff sought in each action to recover from the Secretary of State monies paid under protest in respect of water cesses which the Government of India had levied under the Madras Act No. VII of 1865, as amended by the Act No. V of 1900. The point to be determined was the right of the Government to levy these cesses. The cess the subject-matter of the first action was levied in respect of water used for the second crop on *zeraiti* lands, part of the estates of Urlam and Devadi, of which the plaintiff was owner. Devadi was originally part of Urlam, and is hereinafter included in the expression "the Urlam Estate" or "the Urlam *zemindari*". The cess the subject of the second action was levied in respect of water used for (1) the first crop on so much of the irrigated *zeraiti* lands belonging to the Urlam Estate as the Government alleged to be in excess of the area so irrigated at the time of the Permanent Settlement; (2) the first crop on so much of certain *inam* lands situate within the Urlam Estate, and of which the plaintiff was the *inamdar*, as the Government alleged to be in excess of the *mamul* or customary wet at the dates when such *inam* lands were respectively originally granted or subsequently settled; (3) the second crop on the whole of such *inam* lands. The cess the subject of the third action was levied in respect of water used both on *zeraiti* and *inam* lands for all the purposes above mentioned with respect to the cess the subject of the second action. It may be mentioned that the plaintiff succeeded in the High Court on the issue as to the Government's right to levy a cess in respect of water used for the second crop on all the *inam* lands except those situate in the village of Venkatapuram. The Government has not appealed to His Majesty in Council. It would seem, therefore, that the questions their Lordships have to decide are the following: *First*: Is the Government entitled under the Act to levy a cess for water used for the second crop on *zeraiti* lands parcel of the Urlam Estate? *Second*: The same question as to *inam* lands in the village of Venkatapuram. *Third*: Is the Government entitled under the Act to levy a cess for water used for the first crop on so much of the *zeraiti* lands parcel of the Urlam Estate as may be in excess of the area of such lands irrigated at the time of the Permanent Settlement? *Fourth*: Is the Government entitled under the Act to levy a cess for water used for the first crop on so much of the *inam* lands within the Urlam Estate as is in excess of the area of such lands irrigated at the respective dates when these *inam* lands were originally granted or subsequently settled? In order to answer these questions their Lordships must, in the first instance, examine the provisions of the Act itself.

The Act is intituled "An Act to enable the Government to levy a separate cess for the use of water supplied for irrigation purposes in certain cases." It recites that in several districts of the Madras Presidency large expenditure out of Government funds has been and is still being incurred in the construction and improvement of works of irrigation and drainage to the great advantage of the country and of proprietors and tenants of land, and that it is right and proper that a fit return should in all cases alike be made to Government on account of the increased profits derivable from lands irrigated by such works. By section 1 of the Act as amended by the Madras Act No. V of 1900, it is provided (*inter alia*) that whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to or constructed by Government, it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for such water, and the Government may prescribe the rules under which, and the rates at which, such water cess as aforesaid shall be levied, and alter and amend the same from time to time. Then follow two provisos, the first for the

protection of *zemindars*, *inamdars*, or any other description of landholder not holding under *ryotwari* settlement; and the second, for the protection of landholders under *ryotwari* settlement. Under the first proviso, where a *zemindar*, *inamdar*, or other landholder not holding under *ryotwari* settlement is, by virtue of engagements with the Government, entitled to irrigation free of separate charge, no cess under the Act is to be imposed for water supplied to the extent of this right and no more. Under the second proviso, no cess is to be levied under the Act in respect of land held under *ryotwari* settlement which is classified and assessed as wet, unless the same be irrigated by using, without authority, water from any source hereinbefore mentioned and such source is different from, or in addition to, that which has been assigned by the Revenue Authorities or adjudged by a competent Civil Court as the source of irrigation of such land.

It cannot be denied that, with regard to the true meaning and construction of this Act, various difficulties arise. In the first place, it might have been expected from the recitals that the cess which the Government is authorised to levy would have been confined to a cess in the case of land irrigated from works constructed or improved by Government and would have been in some way proportional to the extra profits derivable by reason of such irrigation. But this does not seem to be the effect of the first section. The amount of the cess is discretionary and, as a matter of fact, it is levied on the basis of the area irrigated, irrespective of actual or possible profits. Moreover, it appears to be leviable whether the Government has or has not spent money in constructing or improving the source from which the water is supplied. If, for example, a riparian owner irrigates his land with water derived from a river or stream of which it can be truly said that it is a river or stream belonging to the Government, a cess would appear to be leviable even though the Government had never spent a single rupee in improving the source of supply. If, in order to avoid this result, reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner.

In the next place, it is by no means easy to say what is meant by a river or stream "belonging to the Government." The same expression in an Act of the United Kingdom would probably connote a Government ownership of the bed or the banks of the river; but it is quite possible that the law of the Madras Presidency recognises some proprietary right on the part of Government in the water flowing in rivers and streams. The law of the Madras Presidency as to rivers and streams certainly differs in some respects from English Law, *Robert Fischer* v. *Secretary of State* (19). Further, the Madras Act No. III of 1905 appears to enact that (*inter alia*) all standing and flowing water, not the property of private individuals, is the property of Government, but subject to the natural and easement rights of other landholders. If this section be relied on, it is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation, is taking water from a stream belonging to the Government within the meaning of the Cess Act? If he is, the natural and prescriptive rights of riparian owners are seriously diminished by the Act and, where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*.

Lastly, it is by no means easy to decide as to the class of cases which the first proviso is intended to meet. Their Lordships cannot accept the contention that the proviso applies only where there is an express contract that the supply to which the person claiming the protection of the proviso is entitled shall be free from anything in the nature of a future tax. It is enough, in their Lordships' opinion, that the person relying on the proviso shall show an engagement between the Government and himself or his predecessors-in-title by virtue of which he is, in fact, entitled to water for irrigation (1) from the source from which he is actually irrigating his lands; (2) to the amount

of water actually used for such irrigation; and (3) without being subject to a "separate charge" for such irrigation. But there is a difficulty in arriving at what is the meaning of the expression "free of separate charge" A provision that the person relying on the proviso must prove that he is already being charged for the supply would be intelligible, for in that case by the imposition of a cess, he would be charged twice for the same thing. But this is not what he has to prove. Indeed, he has to prove the contrary. He must prove either that he is not charged already for the supply, or that the charge, if any, is not a "separate charge."

Their Lordships think that the real object of the proviso may be found in the following considerations: The cess under the Act is leviable on the land which is irrigated. It is, therefore, in the nature of a land tax, and by section 2 is recoverable in the same manner as arrears of land revenue. Now the Permanent Land Settlement in the Madras Presidency (as in the Presidency of Bengal) proceeded on the footing that, whatever may have been the interest of the *zemindars* and other landholders prior to the British occupation, the Government would grant to them and their heirs "a permanent property in their land for all time to come, and would fix for ever a moderate assessment of public revenue on such lands the amount of which should never be liable to be increased under any circumstances." (See section 1 of Madras Regulation XXV of 1802.) The Government, therefore, came under an obligation not to raise the *jama* or, as it is sometimes called, the *peishcush*, fixed at the Permanent Settlement in respect of the lands then granted. Under these circumstances the Government could not impose a cess for the use of water the right to use which was appurtenant to the land in respect of which the *jama* was payable without in fact, if not in name, increasing the amount of such *jama*, and thus committing a breach of the obligation undertaken at the time of the Permanent Settlement. If the right to use the water was paid for separately the case would be different. The existence of a separate charge would show that no payment for the use of the water was included in the *jama* and the imposition of a water cess, though it might increase the separate charge, would not increase the *jama*. Its imposition would not be a breach of the Government's obligation.

That the object of the first proviso was to safeguard the obligation not to increase the *jama* is borne out by a consideration of the second proviso. The incidents of *ryotwari* tenure are governed by custom, and include a right to receive from the owner of the soil (whether the Government or a private individual) a supply of water sufficient for the irrigation of the *mamul* wet lands comprised in each holding. The owner of the soil is, on his part, entitled to his customary share in the actual produce. It has, however, long been the practice on Government estates to make periodical settlements with the *ryots* whereby the Government's share in the produce is commuted for a fixed annual payment, in assessing which the wet lands are separately classified. The annual payment is incapable of increase during the period for which the settlement is made. It is paid (*inter alia*) for the *ryot's* right to water for irrigating his *mamul* wet lands, and would be increased if a new cess were imposed for this supply. The second proviso seems to be intended to provide against this result.

Their Lordships, therefore, conclude that whether or not there are other possible cases which the first proviso was intended to meet, it at least covers the case of engagements with the Government arising out of the Permanent Settlement. If by virtue of such settlement a *zemindar* is entitled to take and use water from any such source of supply as mentioned in the Cess Act, and this right is part of or appurtenant to the property in respect of which he pays a single *jama* or *peishcush*, no cess can be levied under the Act in respect of the water which he is so entitled to take and use.

The appellants claim the benefit of the first proviso, relying mainly on the engagement with the Government constituted by the Permanent Settlement of the Urlam Estate, but as to the *inam* lands in some degree also on engagements arising out of the *inam* grants or subsequent *inam* settlements. Obviously if their claim be well founded the appeal must succeed on this ground alone, and it will be unnecessary for their Lordships to

deal with the other questions which have been argued. Their Lordships, therefore, propose to consider in the first instance whether, and to what extent, the appellants are within the first proviso. That they are to some extent within the proviso was admitted in the Courts below, and was not really contested before their Lordships' Board. The respondent's contention was really this. The appellants, he said, may well be entitled without separate charge to certain water rights under the Permanent Settlement or in respect to *inam* lands under the *inam* grants or subsequent *inam* settlements, but those rights must in all cases be limited by the *mamul* prevailing when the particular settlement or grant relied on was made. The *mamul* did not extend to a second crop on any of the *zeraiti* lands in the Urlam Estate or to the *inam* lands in the village of Venkatapuram, nor did it extend to any wet land which was not *mamul* wet at the date of the settlement or grant on which reliance is placed. The Government has not charged cess for any water taken or used in accordance with the *mamul*. If they have done so they will refund the amount so charged; but they claim the right to charge cess for water taken in excess of the *mamul*, whether for the second crop on *mamul* wet land or for any crop on land in excess of the *mamul* wet. This contention depends for its validity on the true effect of the particular settlement or grant upon which reliance is placed, and the true effect of such settlement or grant depends upon its terms taken in connection with the circumstances existing when it was made. Their Lordships will first consider the effect of the Permanent Settlement of the *zemindari* or estate of Urlam. They will postpone for the present all questions as to the *inam*.

The Urlam Estate had no separate existence prior to the Permanent Settlement. Till then it was part of a larger district consisting of (1) *haveli* lands and (2) land belonging to a religious community of *Brahmins* known as the *agraharam*, such last mentioned lands being held under *inam* grants. This district was bounded in part by the River Vamsadhara, and some time prior to the Permanent Settlement extensive works had been carried out for the purpose of supplying the district with water from the river. These works included four main channels known as Jalmour, Polaki, Lukulam and Mobagam. The first three appear to have been cut by one Ramaradhanulu, a member of the *agraharam*, who was also a renter under Government of the whole or the greater portion of the *haveli* lands within the district. The origin of the Mobagam channel is lost in obscurity. Each channel derived its water by means of weirs and sluices from the river Vamsadhara, and the water was distributed throughout the district by means of branch channels and subsidiary channels ending in many instances in village tanks or reservoirs. The prosperity of the district depended to a great extent on the supply of water thus obtained.

In 1802 the Government proceeded to carve out of this district four estates or *zemindaris*, subsequently known as Jalmour, Nagarakatakam, Urlam and Polaki, and to assess the permanent land revenue or *jama* to be paid for each estate. Having assessed the permanent *jama* the Government in July 1803 caused these four estates or *zemindaris* to be put up for public auction. At the auction all four estates were sold. It appears that in the advertisement announcing the sale particular attention was called to the fact that the village tanks or reservoirs had been repaired or improved for the benefit of purchasers, and particular stress laid on the benefit which the country would derive from the improvement of the properties offered for sale. In due course after the sale each purchaser obtained a *sanad*, but none of these *sanads* is now forthcoming. The corresponding *kabuliyat* in the case of the Urlam Estate is, however, in evidence. It refers to the Urlam *sanad*, the terms of which must have corresponded in all material particulars with those of the *kabuliyat*. Their Lordships see no reason to suppose that the other *sanads* were not framed on the same lines.

The Urlam *kabuliyat* does not mention any water rights. It does not even refer to the existence of main or branch or subsidiary channels or of the tanks or reservoirs in the several villages. It mentions the advantages likely to accrue to the *zemindar* and his people by the public revenue being put on a permanent foundation, and it refers to the *jama* payable for the *zemindari* as a permanent annual

tax, of which no increase can be ever made, whatever changes or improvements the interests or pleasure of the *zemindar* may lead him to introduce in his *zemindari*. It contains also an agreement by the *zemindar* to enter into engagements with his *ryots* in manner provided by section 14 of the Madras Regulation XXV of 1802, and to encourage such *ryots* to improve and extend the cultivation of the land. Subject to his observing the conditions of the *kabuliyat*, the *zemindar* is authorised to hold the *zemindari* in perpetuity for himself and his heirs.

Their Lordships regret that they have not been supplied with a map or plan showing the boundaries of the four *zemindaris*, the subject of the auction sale, their position with regard to each other and the extent to which the four main channels with their numerous branches or subsidiary channels lay within the boundaries of each estate. It appears, however, to be common ground that the four *zemindaris* together comprised all the *haveli* lands within the district, including those contiguous to the river Vamsadhara, together with the head sluices of the four channels, and, if the principles of English Law governing the grant of land bounded by a stream or river be applicable in the Madras Presidency, they comprised also the river bed *usque ad medium filum* and the weirs by which water was diverted from the river into these main channels.

Three of the four *zemindaris*, namely, Jalmour, Nagarakatakam and Urlam were sold in 1809-10 in order to raise arrears of land revenue. Two of them, namely, Jalmour and Nagarakatakam were bought by the Government, and thenceforward became Government land subject to *ryotwari* tenure. The third, Urlam, was bought at the same time by the plaintiffs' predecessor-in-title. The sluice gates of the Mobagam channel were admittedly in the Urlam *zemindari*. The sluice gates of the Polaki channel were originally in Urlam, but appear to have been removed about 1824 to the Government village of Parlam, which would thus seem to have been within Jalmour or Nagarakatakam, for the Government did not acquire the Polaki *zemindari* till 1850. The sluice gates of the Jalmour channel were admittedly in the Jalmour *zemindari*; those of Lukulam are now admittedly on Government lands, but it is impossible to determine on the evidence in which *zemindari* they were comprised at the Permanent Settlement. They were certainly not comprised in Urlam.

The Jalmour main channel does not pass through any village in the Urlam *zemindari*. From it, however, some 130 acres of Urlam derive their water supply either by regulators in the main or branch channels, or by subsidiary channels through the estate, ending in one instance at least in a village tank. The Jalmour channel also now irrigates some 6,000 acres of Government land and some 1,100 acres belonging to the *agraharam*. The Lukulam, Polaki and Mobagam main channels all pass for considerable distances through the Urlam *zemindari*. Lukulam now supplies water to some 1,000 acres of Urlam land, some 500 acres of Government land, and some 2,500 acres belonging to the *agraharam*, Polaki now supplies water to some 500 acres of Urlam, some 10,000 acres belonging to the Government, and some 1,500 acres belonging to the *agraharam*. Mobagam now supplies water to some 3,500 acres of Urlam and some 500 acres of Government land. No doubt most, if not all, of the Government lands now supplied with water from these four channels were originally comprised within the *zemindaris* of Jalmour, Polaki, or Nagarakatakam. Moreover, though the area of land under each of the four channels may have increased since the Permanent Settlement, the general purpose which each channel served at the date of the Permanent Settlement can, in their Lordships' opinion, be properly inferred from the facts as they now exist.

Before proceeding further, it may be useful to summarise the conclusions arrived at by the Subordinate Judge and the High Court respectively. The Subordinate Judge held that the Vamsadhara river was not a river belonging to the Government within the meaning of the Cess Act. He held, however, that the head sluices of the Jalmour, Polaki and Lukulam channels, with the initial portions of the channels themselves, belonged to Government, and must be looked on as the source of supply of water for the lower portions of the whole system of irrigation

dependent upon them, and it was immaterial that parts of these main channels, or the branch or subsidiary channels leading therefrom, or the tanks or reservoirs in which some of the subsidiary channels ended, belonged to the owners of the villages through which they passed or in which they were situate. He held further that the rights of the owners of these villages were confined to using the water in the main branch and subsidiary channels and tanks or reservoirs for the purposes for which the same had been used at the time of the Permanent Settlement. They could not, therefore, without the consent of the owner of the head sluices and the initial portions of the channels, lawfully use the water for a second crop unless second crops were within the then existing *mamul*, or extend wet cultivation beyond the area of the then *mamul* wet. On the other hand, he held, with regard to the Mobagam channel, that its head sluice and its initial portion did not belong to the Government but to the owner of the Urlam *zemindari*, who had an unlimited right to the use of the water in the channel subject to the *mamul* rights of others. These findings appear to involve the following propositions:—

First.—The effect of the Permanent Settlement was to vest the head sluices of the four channels, the channels themselves, and all branch and subsidiary channels and tanks or reservoirs in the *zemindars*, through or within whose *zemindaris* the same respectively passed or were situate.

Second.—The *zemindars* who thus acquired the head sluices, with the initial portions of the channels themselves, became entitled to take into the channels from the river as much water as they chose, subject only to the rights of lower riparian owners on the river, and as little as they chose, subject to the obligation to send down each channel sufficient water to satisfy the *mamul* rights of persons entitled to water from the system supplied by each channel.

Third.—If the owner of the head sluice or the initial portion of any channel sent down more water than would satisfy those *mamul* rights, the proprietors of other parts of the channels or of the branch or subsidiary channels or the tanks or reservoirs were not entitled to make use of the surplus, or if they were entitled to make use of the surplus, were not so entitled by virtue of the *sanads* granted at the Permanent Settlement.

Fourth.—It was merely the accident of the Government having subsequently purchased the *zemindaris* of Jalmour, Polaki and Nagarakatakam which in any way brought their powers under the Cess Act into play. Had those *zemindaris* still existed in private ownership, each of these channels would have been precisely in the same position as the Mobagam channel.

The High Court disagreed with the Subordinate Judge on the question as to the Vamsadhara river. They held that it belonged to Government, and must, for the purposes of the Cess Act, be looked on as the source of supply of the whole system of irrigation dependent on the four main channels. They agreed with the Subordinate Judge that the effect of the Permanent Settlement was to vest the head sluices, the four channels, and all branch and subsidiary channels, and the tanks or reservoirs, in the *zemindars*, through or within whose *zemindaris* the same respectively passed or were situate. They held that the water rights of the owners of the head sluices and the initial portions of the channels, as of all other persons entitled to water from the system supplied by these channels, were confined to the *mamuls* at the date of the Permanent Settlement, and that the Government could, therefore, charge water cess in respect of water used in excess of the then *mamul*, either for a second crop where no second crop had been customary, or for irrigating land in excess of the original wet area. These findings appear to involve the propositions: (1) that the easements of taking water from the Vamsadhara conferred by the *sanads* were confined to taking sufficient water to satisfy the *mamul* rights, and (2) that, if without objection from the Government, more water were taken, the proprietors of the various portions of the main channels, branch or subsidiary channels or of the tanks or reservoirs were not entitled to make use of the surplus, or if they were entitled to make use of the surplus, were not so entitled by virtue of the *sanads* granted at the Permanent Settlement.

In their Lordships' opinion, there can

be no real doubt that the Courts below were right in holding that the effect of the Permanent Settlement was to vest the channels, with their head sluices and branch and subsidiary channels, and the tanks, or reservoirs, in the *zemindars* through or within whose *zemindaris* the same respectively passed or were situate. As pointed out by the High Court, this would be in full accordance with the policy enunciated in the well-known fifth report. Indeed, no reason can be suggested for implying in favour of the Government any reservation of this system of irrigation. It is not shown that the Government were retaining any of the land thereby irrigated. They were parting, or had parted, with (if not the whole), at any rate, the greater portion of such land. If they retained any, it would be enough to imply a reservation of water rights in respect of the land so retained. It is true that, on this footing, disputes were not unlikely to arise (indeed, they did arise) as to the relative rights of the several *zemindars* or their *ryots*. But the probability of such disputes is not sufficient reason for implying a reservation. They could not concern the Government, and were capable of settlement by arrangement, or through the medium of the Courts. On the other hand, reservation of the main channels and other works would certainly have raised questions as to the Government's liability for repairs or otherwise. But, while agreeing in this respect with the conclusion of the Courts below, their Lordships do not think that such Courts attached sufficient importance to that conclusion. In their opinion, the fact that the ownership of the channels and works passed under the several *sanads* is of the utmost importance in ascertaining the water rights thereby conferred.

Assuming that the Vamsadhara River belongs to Government, the case may be looked on in this way. The owner of a river and of contiguous land through which passes a channel constructed for irrigation purposes and supplied with water from the river, grants the contiguous land together with the channel. Obviously some right or easement of taking water from the river must pass. The only question is as to the measure of this right. In their Lordships' opinion, the right must be measured by the physical conditions, such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel, and not by the purposes for which the grantor or his tenants have been accustomed to use water from the channel prior to the date of the grant. The water in the channels may never have been used by the grantor or his tenants at all; but it would be absurd to hold on that account that no easement or right of taking water from the river passed by the grant. The case would have been very different if the contiguous land had been granted reserving the channel. In that case if any easement passed, it would be an easement in respect of which the channel and not the river was the servient tenement, and if no water had been or were being used by the grantor or his tenants, it may well be that there were no existing physical conditions by which the principle of continuous and apparent easements could be brought into play. In such a case no easement or right to use water from the channels would pass under the grant.

It follows from these considerations that the *zemindar* in whose estate the head sluices and initial portions of each of the four channels in question were situate obtained under his *sanad* the right to take water from the Vamsadhara (assuming it belonged to the Government), limited only by the size of the channel and the nature of the sluices and works by which water was diverted from the river into the channel. The Government could not complain if the amount of water taken were within this limit. After the water was lawfully taken into the channel, the Government had nothing further to do with the matter; the subsequent distribution and use depended on the rights *inter se* of the *zemindar* and others entitled to take water from the system supplied by the channels in question.

It may be observed that the Government could not grant the *zemindaris* otherwise than subject to the customary rights of the *ryot* cultivators and the rights of all holders of *inams* under existing *inam* grants. The *zemindars* in whose favour the *sanads* were made took, therefore, subject to those

rights. In other respects the rights *inter se* of the several *zemindars* under their *sanads* would, in their Lordships' opinion, be analogous to the rights of upper and lower riparian owners on a natural stream. Each would be entitled to have the full supply taken into the main channels. Each would be entitled to make use of the water in any channel through his own lands or in tanks or reservoirs in villages within his estate, but in exercising this right each would be bound to have due regard to the existence not only of the rights of the *ryots* and *inamdars* in the lower portions of the irrigation system, but to the rights similar to his own of the other *zemindars* in whose estates any portion of the system was situate. Further, each *zemindar* might be entitled to take water from a channel or branch channel in the estate of the others if at the time of the settlement and on the principle of continuous and apparent easements circumstances pointed to the intention to create such a right. It follows that each *zemindar* could (subject as aforesaid) legally authorise his *ryots* to use water to the use of which he was himself entitled for the growth of second crops on their holdings or for increasing the area of land within their boundary for the time being under wet cultivation. In taking advantage of such authorisation the *ryots* would be entitled to rely on the engagements with the Government arising out of the Permanent Settlement to the same extent as the *zemindar* himself. All these *zemindari* rights would, moreover, arise under and be dependent upon engagements with the Government embodied in the *sanads* granted at the Permanent Settlement, and payment for them would be included in the *jamas*.

Assuming, on the other hand, that the River Vamsadhara does not belong to the Government, the right of taking water from it into each of the four channels could not depend on any easement created by virtue of the Permanent Settlement. It would depend in part upon the natural rights of riparian owners and in part on prescriptive rights existing at the date of, and passing under, the *sanads*, or acquired since the *sanads* were granted. Moreover, in the case of these prescriptive rights, it would be the lands of the lower riparian owners and not the river itself which would constitute the servient tenement. The Government would have even less interest in the amount of water taken into the channels than if the river belonged to it and constituted the servient tenement. The rights *inter se*, however, of the grantees of the four *zemindaris* would be, for all practical purposes, the same. The rights of the proprietor of Urlam under his *sanad* could not in any case be affected by the subsequent purchase by the Government of the three other *zemindaris*.

The construction of the *sanads* in the way their Lordships construe them has the advantage of being in ample accord with the known policy and objects of the Permanent Settlement. The uncertainty as to the ownership of the soil and the liability to arbitrary and varying assessments to the land revenue had (to use the language of Regulation XXV of 1802) "obstructed the progress of agriculture, population, and wealth." The policy was to encourage such progress, and accordingly we find in the *kabuliyat* of the Urlam Estate (which is admittedly a common form *kabuliyat*) an undertaking by the *zemindar* to encourage his *ryots* to extend and improve the cultivation of the land. The same point is emphasised in the advertisement for the sale at which the *zemindaris* were sold. In this part of India, water is essential for improvements in agriculture. These facts coupled with the actual grant to the *zemindars* of the channels, branch channels, and works, constituting an extensive system of irrigation which must have been created for the benefit of the lands comprising the several *zemindari* estates, manifest, in their Lordships' opinion, an intention that the water therefrom should be used to the utmost extent for the purpose of improving the estates, and increasing the population or wealth of the district. On the construction of the *sanads* adopted by the High Court, water could not properly be used for any such purpose. Indeed, though the channels, branch channels, and works constituting the irrigation system were included in the grants, no right to use such system passed at all. For the grants were necessarily subject to the existing rights of the *ryots* and *inamdars*, and according to the decision of the High Court it was only in respect of these rights that any water could be used from the system.

Both the Courts below appear to have

arrived at the conclusion that the water rights which passed by the *sanads* were limited by the *mamuls* at the Permanent Settlement for the following reasons: The assessment of the permanent *jama* in the case of each *zemindari* was arrived at on the basis of the then actual produce of the land. An annual value was placed on this produce, and a proportion of the annual value was fixed as the *jama* or *peishcush*. The water actually used in growing the annual produce thus comes within the assessment. The use of the water for other purposes was not assessed at all, and, therefore, does not pass by the *sanad* grants. In their Lordships' opinion, this process of reasoning is fallacious on two grounds: It does not follow that the assessors in fixing the proportion of the annual value which should constitute the *jama* or *peishcush* did not take into full account the possibility of improving the cultivation of the lands, the subject of the grant, by means of the irrigation system comprised therein. The *jama* or *peishcush* was in the case of each of the *zemindaris* in question admittedly high. Again, it does not follow that all which is not brought into account in fixing the *jama* or *peishcush* is excluded from the grant. On this footing many things of great importance to the enjoyment of a *zemindari* would not pass by a *zemindari* grant, for example, waste land, farm buildings, tanks, or, in the present case, irrigation channels. As pointed out in the recent case of *Ranjit Singh* v. *Kali Dasi Debi* (27), the property taken into account in arriving at the *jama* is by no means necessarily the same as the property upon which the *jama* is chargeable, and all that is chargeable with the *jama* or *peishcush* is included in the grant.

There being no evidence whatever that more water is being taken from the river than would be justified by the *sanads*—construed, as in their Lordships' opinion, they ought to be construed—it follows that the appellants must succeed in respect of the *zeraiti* lands on which the cesses in dispute were levied. It remains to consider the case of the *inam* lands.

(27) 40 Ind. Cas. 981; 2 P. L. W. 1; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 25 C. L. J. 493; 19 Bom. L. R. 462; (1917) M. W. N. 453; 6 L. W. 101.

Inams are Government grants subject to quit-rents, and in some instances to services. They were not assessed for land revenue at the date of the Permanent Settlement. The *inams* now in question existed at the date of the Permanent Settlement, and the quit-rents payable in respect thereof were by the Urlam *sanad* made part of the assets of the Urlam Estate. They are constantly referred to in the *inam* records as within the Urlam Estate. They were sometimes since acquired by the plaintiff or her predecessors. The appellants, therefore, are the *inamdars* as well as the persons entitled to the quit-rents under the Urlam *sanad*. The water for the use of which the cesses in dispute were levied was used by the *zemindar* on *inams* which belonged to him and were within his *zemindari*. The question is whether the *zemindar* was entitled so to use this water. In their Lordships' opinion, the answer to this question must be in the affirmative. The only persons who could complain of such use would be persons whose rights to take water from the irrigation system in question were interfered with by such user, and there appears to be no such person. If the cess were levied on the plaintiff as Urlam *zemindar*, he brings himself within the first proviso by virtue of the engagement with Government arising out of his *zemindari sanad*. If the cess were levied upon him as *inamdar*, he can rely on the same engagement to the same extent as could a tenant of *zemindari* land authorised by the *zemindar* to use the water. It is, therefore, in their Lordships' opinion, unnecessary to consider the terms of the original *inam* grants or the effect of any subsequent *inam* settlement. The appellants must succeed also as to the *inam* lands.

The result is that the appeal succeeds, both as to *zeraiti* and *inam* lands. The right thing will be to discharge the orders of the Subordinate Judge and the High Court, and to declare that the rights of the *zemindar* of Urlam under the Urlam *sanad* to irrigate the Urlam Estate (including *inams* therein) from the Jalmour, Polaki, Lukulam, and Mobagam channels or their branches, is not limited by any *mamul*, and that such *zemindar*, not being subject to any separate charge for such irrigation, is within the protection of the first proviso to section 1 of the Cess Act No. VII of 1865, as amended by the Act No. V of 1900. The appellants will be en-

titled to recover the amounts paid under protest with interest at 6 per cent. per annum and their costs here and in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitor for the Appellants:—Mr. *Douglas Grant.*

Solicitor for the Respondent:—The Solicitor, India Office.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 34 OF 1916.

April 2, 1917.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

MIDNAPORE ZEMINDARI CO., LTD.—PLAINTIFFS—APPELLANTS

versus

PANDAY SARDAR AND OTHERS—DEFENDANTS - RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Landlord and tenant—Encroachment—Possession, presumption as to - Burden of proof—Proof of proprietary title—Limitation—Trespassers, tacking of period of possession of—Ghatwal *in Manbhum, appointment of—Approval of Government, whether necessary.*

In a suit for possession where Article 142 of the Limitation Act applies, plaintiff must prove his possession within 12 years. If the plaintiff proves his proprietary title, there is a presumption that his possession continued till within 12 years of the suit. It is for the defendant to rebut that presumption. [p. 114, col. 2.]

Whereas a tenant is bound to treat an encroachment as held by him under his landlord, there is no corresponding liability upon the landlord to treat the land on which his tenant encroaches as a part of his tenancy. The landlord is entitled to re-enter upon the land encroached upon unless his right is otherwise barred. If the tenant has been in possession of the encroachment for more than 12 years, then it is to be seen whether he has been in such possession adversely to the landlord and whether such adverse possession is in respect of a limited or absolute interest. [p. 115, col. 2.]

Two independent trespassers cannot tack the period of their possession as against the owner. [p. 115, col. 2.]

In the District of Manbhum the *ghatwal* tenure is not heritable. The *ghatwal's* appointment depends upon the will and pleasure of the Government. [p. 116, col. 1.]

Appeal from a decision of the District Judge, Manbhum, Sambalpur, dated the 23rd August 1915, reversing that of the Munsif, Purulia, dated the 4th November 1915.

Messrs. *P. R. Dass, S. N. Palit, Sitaram Bangli* and *Amarendra Prasad*, for the Appellants.

Mr. *Sivnarain Bose*, for the Respondents.

JUDGMENT.

MULLICK, J.—This is a case of encroachment by a tenure-holder upon the land of his landlord.

The title of the plaintiff proprietor is not denied but the ground on which the learned District Judge has dismissed the plaintiff's suit is that the plaintiff has not proved possession of the lands within 12 years of the institution of the suit and that, therefore, under Article 142 of Schedule I of the Limitation Act of 1908 his right to sue has been extinguished.

Tue first point argued before us by Mr. Dass on behalf of the plaintiff-appellant is that the land being jungle and title having been proved, the possession of the plaintiff can be presumed.

This is not altogether a correct proposition, because I do not think the presumption under section 114, Evidence Act, is limited to jungle land. The character of the land cannot affect the principle of law which requires that the plaintiff should give affirmative evidence of possession within what may be called the statutory period in every suit under Article 142. It is true that here the plaintiff took upon himself the burden of proving acts of ownership within 12 years. The learned District Judge has disbelieved his evidence on this point and that finding is final.

But this finding does not dispose of the case. The plaintiff having proved his proprietary title in 1884 is entitled to claim the presumption that he had possession and that his possession continued till within 12 years of the suit. It was for the defendants to rebut the presumption and this they have failed to do. The case is covered by *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (1), *Radha Gobind Roy Saheb* v. *Inglis* (2) and *Secretary of State* v. *Chelikani Rama Rao* (3). Indeed the judgment of their Lordships in the last mentioned case is so apposite and instructive that I think it necessary to reproduce some portions of it. There

(1) 9 C. 744; 12 C. L. R. 257; 4 Ind. Dec. (N. S.) 1145.

(2) 7 C. L. R. 364; 3 Suth. P. C. J. 809 (P. C.).

(3) 35 Ind. Cas. 902; 25 C. L. J. 69; 43 I. A. 197; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 39 M. 617; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007 (P. C.).

the Crown claimed an island in the sea, but the High Court of Madras dismissed the suit on the ground that the Crown had failed to prove possession, *i.e.*, a subsisting title within the period of limitation which in this case was 60 years. Their Lordships of the Privy Council disagreed with this view and observed as follows: "Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say: 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all legal conditions.' And later their Lordships go on to say: "It would be contrary to all legal principles thus to permit the squatter to put the owner to the fundamental right to a negative proof upon the point of possession."

Therefore, even if Article 142 applies to the present case the plaintiff must succeed, because the defendant has failed to rebut the presumption of the plaintiff's possession and to prove that the plaintiff's title was extinguished by adverse possession. The learned District Judge is in error in saying that the length and nature of the defendant's possession is wholly immaterial.

But in my opinion the suit is not one under Article 142. The plaint, though inartistically drawn, is in essence one for declaration of title and confirmation of possession, the cause of action starting from the 30th of July 1910, when the survey authorities dismissed the plaintiff's objection to an entry declaring the land to be the first defendant's *ghatwali* tenure. The plaintiff's case is that from that date the possession of his tenant became adverse and that Article 144 applies.

The defendants rely upon *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (4) and on *Raktoo Singh* v. *Sudhram Ahir* (5), but it is not clear from the reports whether in these cases the tenants did not in fact assert adverse possession for twelve years. In my opinion the law is clearly stated by Jenkins, C. J., in *Gopal Krishna* v. *Lakhiram* (6), where it is laid down that whereas a tenant is bound to treat that which is an encroachment as held by him under his landlord, there is no corresponding liability upon the landlord to treat the land on which his tenant encroaches as a part of his tenancy, that the landlord is entitled to re-enter unless his right is otherwise barred, that if the tenant has been in possession of the encroached portion for more than twelve years, then it is to be seen whether he has been in such possession adversely to the landlord and whether such adverse possession was in respect of a limited or absolute interest. In my opinion the learned Chief Justice held that Article 144 is applicable.

It follows, therefore, that if the first defendant has been in adverse possession of the absolute interest for twelve years then the plaintiff's rights have been completely extinguished, but if the adverse possession was in respect of a limited interest, as tenant, then the landlord would be entitled only to claim rent.

The Subordinate Judge who heard the evidence found that the defendant had failed by the only witness called by him to prove any adverse possession and that finding has not been displaced by the learned District Judge. Therefore, the plaintiff is entitled to re-enter.

Moreover in this particular case the question whether the possession of the present defendant and that of his father before him was adverse is not really material. For the encroachment was begun by the first defendant's father, who was the former *ghatwal* and who died in 1908. As the defendant was appointed by the Crown as *ghatwal* after an interval of some months, the defendant was an independent trespasser in relation to his father and cannot add his possession to that of the latter, and it follows that the plaintiff's title has not been extinguish-

(4) 2 C. L. J. 125.

(5) 8 C. L. J. 557.

(6) 14 Ind. Cas. 212; 16 C. W. N. 634.

ed by any possession that this defendant may have exercised.

It has been contended by the learned Vakil for the respondent that a *ghatwali* tenure is hereditary and that the defendant became entitled to possession immediately upon the death of his father. This, however, is not the view taken by this Court in *Midnapur Zamindar Co., Ltd.* v. *Ajambar Singh Mura* (7), where it was held that in the District of Manbhum from which this suit comes, *ghatwali* tenures are not hereditary and that the *ghatwal's* appointment depends upon the will and pleasure of the Crown.

Therefore, if as I hold to be the case, Article 144 applies, the suit is clearly within time; and I have already shown that even if Article 142 applies it is also within time.

It appears that a small portion of the jungle has been reclaimed and that defendants Nos. 4 to 9 are *khuntkattidars* in possession of some plots and defendants Nos. 10 to 12 are occupancy *r iyats* in respect of others. The landlord is not entitled to and does not ask for *khas* possession but only claims rent from the persons entered in the survey records as tenants in occupation of these plots. In respect of the other lands the landlord is entitled to *khas* possession against the defendants.

The decree of the District Judge, therefore, will be set aside and the Subordinate Judge's decree will be restored, except as to costs.

With regard to costs we have to observe that at one stage of this appeal before us the landlord undertook to settle the lands with the first defendant, but after taking an adjournment he has resiled from that promise. He has, moreover, so imperfectly instructed the learned gentlemen appearing for him that they have been unable to tell us the respective areas of the jungle and cultivated lands in suit. The plaintiff will pay costs of the defendant in all the Courts.

ATKINSON, J.—I concur.

Appeal accepted.

(7) 36 Ind. Cas. 963; 1 P. L. J. 601.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 121 OF 1915.

April 23, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

AMBAR ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

LUTFE ALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence—Record of Rights, entry in draft of—Admission of irrelevant evidence, whether vitiates judgment—Admission of co-party, whether admissible against others—Evidence Act (I of 1872), s. 32 (3)—Recital in document of conveyance as to boundaries of land sold, admissibility of—Document admitted in evidence without objection—Appeal, objection in.

An entry in the draft Record of Rights is not admissible in evidence, as the presumption of correctness applies only to the record when finally published. [p. 117, col. 2; p. 118, col. 1.]

The mere fact that inadmissible evidence was admitted by a Court does not vitiate its judgment, if the Court arrived at its conclusions on the merits independently of the evidence improperly admitted. [p. 118, col. 1.]

Where several persons are jointly interested in the subject-matter of a suit, an admission by any one of these persons is admissible not only against himself, but also against the others, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and is made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered [p. 118, col. 2.]

The admission of one co-plaintiff or co-defendant is not admissible against another merely by virtue of his position as a co-party in litigation but because of some privity of title or of obligation which justifies the use of the admission of one against the other. [p. 118, col. 2; p. 119, col. 1.]

A statement by the vendors in a deed of sale, that the land conveyed is limited by certain boundaries, is an admission that their proprietary interest does not extend over any land outside the boundaries mentioned, and as such is admissible against strangers to the transaction under section 32 (3) of the Indian Evidence Act. [p. 119, cols. 1 & 2.]

Where a document which was not receivable in evidence against some of the defendants was admitted in evidence in the Primary Court without any objection, and it was apparent that had objection been taken the plaintiffs could have taken some steps to introduce the document as evidence against all the defendants:

Held, that the Appellate Court was not in error in using the document as evidence against those defendants against whom it was improperly received, inspite of objection raised to its admissibility in that Court. [p. 120, col. 1.]

Appeal against the decree of Mr. Justice Newbould, dated the 30th June 1915, in Appeal from Appellate Decree No. 1525 of 1914.

AMBAR ALI *v.* LUTFE ALI.

FACTS will appear from the following judgment of Mr. Justice Newbould:—

"The plaintiffs have obtained a decree establishing their title to a certain tank and for ejectment of the defendants. The points taken in this appeal are that in coming to the decision in favour of the plaintiffs, the lower Appellate Court has relied on certain documents which are inadmissible in evidence, and *secondly*, that the suit is bad for non-joinder.

"The documents to which objection is taken are deeds of sale executed by defendants Nos. 4 and 5 in which the tank is described as Laskar Gazi's tank. The fact that the tank is socalled is an important point in this case. The plaintiffs based their claim on the allegation that they are descendants of this Laskar Gazi.

"It is contended that though the statements in these deeds of sale are admissible against defendants Nos. 4 and 5, they are no evidence against defendants Nos. 1, 2 and 3. As, however, all these defendants claim under the same title, evidence admitted against one may be taken into consideration as against them all. The second document to which an objection is taken is an uncorrected copy of the Record of Rights. This, I agree, should not be treated as evidence. As the entry in which the tank was described as Laskar Gazi's tank was subsequently expunged, it seems unlikely that much weight was given to this piece of evidence. There is other evidence on the record which is sufficient to support this finding.

"As regards non-joinder, it appears from the judgment of the Munsif that in the first Court no objection was taken that any person other than the Maharaja was a necessary party to the suit. I see no reason for holding that the plaintiffs are not entitled to the decree obtained by them. I, therefore, dismiss the appeal with costs."

Babu *Birendra Chandra Das*, for the Appellants.

Babu *Ram Dyal De*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal, under clause 15 of the Letters Patent from the judgment of Mr. Justice Newbould in a suit for recovery of possession of a tank on declaration of title. The plaintiffs alleged that the disputed tank had been excavated by their ancestor Laskar Gazi Mozumdar about a century ago, that it had always been known by his name and had been owned and possessed by members of the family from generation to generation and that they themselves were in peaceful possession when they were forcibly dispossessed by the defendants in 1911. They accordingly instituted this suit on the 27th November 1911 for recovery of possession on establishment of title. The defendants contended that the tank was not known by the name of Laskar Gazi and was never held by his descendants. They asserted that it had been abandoned by the previous owners, had become silted up and had ultimately been settled with them on the 24th October 1911 by the proprietor of the estate, the Maharaja of Tipperah. The Trial Court held that the plaintiffs had failed to establish their alleged ancestral right to the tank and that their claim, even if well founded, was barred by limitation. Upon appeal, the Subordinate Judge reversed the decision as upon the question of title as also of possession he found in favour of the plaintiff. On second appeal to this Court, the decree of the Subordinate Judge was assailed on the ground that he had based his conclusion upon two pieces of evidence not admissible in law. Mr. Justice Newbould overruled this contention and dismissed the appeal. The objections urged before him have been reiterated in this Court.

One of the substantial points in controversy between the parties was, whether, as alleged by the plaintiffs, the tank was known by the name of Laskar Gazi. Besides oral testimony, the plaintiffs relied upon two pieces of documentary evidence, namely, *first*, an entry in a draft Record of Rights and *secondly*, a recital contained in a conveyance of an adjoining piece of land executed by the fourth and fifth defendants in favour of a stranger on the 7th October 1894. The Subordinate Judge has relied upon both these documents, and the question for consideration is, whether they are admissible in evidence against the defendants.

As regards the entry in the draft Record of Rights to the effect that the tank is known by the name of Laskar Gazi, there can be no room for controversy that it was not admissible in evidence. *Gulab Kuer* v. *Ram Ratan Pandey* (1). No reference should, consequently, have

(1) 27 Ind. Cas. 229; 18 C. W. N. 806.

been made to the entry in the draft record, specially as it transpires that the entry was omitted from the record finally published on the 7th December 1898, to which alone the presumption of correctness applies. The circumstance mentioned, however, does not vitiate the judgment of the Subordinate Judge, because it is plain that the lower Appellate Court arrived at the conclusion on the merits independently of the evidence improperly admitted [*Womes Chunder Chatterjee* v. *Chundee Churn Roy Chowdhry* (2)]. As regards the recital in the conveyance, the position is somewhat different and requires closer examination. On the 27th August 1894, the fourth and fifth defendants acquired title by purchase to a parcel of land on the border of the tank now in dispute. On the 7th October 1894 they sold that land to one Hamidunnessa Bibi. In the schedule of boundaries in that conveyance they stated the land then transferred was bounded by the tank of Laskar Gazi. The conveyance was produced at the trial by the scribe, was duly proved and was admitted in evidence without objection. The Subordinate Judge has used the recital as valuable evidence, not only against the fourth and fifth defendants who executed the conveyance, but also against the other defendants who were not parties to that transaction. There can be no room for controversy that the admission is good evidence against the makers of the conveyance, but the question arises whether it is admissible against the other defendants. These defendants, it will be observed, are jointly interested in the land now in dispute, along with the fourth and fifth defendants; in fact, they claim under a common lease from the landlord and have, on basis thereof, taken a common defence to defeat the suit of the plaintiffs. But these defendants were not joint owners of the property covered by the conveyance of 1894, and were strangers to that transaction. They consequently press the view that an admission made by the owners of that property cannot be received in evidence against them merely because since the date of the alleged admission they have jointly acquired the property now in suit. In our opinion. this contention is well founded, as section 18 of the Indian Evidence Act is of no assistance to the plaintiffs. The principle which regulates the reception in evidence of an admission by one defendant as against another defendant, was formulated in the cases of *Kowsulliah Sundari Dasi* v. *Mukta Sundari Dasi* (3), *Chalho Singh* v. *Jharo Singh* (4) and *Meajan Matbor* v. *Alimuddin Mea* (5). The principle is that when several persons are jointly interested in the subject-matter of the suit, an admission of any one of these persons is receivable not only against himself but also against the others whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The requirement of the identity in legal interest between the joint owners is of fundamental importance. *Blenkinsopp* v. *Blenkinsopp* (6). On this principle, the position has been maintained that the joint ownership must have existed at the time the statement was made. Thus, in *Blakeney* v. *Fergusson* (7), it was ruled that the admissions of one person cannot be admitted in evidence against another on the ground of a joint interest in the subject, unless the interest is a subsisting one at the time of the admission, and where the interest is derivative, it must have been acquired after the admission was made. To the same effect is the rule enunciated in *Kilburn* v. *Ritchie* (8), that the declaration of one of two joint owners is admissible against the other, if made at a time after the joint interest came into existence; if made before they became joint owners, the declaration is not admissible. The distinction is based upon obvious good sense. The admission of one co-plaintiff or co-defendant is not receivable against another, merely by virtue of his position as a co-party in the litigation; if the rule were otherwise, it would in practice permit a

(2) 7 C. 293; 3 Ind. Dec. (N. S.) 737.

(3) 11 C. 588; 10 Ind. Jur. 66; 5 Ind. Dec. (N. S.) 1151.

(4) 18 Ind. Cas. 61; 39 C. 995.

(5) 34 Ind. Cas. 571; 44 C. 130; 20 C. W. N. 1217; 25 C. L. J. 42.

(6) (1846) 10 Beav. 143; 2 Phillips 607; 16 L. J. Ch. 88; 11 Jur. 721; 50 E. R. 537; 78 R. R. 216.

(7) 14 Ark. 641.

(8) 2 California 145; 56 Am. Dec. 326.

litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party, and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other; it must be, because of some privity of title or of obligation [see the observations of Erskine, L. C., in *Morse* v. *Royal* (9) and Ellenborough, C. J., in *R.* v. *Hardwick* (10)]. The vital point for consideration accordingly is whether there is such privity of obligation or title between two persons as to justify the use of the admission of one against the other; and plainly this must be determined by reference to the relation between the parties at the time the admission is made. As a matter of probative value, the admission of a person (such as one joint owner) having precisely the same interest at stake as another (his co-owner) will, in general, be likely to be equally worthy of consideration; there being an identity of legal liability, the two persons may be deemed one so far as affects the propriety of discrediting one by the statement of the other. This reason, however, ceases to be applicable where, as in the case before us, the admission was made at a time when the parties had no community of interest. The inference is thus irresistible that the recital in the conveyance of 1894, though admissible against the fourth and fifth defendants, is not admissible as admissions against the other defendants under section 18 of the Indian Evidence Act.

The question next arises whether the recital in the conveyance is admissible against these defendants on any other principle. The decisions in *Abdullah* v. *Kunja Behari Lal* (11), *Imrit Chamar* v. *Sirdhar Panday* (12) and *Natwar* v. *Alkhu* (13) show that the statement is admissible under section 32 (3) of the Indian Evidence Act. The statement by the vendors, that their land then conveyed was limited by certain boundaries, was an admission that their proprietary interest did not extend over any land outside the boundaries mentioned. The entire statement was, consequently, admissible [*Higham* v. *Ridgway* (14), *Connor* v. *Fitzgerald* (15), *Percival* v. *Nanson* (16), *Smith* v. *Blakey* (17), *Reg.* v. *Exeter Guardians* (18)]. The principle is that the statement is accepted, not merely as to the specific fact against the interest, but also as to every fact contained in the same statement. Here, however, the plaintiffs have to face an unexpected difficulty. The statement can be made admissible under section 32 (3) only if the conditions mentioned in the introductory words of the section are fulfilled, and those conditions admittedly have not been fulfilled in this case. Consequently, the plaintiffs cannot avail themselves of section 32 (3) and there thus seems at first sight no escape from the position that while the appeal must be dismissed so far as the fourth and fifth defendants are concerned, the case must be remitted for re-consideration at the instance of the other defendants after exclusion of the recital in the conveyance. On careful consideration, however, of all the circumstances of the case another aspect of the matter emerges for examination.

It is plain that if the plaintiffs had cited the fourth and fifth defendants as witnesses, the recital in the conveyance executed by them could have been received in evidence to impeach their credit under section 155 (3) or to corroborate their testimony under section 157. Now in the case before us no objection was taken to the reception of the conveyance in evidence by any of the defendants. If such objection had been taken, it would have been open to the plaintiffs to avoid the difficulty by citing the fourth and fifth defendants as witnesses and by proceeding under section 155 (3) if they repudiated their admissions. It is perfectly true, as pointed out by Sir Richard Couch in *Miller* v. *Babu Madho Das* (19), that an erroneous omission to object to evidence,

(9) (1806) 12 Ves. (Jun.) 355 at p. 361; 33 E. R. 134; 8 R. R. 338.
(10) (1809) 11 East 578 at p. 585; 103 E. R. 1129.
(11) 12 Ind. Cas. 149; 14 C.L.J. 467; 16 C.W.N. 252.
(12) 13 Ind. Cas. 120; 15 C. L. J. 7; 17 C. W .N. 108.
(13) 18 Ind. Cas. 752; 11 A. L. J. 139.
(14) (1808) 10 East 109; 103 E. R. 717; 2 Smith L. C. 301; 10 R. R. 235.
(15) 11 L. R Ir 106.
(16) (1851) 7 Ex. 1; 21 L. J. Ex. 1; 86 R R. 547; 155 E. R. 830.
(17) (1867) 2 Q. B. 326; 8 B. & S. 157; 36 L. J. Q. B. 156; 15 W. R. 492.
(18) (1869) 4 Q. B. 341 at p. 344; 10 B. & S. 433; 38 L. J. M. C. 126; 20 L. T. 693; 17 W. R. 850.
(19) 23 I. A. 106; 19 A. 76; 7 Sar. P. C. J. 73; 9 Ind, Dec. (N. S.) 50

which is irrelevant and consequently inadmissible under any circumstances, does not make it admissible. But it is equally well settled that the Court will not entertain for the first time in appeal an objection that a document, which *per se* is not inadmissible in evidence, has been improperly admitted in evidence. *Girindra Chandra Ganguli* v. *Rajendra Nath Chatterjee* (20), *Priya Nath* v. *Mahendra Kumar* (21). It is plain that the case before us falls within the latter principle. Assume for a moment that we accede to the contention of the appellants other than the fourth and fifth defendants, we shall have to confirm the decree of the Subordinate Judge in favour of the plaintiffs against those defendants, and to set aside his decree as regards the other defendants; we shall then have to remit the case in part to the Subordinate Judge, allow the plaintiffs an opportunity to make the conveyance legally admissible in evidence, and if they fail to do so, to take the chance of success upon the balance of evidence. The plaintiffs will forthwith proceed to cite the fourth and fifth defendants as witnesses and they will be in a position to do so, with reasonable safety, as the claim of these defendants will have been finally negatived by our decree. When these defendants are examined as witnesses the plaintiffs will be free to introduce the conveyance into evidence to corroborate or contradict them as the contingency may require. The Court will then have to re-consider the case upon practically the same evidence as had formed the basis of the decision now under appeal. No useful purpose is likely to be served by the adoption of such a course in a litigation which has already lasted for nearly six years. We are consequently of opinion that in these circumstances the decree of Mr. Justice Newbould should be confirmed and this appeal dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

(20) 1 C. W. N. 530.

(21) 10 Ind. Cas. 376; 14 C. L. J. 578; 16 C. W. N. 317.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 32 OF 1916.

January 12, 1917.

Present:—Sir Donald Johnstone, KT., Chief Judge.

ALLAH DIA—PLAINTIFF—APPELLANT

versus

ALLAH BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 77 (e)—Jurisdiction of Civil and Revenue Courts—Plaint, wording of.

Where there is a question whether a case is one for a Civil or for a Revenue Court, primarily the plaint alone should be considered; but where the plaint is ambiguous, the Court first hearing the case should always point out to the plaintiff where the ambiguity lies and ask him to make his meaning clear. [p. 120, col. 2]

Case referred by the Deputy Commissioner, Karnal, with his No. 198-G, dated the 5th June 1916.

ORDER.—When there is a question whether a case is one for a Civil or for a Revenue Court, primarily the plaint alone should be considered; but here the plaint is ambiguous, and when this is so, the Court first hearing the case should always point out to the plaintiff where the ambiguity lies and ask him to make his meaning clear. Here the plaintiffs said in their plaints—(1) defendants are cultivating as our non-occupancy tenants, (2) they took forcible possession. The contradiction is clear, and, until it is removed, no decision as to jurisdiction is possible. Plaintiffs have now been asked what they meant, and they have chosen to say: When the land re-appeared from under the river we gave it to the defendants for cultivation on agreement to pay *batai*, etc. They have paid no rent, but for 3 years they kept saying they would pay; in the fourth and last year they refused.

It seems to me that the plaintiffs are bound, for the purposes of these cases, by this presentation of their claims, and the cases are triable only by a Revenue Court. Whether such claims can *succeed* in the Revenue Court in *view of the facts*, is another matter with which I am not concerned. Plaintiffs have chosen their path. To call the cases now cases for a Civil Court merely because the plaintiffs have apparently misstated facts, and to have the cases tried as claims by proprietors against

trespassers would be unfair to defendants, who should be called upon only to meet the claims *as made*. Plaintiffs insist that defendants are their tenants by agreement: if they fail in the Revenue Court to prove this, that Court, I imagine, should simply dismiss the suits.

The cases are Revenue cases. Papers returned.

Papers returned.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 68 OF 1916.

January 9, 1917.

Present:—Mr. Lindsay, J. C.

TUNG NATH AND ANOTHER—DECREE-HOLDERS—OBJECTORS—APPELLANTS

versus

KANDHAIYA LAL—AUCTION-PURCHASER—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 104 (2), *O. XXI, r.* 92, *order passed under—Appeal, second, whether lies.*

An order passed under Order XXI, rule 92, Civil Procedure Code, is not open to second appeal. [p. 121, col. 2.]

Mahmud Ali v. *Gobind Prasad*, 28 Ind. Cas. 184; 18 O. C. 1, explained.

Appeal against the order of the District Judge, Gonda, dated the 31st August 1916, confirming that of the Munsif, Gonda, dated the 19th July 1916.

Babu *Surendro Nath Roy*, for the Appellants.

Babu *Jiban Krishna Banerji*, for the Respondent.

JUDGMENT.—A preliminary objection is raised on behalf of the respondent that no second appeal lies in this case and after hearing the argument of the learned Counsel I am satisfied that this contention must prevail. The way in which this case has come before this Court is as follows. The appellants here are decree-holders, and in execution of the decree obtained by them against the judgment-debtor certain property was sold and purchased by one Kandhaiya Lal. The decree-holders made an application to the execution Court under Order XXI, rule 90, asking for the sale to be set aside on the ground that there had been a material irregularity in the publication and conducting of it. That application was dismissed by the Court of first instance and thereafter the decree-holders went in appeal to the District Judge. The learned District Judge has dismissed their appeal and now it is sought to have the decision of the learned Judge upset here by bringing this second appeal. It is quite clear from the provisions of section 104 of the Code of Civil Procedure and of Order XLIII that this second appeal is incompetent. Under Order XLIII, rule (1) (*j*), an order refusing to set aside the sale is appealable and consequently it is one of the orders which fall within the category indicated by clause (*i*) of section 104, sub-section (1), of the Code of Civil Procedure. It is an order made under rules from which an appeal is expressly allowed by rules. No doubt, therefore, an appeal could lie in the Court of the District Judge. But sub-section (2) of section 104 goes on to say that no appeal shall lie from any order passed in appeal under this section. These words are to my mind conclusive of the matter in dispute and they correspond with the language of the concluding clause of section 588 of the old Code of Civil Procedure. I have no doubt whatever, therefore, that no second appeal lies in this case. It is true as the learned Counsel for the appellants points out that a case similar to the present was decided in *Mahmud Ali* v. *Gobind Prasad* (1), where it was entertained as a miscellaneous appeal. I notice, however, that the question of the competency of the appeal was not raised in that case and was not decided. Now that the matter has been brought definitely before me I must decide against the appellants that no second appeal lies. There remains an argument put forward on behalf of the unsuccessful appellants to the effect that they can ask this Court to interfere in revision. My powers as a Court of revision are limited by the provisions of section 115 of the Code of Civil Procedure. Mr. Roy does not pretend that he could bring a case for revision within clauses (*a*) and (*b*) of section 115. Consequently the only argument he could put forward in this connection was that there had been an illegality

(1) 28 Ind. Cas. 184; 18 O. C. 1.

or material irregularity committed by the Court below in the exercise of its jurisdiction. I am, however, unable to convince myself that this was so. The only way in which Mr. Roy can argue the case to my mind is by saying that the judgment of the lower Appellate Court is a wrong judgment either on law or fact. I do not for a moment suggest that the judgment is erroneous, in either of these respects. But assuming that it is so, it is well established that the Court cannot interfere in revision in order to correct an erroneous judgment either on law or on facts. It appears to me that this case must fail. I dismiss the appeal with costs to the respondent.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 512 TO 522 AND 544 OF 1916.

March 6, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

MOGADASU VENKATADASU AND OTHERS —DEFENDANTS—APPELLANTS

versus

VANKAMAMIDI UDAYANARAYANA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (*I Mad. of* 1908) *ss.* 3 (2) (d) *and* 8, *Exception*—Inam, *grant of—Presumption as to right acquired—Pre-settlements* inams, *presumption as to—Grant with* ashtabogam, *effect of—Ejectment suit—Jurisdiction—Burden of proof*—Kudivaram *right, acquisition of, by relinquishment.*

The presumption, in all cases of grants of *inams*, is that only the *melvaram* was granted as *inam*. [p. 123, col. 1.]

Courts should always start with that presumption, unless the grant-deed expressly confers *kudivaram* rights also. [p. 123, col. 1.]

A grant with *ashtabogam* does not necessarily import the grant of the *kudivaram* also in the same manner that it does not clearly imply the grant of temple and other communal sites. [p. 123, col. 1.]

Pre-settlement *inam* grants must be presumed to be of land revenue only; what the grantor was entitled, in those days, to obtain from the lands as feudal landlord being connoted by the word 'land revenue', though now it would be called *melvaram*. [p. 123, col. 2.]

Where the defendants in a suit for ejectment contest the jurisdiction of the Civil Courts to entertain the suit under section 3 (2) (*d*) of the Madras Estates Land Act, it is for them to prove that the plaintiff was not the owner of the *kudivaram* right at the time of the grant of the *inam* to him. But this is not necessary when, by setting up that the grant was of both *varams*, the plaintiffs admit that they were not the owners of the *kudivaram* at the time of the grant. [p. 124, col. 1.]

It cannot be laid down as a broad proposition of law that the *inamdar* must have the occupancy right when the tenants have no occupancy rights in themselves, though it is open to the Court, from such a state of facts, to infer that, at the time of the grant, the grantee had the *kudivaram* right. *Inamdars* might well be asked to establish that, by transfer or succession etc., they got the *kudivaram* right subsequently, where it is admitted or proved that they had not got the *kudivaram* right at the time of the grant. [p. 124, col. 2.]

Opinion of Miller, J, in *Ponnuswamy Padayachi* v. *Karuppudayan*, 24 Ind. Cas. 217; 26 M. L. J. 285; 1 L. W. 218; 15 M. L. T. 299; 38 M. 843, dissented from.

Per *Spencer, J*—In a suit for ejectment, where plaintiffs rely on the Exception to section 8 of the Estates Land Act for ousting the jurisdiction of the Revenue Courts, the plaint should specifically show by what acts the plaintiff acquired the *kudivaram* interest of his *ryots* and became entitled to both *varams*. [p 125, col. 1.]

Second appeals against the decrees of the Additional Temporary Subordinate Judge's Court, Guntur, in Appeal Suits Nos. 1 to 14 of 1915, preferred against those of the District Munsif, Tenali, in Original Suits Nos. 794, 805, 804, 792, 796, 797, 784, 786, 799, 793, 802, 795 of 1910.

Messrs. *P. Narayanamurthi* and *B. Somayya*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The defendants are the appellants in these second appeals. The plaintiffs are *agraharamdars* who claim a right to eject the defendants (tenants) on the ground that they (the plaintiffs) are the owners of both the *kudivaram* and *melvaram* rights in the lands in the occupation of the defendants. Though the plaint does not definitely set out how the plaintiffs own both the *varams*, it is clear from the 13th paragraph of the District Munsif's judgment that they claimed both *varams* as conferred upon their ancestor Dakshinamurthy Sastrulu by the gift deed, Exhibit A of 1796, executed by the then *zemindar*, who called himself Raja Manyakya Row Bhavanarayana Rao Sir Desa Mukhi Mannevaru Sirkar Mrithujangan. I think, therefore, the only question in this case is whether the plaintiffs obtained both the *varams* under this grant Exhibit A or the *melvaram* alone. If they obtained

the *melvaram* alone, the *kudivaram* not being granted to them and they not having claimed the *kudivaram* as having belonged to them at the time of the grant, the village is *prima facie* an estate under section 3 (2) (*d*) of the Estates Land Act and the Civil Court has no jurisdiction over these suits. The presumption in all cases of grants of *inam* is that only the *melvaram* was granted as such *inam*. I think that Courts should always start with that presumption in these cases, unless the grant deed clearly confers *kudivaram* rights also. In this case, the grant deed, Exhibit A, itself indicates that there were inhabitants residing in the village at the time of the grant and it excludes *savaram* or home farm lands from the gift, and, though it is a grant with all the *ashtabogam*, it has been held in *Parankusa Zatindra Mahadesikaswami* v. *Subramania Pillai* (1) that a grant with *ashtabogam* does not necessarily import the grant of the *kudivaram* also in the same manner that it clearly does not imply the grant of temple and other communal sites. I am, therefore, clear that the plaintiffs' case that the grant of 1796 included the *kudivaram* rights also cannot be supported. In coming to this conclusion, I do not rely upon Exhibit I in respect of which the District Munsif seems to have fallen into two inaccuracies in his judgment, namely, (1) that it must have been prepared about 1786, and (2) that the reference to *seri* in Exhibit I also indicated that there were already tenants occupying these lands. It appears from the Kistna Manual that the Collector Mr. Ram in whose time the Register, Exhibit I, was prepared became such Collector only in 1794, and it further appears that the word "*seri*" might have been used to describe the village in his time owing to its having been attached about the year 1800 or 1801 for recovery of arrears of Government *peshcush* and *cowles* for the *inam* lands were granted to the *inamdars* then. (See Exhibit N series. Also Kistna Manual, page 320).

Mr. Rama Doss then argued that even if the grant was only of the *melvaram*, it was not a grant of "land revenue" and, therefore, the *inam* did not fall within the definition of an estate found in section 3, clause 2, sub-clause (*d*), of the Madras Estates Land Act, because the said sub-clause speaks of a "village of which *the land revenue* alone has been granted in *inam*", and not a village of which *the melvaram alone* has been granted in *inam*. This contention seems to have found favour with both the lower Courts. If it be held that no *inam* village granted *by a zemindar* before the Permanent Settlement would come under clause (*d*) of section 3 (2), the result would be that, as most of the pre-settlement *inams* would come under this head (very few having been granted directly by the Sovereign power under whose nominal suzerainty, the *zemindars* held their estates), almost all such *inam* villages would be excluded from the purview of the Act. I am not at all prepared to accept this contention. *Zemindars* were supposed to have come in as only receivers of land revenue, they considered themselves to possess royal authority and the pre-settlement *inams* granted by them might, therefore, be well considered by the Legislature as merely grants *prima facie* of land revenue. When the *inams* were afterwards confirmed or recognised by the British Government, they were so recognised and confirmed as grants of mere land revenue made by the *zemindars*. It is also significant that in clause (*d*) the *kudivaram* right is referred to in a subsequent portion of the same sentence in contradistinction to "the land revenue alone" mentioned in the first portion, showing that what the grantor was, in those days, entitled to obtain from the lands as *feudal* landlord, was connoted by the word "land revenue", though, now, it would be called "*melvaram*."

Next it was argued that as the jurisdiction of the Civil Courts would be ousted by treating the *inam* village as an estate under section 3 (2) (*d*), it lay upon the defendants to prove that it was an estate. I think that the several cases quoted by Mr. Rama Doss and which are reported as *Indety China* v. *Potu Konchi* (2); *Upadrasta*

(1) 26 Ind. Cas. 117.

(2) 8 Ind. Cas. 365; (1910) M. W. N. 639; 8 M. L. T. 376.

Venkata v. *Devi Sitaramudu* (3), *Srimath Kidambi* v. *Pidipiti Kutumbarayadu* (4) and in *Karri Narasayya* v. *Thavvala Nageswara Rao* (5) proceed only to this extent, that it lay upon the defendants in such cases to prove that the grantee *was not the owner of the kudivaram at the time of the grant.* I do not think that these cases afford any help to the decision of these suits as the plaintiffs do not claim that they were owners of the *kudivaram* interests in these lands at the time of the grant, but set up that the grant itself to them was of both *kudivaram* and *melvaram*, thus admitting that they were not the owners of the *kudivaram* at the time of the grant.

The next contention of Mr. Rama Doss is that it must be presumed that he has acquired the *kudivaram* interest subsequent to the time of the grant somehow, and that under the exception to section 8 of the Madras Estates Land Act, these lands had ceased to be part of the *inam* estate. It has been held in *Upadrasta Venkata* v. *Devi Sitaramudu* (3) that that exception applies only to acquisitions of *kudivaram* by means of transfer, succession or other modes *ejusdem generis* and not by means of relinquishment of his holding by the tenant. Mr. Rama Doss, however, argued that we can presume acquisition even by the former modes on the finding of the lower Courts that nobody else was allowed by the *inamdars* to acquire occupancy rights in these lands and that they have been claiming occupancy rights for several years past. He relied especially upon the cases of *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* (6) and *Ponnuswamy Padayachi* v. *Karuppudayan* (7). As regards the case of *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* (6) Benson and Sundara Aiyar, JJ., expressed the opinion that on the facts found in that case the *agraharamdars* "must be taken to have been entitled to the *kudivaram at the time of the* inam *grant*," and not that they can be presumed to have subsequently acquired it. Thus the *inamdars* preventing their tenants from acquiring *kudivaram* and claiming *kudivaram* in themselves for several years can be used by the lower Courts only to infer that the *agraharamdars* were entitled to *kudivaram* at the time of the grant, but (as I said already) on the pleadings in these cases, the question of the *inamdars* being entitled to the *kudivaram* at the time of the *inam* grant does not arise.

As regards the case of *Ponnuswamy Padayachi* v. *Karuppudayan* (7), the opinion of one alone of the learned Judges (Miller, J.) can be relied on by the plaintiffs as laying down the broad proposition that the *inamdar* must have the occupancy right when the tenants have no occupancy rights in themselves. I must respectfully differ from such a broad proposition. As I said, it is open to the lower Courts to infer from such a state of facts only this, that at the time of the grant the grantees had the *kudivaram* right. But even as regards such a presumption, speaking for myself, I would not draw such an inference from that fact alone if I was the Court of first instance, knowing how *inamdars* and *zemindars* in the northern districts have always tried to deny occupancy rights to their tenants and to prevent their tenants from claiming such rights. *Inamdars* might very well be asked to establish that by transfer or succession, etc., they got the *kudivaram* right subsequently, where it was admitted or proved that they had not got the *kudivaram* right at the time of the grant.

In the result, I am of opinion that the village is an estate under section 3, clause 2 (*d*), and reversing the decision of the lower Appellate Court, I would order the return of the plaints in all these suits for presentation to the proper Revenue Court. The plaintiffs must pay the defendants' costs throughout.

SPENCER, J.—I agree. I desire only to say a few words on the last question, *viz*, whether *agraharamdars* can be regarded as having acquired by relinquishment any *kudivaram* right which they had not at the time of the grant. The first question to be decided here is whether these suits are cognisable by a Civil Court or by a Revenue Court. For the purpose of deciding that

(3) 24 Ind. Cas. 224; 26 M. L. J. 585; 38 M. 891.
(4) 25 Ind. Cas. 891; 27 M. L. J. 233; 39 M. 21.
(5) 31 Ind. Cas. 209.
(6) 20 Ind. Cas. 769; 24 M. L. J. 659; (1913) M. W. N. 782.
(7) 24 Ind. Cas. 217; 26 M. L. J. 285; 1 L. W. 218; 15 M. L. T. 299; 38 M. 843.

point, it is necessary to see whether at the time of the grant, the *inam* was given to a person not owning the *kudivaram*. If the plaintiffs intended to rely on the exception to section 8 of the Madras Estates Land Act for ousting the jurisdiction of the Revenue Court, it was necessary that they should have advanced a specific case to show by what acts they acquired the *kudivaram* interest of their *ryots* and became entitled to both *varams*. But it was not the plaintiffs' case in their plaints that they had a grant only of the *melvaram* and that they subsequently acquired the *kudivaram* right as regards all the lands comprised in these suits. It was their case that they got both the *melvaram* and the *kudivaram* rights under the grant. I, therefore, agree that the Civil Courts had no jurisdiction to entertain these suits and the plaints must be returned for presentation to the Court having jurisdiction.

Plaint returned.

V.R.P.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 1 OF 1917.

February 16, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

THE HON'BLE MAHARAJAH SIR BHAGWATI PRASAD SINGH—PLAINTIFF—APPELLANT

versus

GOVIND DAT AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal, second—Revision—Mortgage of occupancy holding—Declaratory suit by landlord—Landlord, whether entitled to any relief—Civil Procedure Code (Act V of 1908), O. VII, r. 10—Proper Court, presentation to, return of plaint for—Civil Court, jurisdiction of.

Where a second appeal is preferred but does not lie under the law, it can nevertheless be treated as an application for revision. [p. 125, col. 2.]

Where, on an occupancy tenant's mortgaging his holding, the landlord sues him in the Civil Court for possession of his holding by his ejectment and for a declaration that the mortgage is null and void, the Court should not return the plaint for presentation to the proper Court; for, although it is incompetent to grant the possessory relief, it can grant the declaratory relief to the effect that the mortgage is invalid and not binding on the landlord. [p. 126, col. 1.]

Appeal against the order of the District Judge, Gonda, dated the 22nd December 1916, upholding the order of the Subordinate Judge, Gonda, dated the 2nd December 1916.

Mr. *Shahid Husain*, for the Appellant.

Babu *Ram Chandra*, for the Respondents.

JUDGMENT.—Jadunath Pande obtained a decree against the predecessor-in-title of the plaintiff, whereby a heritable but non-transferable right of occupancy in 11 *bighas* 3 *biswas pukhta* of land, then in suit, was decreed in his favour. He was succeeded by his daughter-in-law, *Musammat* Pragdei, who on the 20th July 1915 made a usufructuary mortgage of the said holding in favour of Govind Dat and gave him possession. The plaintiff as the *zemindar* of the village in which the disputed plots are situated sued for possession of the same by the ejectment of the defendants and for a declaration that the mortgage aforesaid was null and void. He also sued for damages.

The Courts below returned the plaint for presentation to the proper Court, holding that *Musammat* Pragdei was a tenant, who could not be ejected by the Civil Court. The plaintiff has filed a second appeal, to which a preliminary objection is taken on behalf of the defendants to the effect that no second appeal lies from an appellate order, upholding an order of the Court of first instance, returning a plaint for presentation to the proper Court under section 104 read with Order XLIII, rule 1, of the Code of Civil Procedure. The learned Counsel, who appears for the plaintiff, concedes that the appeal was filed by mistake and he prays that his appeal may be treated as an application for revision and dealt with accordingly.

I have allowed the appeal accordingly to be treated as an application for revision and on that footing proceeded with the hearing of the case. It is not disputed on behalf of the defendants-opposite parties that *Musammat* Pragdei had no right to make a mortgage of the occupancy holding in favour of Govind Dat. It is also conceded on behalf of the plaintiff-applicant that a suit for ejectment of *Musammat* Pragdei or for damages cannot in the circumstances lie in the Civil Court, for the ejectment of Govind Dat and the

delivery of possession of the property comprised in the mortgage to the plaintiff-applicant would involve *ipso facto* the ejectment of *Musammat* Pragdei, the mortgagor, which cannot, however, be effected except in accordance with the provisions of section 52 of the Oudh Rent Act (XXII of 1886). The only relief which the Civil Court is competent to grant in a case of this kind is a declaration that the mortgage effected by the occupancy tenant is legally invalid and not binding on the plaintiff-applicant.

The application is accordingly allowed in so far that the plaintiff-applicant will be granted a declaration that the mortgage effected by *Musammat* Pragdei in favour of Govind Dat on the 20th July 1915 is null and void and is inoperative as against the plaintiff-applicant. The rest of the claim is dismissed. As the plaintiff-applicant came into Court claiming in the main reliefs to which he was not entitled and did not seek his remedy in this Court in the proper form, I direct the parties to bear their own costs throughout.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 90 OF 1916.

March 6, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

Munshi HAR DAYAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHYAM NARAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Family settlement—Deceased's estate, bona fide *dispute as to—Compromise between daughter and first cousin, whether binding on reversioners*

Where a *bona fide* dispute between the daughter and the first cousin of a deceased Hindu regarding his estate resulted in a compromise:

Held, that the compromise was as much binding on the reversioners as on the persons who were parties to it, inasmuch as it was made in the interest of the estate which might otherwise have suffered the expense of a long litigation. [p. 127, col. 2.]

Khuni Lal v. *Gobind Krishna Narain*, 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.), followed.

Appeal from the decree of the District Judge, Hardoi, dated the 23rd December 1915, reversing the order of the Munsif, Shahabad, dated the 29th June 915.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *St. George Jackson* and Babu *Prabhat Chandra Gupta*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for possession of certain property and mesne profits. The property aforesaid belonged to Sheo Ghulam, who died on the 21st April 1895, leaving a widow, *Musammat* Radha Kuar, and a daughter, *Musammat* Rup Rani. On the death of Sheo Ghulam, mutation of names was effected in favour of his widow, *Musammat* Radha Kuar, but on death of the latter, which took place on the 21st February 1899, a dispute arose between *Musammat* Rup Rani on the one hand and Har Dayal, the first cousin of Sheo Ghulam, on the other. Both of them made applications to the Revenue Court, claiming that mutation should be effected in respect of the property left by *Musammat* Radha Kuar in their respective names. On the lst May 1899 an agreement was arrived at between them, by which Har Dayal agreed to allow the name of *Musammat* Rup Rani to be entered in respect of a two-thirds share and *Musammat* Rup Rani in turn agreed to allow the name of Har Dayal to be entered in respect of the remainder. No written agreement was apparently executed or is at all events forthcoming. The record of the mutation file has been destroyed, and the only written evidence available consists of the copy of a statement, then made by Har Dayal, agreeing to the entry of the name of *Musammat* Rup Rani in respect of a two-thirds share of the estate left by her deceased father, Sheo Ghulam, and that of Sheo Prasad, the general agent of *Musammat* Rup Rani, expressing his assent to the same. This copy had been obtained before the mutation file had been destroyed.

The manner in which the above settlement was arrived at is indicated by the evidence adduced by the parties, and the finding of the lower Appellate Court as also of the Court of first instance on this point is that on the death of *Musammat* Radha Kuar

there was a dispute between *Musammat* Rup Rani and Har Dayal, each of whom claimed the entire property and had applied for mutation in respect of the whole, that friends intervened, used various arguments and were successful, and that the parties eventually agreed to be satisfied with mutation of two-thirds in favour of *Musammat* Rup Rani and one-third in favour of Har Dayal. There is also a finding that mutation was obtained in the same proportion in regard to each of the three villages to which the present suit relates.

Musammat Rup Rani died on the 19th December 1911, leaving a husband, Ram Narayan, and four sons, one of whom died, leaving a son surviving him. The plaintiffs are the descendants of *Musammat* Rup Rani and sued in this case for the recovery of the one-third share of the property of Sheo Ghulam, which *Musammat* Rup Rani allowed to be entered in the name of Har Dayal. Their allegation was that *Musammat* Rup Rani had no right to enter into a compromise which could have the effect of binding their interest. Har Dayal had meanwhile transferred the property to his wife, *Musammat* Rukmin, from whom it passed to her daughters, *Musammat* Ram Pyari and *Musammat* Kesar, who are defendants to the present suit. *Musammat* Kesar has transferred a portion of the same to Anant Bihari, who is also a defendant. The defence of Har Dayal and his wife and daughters was that *Musammat* Rup Rani was excluded by custom, that the entire property had devolved on the death of *Musammat* Radha Kuar on Har Dayal, and that *Musammat* Rup Rani was allowed a two-thirds share in consideration of her poverty for her maintenance for her lifetime. The defence of Anant Bihari was that the settlement arrived at between *Musammat* Rup Rani and Har Dayal in the course of the mutation proceedings, which were instituted on the death of *Musammat* Radha Kuar by each of them, was final and binding on the plaintiffs.

The Court of first instance dismissed the claim, holding that the plaintiffs could not resile from the family arrangement into which *Musammat* Rup Rani had entered with Har Dayal, though no custom excluding daughters from inheritance was established. The lower Appellate Court, however, decreed the claim on the ground that no such family arrangement was set up by Har Dayal and his wife and daughters in their defence.

It appears from their written statement that a different construction was then attempted to be put by Har Dayal and his wife and daughters on the settlement made in the mutation proceedings. The making of the settlement was not, however, disputed, and all that was asserted was that its effect was to give *Musammat* Rup Rani no more than a two-thirds share of the property of her father for her maintenance for her lifetime. The reason suggested for that concession in the written statement has no relevancy in determining whether it was binding or not, because the defendants aforesaid were clearly trying to put on it a construction different from what the Courts below have found it actually bore. The plea raised by Anant Bihari was in any event clear and definite, and on the finding arrived at by the Courts below, it was sufficient for the dismissal of the plaintiffs' claim. In the *wajib-ul-araiz* of several of the villages to which the Courts below have referred, there is a reference to the existence of a custom of the exclusion of daughters among the Srivastava Dusre Kayasthas, to which caste Sheo Ghulam belonged, and though the Courts below found that the entries in those *wajib-ul-araiz* were insufficient to establish a family custom applicable to the family of Sheo Ghluam, there can be no question that there was a *bona fide* dispute which but for the settlement arrived at in the mutation proceedings may have involved the parties in an expensive litigation. A settlement of that kind arrived at with the holder of a life-estate is, as pointed out by their Lordships of the Privy Council in *Khunni Lal* v. *Gobind Krishna Narain* (1), as much binding on the reversioners as on the persons who are parties to it, because the settlement is made in the interest of the estate which might otherwise have suffered the expense of a long litigation; and the assumption which underlies such a settlement is that there was an antecedent but doubtful title of

(1) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.).

some kind which each party was claiming and that the agreement acknowledged and defined what that title was. It is unnecessary in the circumstances to consider the question of the value of the evidence afforded by the *wajib-ul-araiz* as to the existence of the custom set up by the defendants-appellants.

The appeal is, therefore, allowed and the plaintiffs' claim dismissed with costs throughout.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 13 OF 1916.

March 19, 1917.

Present:—Mr. Justice Roe and
Mr. Justice Jwala Prasad.

GIRIDHARI NAIK—DECREE-HOLDER—APPELLANT

versus

KASHI TINDI—RESPONDENT.

Orissa Tenancy Act (II B. C. of 1913), s. 31—Occupancy rights, transferability of—Sale in execution of mortgage decree—Procedure.

The decisions with regard to the transferability of occupancy rights in Bengal are not applicable to the transfer of such rights in Orissa.

In Orissa occupancy rights are transferable without the landlord's consent, unless it is shown to the satisfaction of the Collector that the landlord has good reason for his objection.

The correct procedure in cases in which it is desired to put up for sale an occupancy right in execution of a decree on a mortgage is to allow the sale to go through. The purchaser should then under section 31 of the Orissa Tenancy Act, 1913, apply to the landlord for registration of the transfer. If the landlord accepts the fee authorised, the sale will hold good. If he refuses to do so, the purchaser should apply to the Collector and the Collector will decide whether there is good and sufficient reason for the refusal of the landlord's consent.

Appeal from a decision of the District Judge, Cuttack, dated the 22nd May 1916, confirming a decision of the Munsif, 1st Court, Puri, dated the 15th February 1916.

Mr. *Biswanath Sinha*, for the Appellant.

JUDGMENT.—The facts of this case are that on 6th December 1915 the decree-holder-appellant made an application to put up for sale in execution of a decree upon a mortgage certain occupancy rights. In these occupancy rights the respondent now before us had made a private purchase. Besides being a private purchaser he is also a co-sharer landlord. He was made a party to the suit in the mortgage in his capacity of a private purchaser. He put in no written statement and allowed the mortgage suit to be decreed. When an attempt was made by the decree-holder to enforce the mortgage by sale of the mortgaged property, he took the objection that occupancy rights are not transferable without the consent of the landlord and that he, as a co-sharer landlord, would in no circumstances give his consent. The proposed sale was bound to be infructuous. Upon this ground the Court of first instance declined to proceed with the sale. This decision was upheld by the learned Judge in appeal.

Much case-law from Bengal has been quoted both in the judgment of the lower Appellate Court and in argument before us. In our view the decisions with regard to the transferability of occupancy rights in Bengal are not applicable to the transfer of such rights in Orissa. The application for sale was made on the 6th December 1915. The Orissa Tenancy Act came into force in 1913. It is fallacious to say that occupancy rights are not transferable in Orissa without the consent of the landlord. They are transferable without the landlord's consent, unless it can be shown to the satisfaction of the Collector that the landlord has good reason for his objection. The correct procedure in cases in which it is desired to put up for sale an occupancy right in execution of a decree in a mortgage is to allow the sale to go through. The purchaser will then under section 31 of the Orissa Tenancy Act apply to the landlord for registration of the transfer. If the landlord accepts the fee authorised, the sale will hold good. If he refuses to do so, the auction-purchaser will go to the Collector and the Collector will decide whether there is good and sufficient reason for the refusal of the landlord's consent. We set aside the decisions of the Courts below and direct that execution proceed in terms of the decree made.

Appeal allowed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 558 OF 1917.

June 12, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Richardson.

CHARLES HENRY BROOKE—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Calcutta Police Act (*IV B. C. of* 1866), *s.* 66, *sub-s.* (4) (a), *offence under—Calcutta Municipal Act*(*III B. C. of* 1899), *s.* 559, *sub-s.* (18), *Bye-laws framed under, breach of.*

The petitioner, a building contractor who had undertaken the erection of a masonry or brick building and who, under a license of the Calcutta Corporation under bye-law 2 of the bye-laws framed under the provisions of section 559, sub-section (18) of the Calcutta Municipal Act, was authorised to make an enclosure on a portion of the public street for the purpose of depositing mortar, bricks, etc, thereon, on condition of his fencing off the portion to be occupied with a temporary fence, unloaded and deposited during the course of his building operations bricks on a foot-path—part of a public street—without fencing it off by a temporary fence, and thereby caused obstruction in the foot-path for about six hours:

Held, that the petitioner had not only committed a breach of the bye-law under which his license was granted, but had also committed an offence under the provisions of section 66, sub-section (4) (*a*), of the Calcutta Police Act. [p. 130, col. 1.]

Quære.—Whether sub-section (4) (*a*), introduced into section 66 of the Calcutta Police Act by the Amending Act III B. C. of 1910, overrides or repeals the provisions regarding the regulation of obstructions to be found in the Calcutta Municipal Act. [p. 130, col. 1.]

Babu *Manmatha Nath Mukherjee*, for the Petitioner.

Mr. *Camell* (Deputy Legal Remembrancer, Bengal), for the Crown.

JUDGMENT.—In this case the petitioner has been convicted under the Calcutta Police Act (Bengal Act IV of 1866), section 66, sub-section 4 (*a*), and sentenced to pay a fine of Rs. 20.

It appears that the petitioner is a building contractor and has undertaken the erection of a masonry or brick building at premises No. 40/1 on the Strand Road. In the course of his building operations on the 20th of March last the petitionér unloaded and deposited some 2,000 bricks on the foot-path or pavement in front of the said premises and thereby, it has been found, caused obstruction in or on the foot-path for a period of some six hours or more.

That the foot-path or pavement in question is part of a public thoroughfare and that obstruction was caused in the manner set out has not been disputed and the defence is that the acts complained of, having been done in pursuance of and in conformity with a license granted by the Chairman of the Corporation of Calcutta, the petitioner had not thereby committed any offence. The present Rule was issued in order to the further examination of that defence.

The license which we have now examined is one granted under the 2nd of the bye-laws framed under the provisions of section 559, sub-section (18), of the Calcutta Municipal Act and authorizes the licensee "to make an enclosure in (a) portion of the public street measuring 40 feet into 4 feet, equal to 160 square feet, for the purpose of depositing mortar, bricks, etc.....during the building .....of premises No. 40/1....."

We further find endorsed on the license a condition to the effect that the license is granted on condition that the portion to be occupied must be fenced off with a temporary fence.

It is conceded that in this case there was no enclosure or surrounding fence, and the first contention before us then is that inasmuch as the Corporation had authorized the occupation by the petitioner of a certain specified area of the foot-path, it was immaterial whether he left the bricks lying loose on that space, or surrounded and enclosed the space and the bricks by means of a fence.

In the alternative it is contended that the petitioner has at most committed a breach of the bye-law under which his license was granted and that proceedings should have been taken against him only under the Municipal Act and at the instance of the Corporation.

On the other hand it is suggested by the Deputy Legal Remembrancer that in view of the provisions of section 66, sub-section (4) (*a*) of the Calcutta Police Act, the license and the bye-law under which it was granted should be held to be invalid and *ultra vires* of the Corporation.

In support of the petitioner's contentions reference is made to the provisions of section 336, section 354 and of section 559, sub-section (18). These sections and sub-section

vest the public streets in the Corporation and authorize the General Committee to discontinue or close such streets, and to make bye-laws prohibiting or regulating the placing of obstructions or the depositing of materials thereon.

We are, however, unable to accede to either of the petitioner's contentions. The petitioner's license authorized him to obstruct the pavement or foot-path by a well-defined enclosure, but did not authorize him to obstruct or endanger the safety of persons using the foot-path by means of loose and unprotected heaps of bricks. The petitioner, therefore, it is plain, has committed a breach of the bye law under which his license was granted, but his offence also falls clearly within the provisions of section 66, sub-section (4) (*a*) of the Police Act, and as he is not protected by his license there is no reason why those provisions should not be applied.

The suggestion made by the Deputy Legal Remembrancer appears to involve the further contention that sub-section (4) (*a*), introduced into section 66 of the Police Act by the Amending Act of 1910 (Bengal Act III of 1910), overrides or repeals the provisions regarding the regulation of obstructions to be found in the Calcutta Municipal Act. As in the present case the petitioner's conduct was not within his license on which he relies, we need not definitely decide the point, but we may say that as at present advised we are of opinion that if by the Amending Act of 1910, the Legislature had intended to repeal any portion of the Calcutta Municipal Act such repeal would have been effected by express provision.

For the reasons given, this Rule is discharged.

Rule discharged.

PATNA HIGH COURT.

CRIMINAL REVISION No. 164 OF 1917.

May 10, 1917.

Present:—Mr. Justice Jwala Prasad.

LALJI SINGH—COMPLAINANT—PETITIONER

versus

PARDIP SINGH—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 4, *Ch. XVI—Complaint, what is—Transfer of complaint to Sub-Deputy Magistrate for enquiry and report—Irregularity.*

Petitioner made an application before a Sub-Divisional Officer impugning the correctness of a report of a Police Officer in a certain criminal matter and prayed that his case against the accused may be proceeded with. On a subsequent date the case was made over to a Sub-Deputy Magistrate to take evidence and to report for prosecution or otherwise:

Held, that the application made to the Sub-Divisional Officer was a complaint within the meaning of section 4 of the Criminal Procedure Code, and that the procedure adopted by the Magistrate, not being in accordance with the provisions of Chapter XVI of the Criminal Procedure Code, was irregular. [p. 131, col. 1.]

Criminal revision against an order of the Sessions Judge, Monghyr.

Messrs. *S. N. Dutta* and *R. L. Dutta*, for the Petitioner.

JUDGMENT.—This is an application for setting aside the order of the Sub-Divisional Magistrate of Beguserai, dated the 24th of January 1917.

The principal ground upon which the aforesaid order is sought to be set aside is that the complaint of the petitioner lodged against Pardip Singh and others under sections 147 and 448 of the Indian Penal Code was not disposed of according to law.

The facts appear to be that two informations were lodged before the Police on the 26th of May 1916, one by the present petitioner against Pardip and the other by Pardip against the petitioner and his party. The Police reported the case of the petitioner to be false and the case of Pardip to be true. The latter case proceeded and ended in conviction of some of the accused in that case. The conviction in that case was, however, set aside by the Sessions Judge in appeal on the 24th of October 1916.

On the 30th of September 1916, in respect of the case brought by the petitioner

against Pardip, the Magistrate ordered the complainant to prove his case on the 12th of October or to show cause why he should not be prosecuted under section 211 of the Indian Penal Code. On the 21st of October 1916 the Magistrate passed the following order: "Issue on return of record from Appellate Court." Thus the case of Lalji *versus* Pardip, with which we are now concerned, was postponed by the order of the Magistrate till after the disposal of the case then pending before the Sessions Judge. After the disposal of the other case by the Sessions Judge the petitioner, on the 18th of November 1916, made an application before the Magistrate impugning the correctness of the report of the Police and praying that his case against Pardip and others, the accused named by him, be proceeded with. Upon that petition the order of the Magistrate is, "With record." The next order in the margin of the petition called reference to the order sheet, which has the following order under date the 22nd November 1916: "Issue notice for 6th December 1912." On the 6th December the case was made over by the Sub-Divisional Magistrate to his Deputy Magistrate to take evidence and to report for prosecution or otherwise. The Deputy Magistrate examined the complainant and his witnesses on the 19th of December 1916, and made his report on the 19th of January 1917 to the Sub-Divisional Magistrate. He disbelieved the witnesses examined on behalf of the petitioner and held that the case of the petitioner was highly improbable; but he did not consider that there was sufficient evidence before him to recommend the prosecution of the petitioner under section 211 or section 182 of the Indian Penal Code. In conclusion he recommended that the whole proceedings should be dropped. The Sub-Divisional Magistrate on the 24th of January 1917 considered the report of the Deputy Magistrate and agreed with him that the case of the petitioner against Pardip was not true. He also held that in view of the Sessions Judge's order it was impossible to proceed further against Lalji the petitioner. The Sub-Divisional Magistrate, therefore, concluded his order in the following words:— "The case is dropped. I accept the final Police report as originally submitted, namely false, section 147/448." Against this order the petitioner moved the Sessions Judge of Monghyr, who by his order of the 24th February 1917 refused to interfere, expressing an opinion that further enquiry should be directed into the complaint of the petitioner and leaving the applicant to move the High Court if he be so advised.

There can be no doubt that the application of the petitioner of the 18th November 1916 was a complaint within the meaning of section 4 of the Code of Criminal Procedure. That application should have been disposed of under Chapter XVI of the Code of Criminal Procedure. The Sub-Divisional Magistrate did not examine the complainant on oath as is required by section 200 of the Act, but made it over to his Deputy Magistrate "to take evidence and report for prosecution or otherwise." The Deputy Magistrate took up the enquiry regarding the complained petition of the applicant along with the enquiry started by the Sub-Divisional Officer by his order of the 30th September on the Police report in the case lodged by the petitioner before the Police. The action of the Sub-Divisional Officer is in utter disregard of the procedure laid down in Chapter XVI of the Code and is open to serious objection, and but for the careful enquiry into the entire case of the complainant made by the Deputy Magistrate I would not have had the least hesitation in setting aside the order of the Sub-Divisional Magistrate and directing further enquiry into the complaint of the petitioner. The error complained of amounts to an irregularity and unless the petitioner has in any way been prejudiced, the order of the Sub-Divisional Magistrate cannot be set aside and the case re-opened. But it appears that the petitioner was as a matter of fact examined in connection with the enquiry into his case by the Deputy Magistrate on the 19th of December and all the evidence that he had to offer in support of his case was taken by the Deputy Magistrate. The petitioner has failed to satisfy me that any prejudice to the trial of his case on merits resulted from the last order of the Magistrate. Taking into consideration all the evidence in the case, the report of the Deputy Magistrate and the Police report

it is impossible to say that any useful purpose would be served by directing further enquiry into the complaint of the petitioner. The order of the Magistrate dropping all proceedings in connection with the case should be maintained. The application is, therefore rejected.

It appears to me that the Sub-Divisional Magistrate has treated the decision of the Sessions Judge in the case of Pardip *versus* Lalji with scant courtesy and the reference to the decision by the Sub-Divisional Magistrate in his orders, dated the 6th December and 4th January, seems to be rather unhappy. The Sessions Judge is right in his remark against the attitude of the Sub-Divisional Magistrate in this case.

Application dismissed.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 239B OF 1916.

August 31, 1916.

Present:—Mr. Justice Twomey.

PO ON—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Burma Gambling Act (*I of* 1899), *s.* 4—"*Ket*", *whether game of mere human skill.*

The Burmese game "ket" is not a game of mere human skill within the meaning of section 4 of the Burma Gambling Act.

Mr. *Maung Ba Kya*, for the Applicant.

Mr. *Maung Kin*, Assistant Government Advocate, for the Crown.

JUDGMENT.—It is clear from the evidence in this case that the "*ket*" gambling was carried on outside the house on the ground and the conviction of the applicant Po On under section 12 of the Gambling Act was, therefore, incorrect.

Apart from this mistake there is in my opinion no ground for interfering in revision. It cannot be held that "*ket*" is a game of mere human skill under section 4 of the Act. The evidence as to the actual gambling is sufficient.

The applicant was liable to conviction under section 10 for playing for money with instruments of gaming (*i.e.*, playing cards) in a place to which the public have access. He has already served about 12 days' imprisonment, which seems a sufficient punishment.

The conviction of the applicant Po On is altered to one under section 10, Gambling Act, and the sentence to imprisonment for the period which he has already undergone.

Conviction altered.

PATNA HIGH COURT.

CRIMINAL REVISION No. 213 OF 1917.

June 12, 1917.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

SUNDER MALL—2ND PARTY—PETITIONER

versus

JHARI LAL—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 145—*Produce of immoveable property, whether subject-matter of dispute—Jurisdiction of Magistrate to deal with produce—Order, good in part and bad in part—Court, power of, to sever good part from bad*

Sub-section 2 of section 145 of the Criminal Procedure must be read in conjunction with sub section 1 which deals with land and water; and sub-section 2 purports to give a definition of what land and water are supposed to comprise. [p. 133, cols. 1 & 2.]

A Magistrate has under section 145, Criminal Procedure Code, power to deal with moveable property which represents the produce of the land in dispute if the produce is attached to, or if the same is cut and lying on, the land in dispute under the section; but if the produce of the land has been removed and is wholly unconnected with and dissociated from the land in dispute, then the Magistrate is deprived of jurisdiction to deal with it under section 145, sub-section 2. [p. 133, col. 2.]

Orders as opposed to convictions are severable and the bad part of an order can be severed from the good. Where an order under section 145 of the Criminal Procedure Code is bad in part and good in part, the Court will sever the bad from the good, reject the bad and maintain the good. [p. 134, col. 1.]

Criminal revision against the order of the Sub Divisional Magistrate, Monghyr, dated the 18th May 1917.

Messrs. *Pugh* and *Jamini Mohan Mukerji*, for the Petitioner.

Messrs. *P. R. Dass* and *Naresh Chandra Sinha*, for the Opposite Party.

JUDGMENT.—This is an application to review an order made by the Sub-Divisional Magistrate of Monghyr under section 145 of the Code of Criminal Procedure. The order is dated the 18th May 1917. As

between the first party and the second party there was a dispute concerning the possession of certain mica mines in which they were concerned, the second party contending that the mineral rights were vested in him and the first party on the other hand contending that the mineral rights were his. The learned Sub-Divisional Magistrate was satisfied that there was a dispute concerning the mica mines and that the dispute was one which was likely to cause a breach of the peace. He accordingly instituted a proceeding under section 145 of the Code of Criminal Procedure. If the learned Sub-Divisional Magistrate had confined his order merely to the mines, we think that there would have been no error at all in the form of the order which he passed on the 18th of May. But the learned Sub-Divisional Magistrate considered he was dealing with the dispute not concerning only the possession of the mines but also concerning the possession of certain mica taken from the mines and stored in a godown, belonging to a person wholly unconnected with the parties and their dispute, in a village which is in no way connected or associated with the land in dispute.

Mr. Pugh contends that the learned Magistrate had no power whatsoever to make an order under section 145 so far as the mica stored in the godown itself was concerned; and that in so doing he acted in excess of jurisdiction; and that this excess of jurisdiction vitiated the entire order passed on the 18th of May. Mr. Pugh, therefore, asks that the whole order may be set aside.

Mr. Dass upon the other hand contends that the order in its present form is perfectly correct and that the Magistrate had power to deal under section 145 not only with the mines and the land connected therewith, but also with the mica which was the produce of the mines even though the mica was stored in a village which was not in any way connected with the land in dispute: and Mr. Dass relies upon sub-section 2 of section 145. We think that the interpretation which Mr. Dass seeks to put upon sub-section 2 of section 145 is far too extensive. Sub-section 2 obviously must be read in conjunction with sub section 1 which deals with land and water; and sub-section 2 purports to give a definition of what land and water are supposed to comprise, and it runs as follows:—"For the purposes of this section the expression 'land or water' includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property." No doubt this is a new section and extends the provisions of the prior Code, but clearly we think that the meaning of this sub section is that the Magistrate has under section 145 power to deal with moveable property which represents the produce of the land in dispute if the produce is attached to, or if the same is cut and lying on, the land in dispute under section 145: but if the produce of the land has been removed and is wholly unconnected with and dissociated from the land in dispute, then we think that the Magistrate is deprived of jurisdiction of dealing with it under section 145, sub section 2. Therefore, in this case, having regard to the interpretation which we have put upon section 145, sub-section 2, it is clear that the Magistrate had no jurisdiction whatever to make an order under section 145 in respect of the mica stored in the godown. Apart from this legal consideration, however, the learned Magistrate has not found as a fact that the mica in the godown was in fact the produce of the mines in dispute; but I think it fair to infer that the mica in the godowns was in fact the produce of the mines, though that has not been stated expressly in the order of the Magistrate, and this affords an additional reason for saying that the learned Magistrate had no jurisdiction to make an order with regard to the mica which was completely severed from the land in dispute.

The next question which arises for our consideration is whether the order made by the learned Magistrate being bad in part and good in part should be set aside *in toto*. We have held that the Magistrate had jurisdiction to make an order under section 145 with regard to the mines. We have also held that he had no jurisdiction to make an order in respect of the mica stored in the godown; thus the order is two-fold in its character, *viz.*, good in part and bad in part. The question is whether inasmuch as one portion of the order is bad the entire order should be set aside, or whether the bad

portion can be severed from the good. There is no case expressly in point, but the law in England, generally speaking, is that orders, as opposed to convictions, are held to be severable and that the bad part of an order can be severed from the good. But in convictions the order is indivisible and cannot be severed. If one branch of the order of conviction is bad then the entire conviction is bad. On the other hand in the case of orders the well-known and well-established distinction is that where an order is bad in part and good in part, the Court will sever the bad from the good, reject the bad and maintain the good. We, therefore, think that the order of the Magistrate dated the 8th of May 1917, so far as it attached the mica in the godowns, must be set aside; and that the said order, so far as it relates to the mines in dispute, should stand and be binding upon the parties.

Mr. Pugh suggests an additional ground for setting aside the order of the 18th May 1917 is that his client, the 2nd party, has not received fair treatment at the hands of the learned Magistrate, who, it is alleged, refused to hear his witnesses. There is nothing upon the record to justify this statement. If, as a matter of fact, the Magistrate had declined to hear witnesses I should have expected to see upon the record, in accordance with the common practice in this country, a petition filed by the party who was refused to be heard to show that some such order was made. It appears from the counter-affidavit filed by the second party that what the learned Magistrate did say was that as he was dealing with the question of possession alone, he did not wish to hear evidence bearing upon totally different considerations. This point was not stated in the petition filed in this Court by Mr. Pugh's client when our jurisdiction was invoked. Therefore, we think that there was no refusal by the learned Magistrate to hear the evidence of the parties and that, therefore, upon that ground this order under section 145 ought not to be set aside, as being founded upon an excess or want of jurisdiction.

The only other point argued before us is that urged by Mr. Dass, namely, that there has been wilful suppression on the part of the petitioner of material facts from the petition which, if known at the time that the application was made before the Court, would have influenced the Court to refuse the issuing of notice. We think that it would have been prudent if the petitioner had in his petition stated the facts connected with the institution of the civil suit; but we do not consider that the facts connected with the institution of the civil suit were vitally and materially important: and while we think that the petitioner ought to have disclosed them in his petition, we are of opinion that their omission would not justify us in refusing to interfere with the order of the learned Magistrate. We shall accordingly direct that the order of the learned Magistrate dated the 18th of May do stand and be operative between the parties so far as the possession of the mines is concerned, but in so far as it purports to deal with the mica stored in the godown it is declared to be inoperative and is hereby set aside.

Order set aside in part.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 275B OF 1915.

October 2, 1915.

Present:—Mr. Justice Ormond.

EMPEROR—PROSECUTOR

versus

MI WA—CONVICT.

Penal Code (Act XLV of 1860), ss. 211, 182—Criminal Procedure Code (Act V of 1898), s. 195—False charge laid before Police—Sanction, Court, whether can grant—Prosecution.

Sanction for the prosecution of an offence under section 211 of the Penal Code is required by section 195 of the Criminal Procedure Code and such sanction cannot be given by the Police. [p. 135, col. 2.]

No Court can grant a sanction for the prosecution of an accused in respect of a false charge laid before the Police which does not lead to proceedings in Court. [p. 135, col 2]

Section 195 of the Criminal Procedure Code cannot be construed as allowing a prosecution under section 211 of the Penal Code without any previous sanction, if the false charge relates to a serious offence and does not lead to proceedings in Court. [p. 135, col. 2.]

Reference under section 348 of the Code of Criminal Procedure made to the Chief Court of Lower Burma by the Sessions Judge, Bassin Division.

UCHIT JHA *v.* BARHMO SINGH.

FACTS of the case appear from the following Order of Reference:—

"For the reasons given in my judgment in Criminal Appeal No. 676 of 1915 of this Court, a copy of which is hereto annexed, I submit this case to the Chief Court with a recommendation that the conviction and sentence passed on Mi Wa be set aside and that she be ordered to be retried by either the District Magistrate or the Special Power Magistrate of Myaungmya under section 211 of the Indian Penal Code.

JUDGMENT IN CRIMINAL APPEAL
No. 676 OF 1915.

The appellant has been convicted on her own plea under section 182, Indian Penal Code, and has been sentenced to four months' rigorous imprisonment.

In actual fact the offence that appellant admits is not one under section 182 at all. She went to the Police Station and laid an information charging two men with raping her. She now admits that this charge was entirely false. Her offence, therefore, clearly falls under section 211, Indian Penal Code, and, in my opinion, it is punishable under the last part of that section with imprisonment which may extend to seven years, and is triable only by the Court of Session. There is perhaps a technical question involved here, since some of the Indian High Courts appear to have held that a false charge which does not go beyond the Police is not punishable under the last part of section 211. I do not think it is necessary to go into this question, for it seems to me that in any case the appellant should be tried under section 211 and not under section 182. The case should be tried as a warrant case and the facts fully investigated. As matters now stand no evidence has been taken and it is impossible to say, whether the sentence passed is appropriate or not. *Prima facie* the sentence is inadequate for such a serious offence, even allowing for the youth of the appellant.

However, I do not think that this Court has any power to interfere with the *conviction* and to order a re-trial. Under section 412, Criminal Procedure Code, there is no appeal against the conviction itself and, therefore, this Court has no jurisdiction to exercise the power otherwise given by section 423 (1) (*b*) (1), Criminal Procedure Code, either by reversing the finding or by ordering a re-trial.

In these circumstances I shall dismiss the appeal and refer the case to the Chief Court in revision.

The appeal is summarily dismissed."

ORDER.—Sanction for the prosecution of an offence under section 211, Indian Penal Code, is required by section 195, Criminal Procedure Code. The Police cannot give such sanction; and there is no Court that can do so, because the false charge did not lead to proceedings in Court. It would be unreasonable to construe section 195 (which requires the sanction of the Police for a prosecution under section 182, Indian Penal Code) as allowing a prosecution under section 211, Indian Penal Code, without any previous sanction, if the false charge relates to a serious offence and does not lead to proceedings in Court. I see no reason to interfere.

Interference declined.

PATNA HIGH COURT.

CRIMINAL REVISION No. 174 OF 1917.

May 17, 1917.

Present:—Mr. Justice Mullick.

UCHIT JHA - PETITIONER

versus

BARHMO SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 439—Sanction to prosecute—Sessions Judge, interference by, under s. 195, whether competent—District Magistrate, whether subordinate to Sessions Judge—Accused, right of, to be heard—Revision.

A Sessions Judge is not the authority to whom a District Magistrate, in the exercise of his powers under section 195 of the Criminal Procedure Code, is subordinate and consequently it is not open to the Sessions Judge, even if an application is made to him, to interfere under section 195 with an order of the District Magistrate in appeal granting sanction to prosecute the accused. The only remedy of the accused is by way of revision to the High Court under section 439 of the Criminal Procedure Code. [p. 136, cols. 1 & 2.]

Section 195 of the Criminal Procedure Code contemplates that where an order is to be made to the prejudice of a party, that party is to be first heard by the Court. [p. 136, col. 2.]

Criminal revision from an order of the District Magistrate, Bhagalpur.

Mr. *Lalit Mohan Ghose*, for the Petitioner.

UCHIT JHA *v.* BARHMO SINGH.

JUDGMENT.– On the 16th of July 1916 Uchit Jha made a complaint before the Sub-Divisional Magistrate of Banka, charging Tej Narain Singh and others with cutting the complainant's *bandh*. Tej Narain Singh and others were put on their trial and were acquitted on the 18th of September 1916. On the 19th September 1916 Uchit Jha again lodged a complaint alleging that Barhmo Singh, the brother of Tej Narain Singh, had cut the same *bandh* as well as the "ails" of his fields.

The Honorary Magistrate who tried Barhmo Singh in respect of an offence under section 426 of the Indian Penal Code found that Panpia *bandh*, alleged to have been cut by Barhmo Singh, was not the property of the complainant and also that the evidence as to the cutting was not satisfactory. He accordingly acquitted the accused Barhmo Singh under section 245 of the Criminal Procedure Code.

Barhmo Singh then applied to the Honorary Magistrate for sanction to prosecute the complainant Uchit Jha for offences under sections 193 and 211 of the Indian Penal Code. The Honorary Magistrate, on the 12th of December 1916, refused this prayer. Barhmo Singh then took the matter up to the District Magistrate under section 195 of the Criminal Procedure Code, with the result that the District Magistrate on the 3rd of March 1917 directed the prosecution of the complainant Uchit Jha under sections 193 and 211 of the Indian Penal Code. The matter now comes on revision before me.

A preliminary objection is taken to the effect that an application lies to the Sessions Judge under section 195, clause (6), to set aside an order of the District Magistrate and that till the Sessions Judge has disposed of the matter no application for revision lies to the High Court. In my opinion this contention is not well founded. The Sessions Judge is not the authority to whom the District Magistrate in the exercise of his powers under section 195, Criminal Procedure Code, is subordinate and consequently in my opinion it was not open to the Sessions Judge, even if an application had been made to him, to interfere under section 195 with the order of the District Magistrate. The only remedy of the complainant, Uchit Jha, is by way of revision under section 439 of the Code of Criminal Procedure. The application to this Court is, in my opinion, competent.

Then as regards the merits, the learned District Magistrate has not submitted any explanation of the grounds upon which he directed the prosecution of the complainant. His order of the 3rd of March 1911 does not discuss the merits of the case, beyond saying that he is satisfied that the case brought by the complainant was false and that the charge of perjury is true.

It further appears that he made this order without hearing the party against whom that order was made. That was a serious defect in procedure and section 195 clearly contemplates that where an order is to be made to the prejudice of a party, that party is to be first heard by the Court.

I have, however, examined the evidence in the case and after hearing both parties I am satisfied that the proceedings ought to be quashed.

The learned Honorary Magistrate expressly states in his explanation submitted to the District Magistrate on the 29th of January 1917 that one of the reasons that influenced him in acquitting the accused was that the complainant had not established his title to the *bandh* and his judgment shows that he did not definitely find that the accused had not cut the *bandh*. All that he found was that the best witnesses which the complainant could have produced had not been produced. In this state of affairs I do not think that it will be possible, in the event of the prosecution of the complainant, to convict him for maliciously instituting a false case.

The learned Counsel for the accused Barhmo urges that the case was manifestly false by reason of the circumstance that the accused's brother was only acquitted a day before the complaint of the present case was lodged; and that it is clear that the intention of the complainant was malicious and to harass the accused. The reply is that the cutting of the *bandh* on the day following the acquittal of the accused's brother is equally consistent with the case put forward by the complainant

namely, malice on the part of the accused and intention to harass by consecutive acts of cutting.

The matter turns really upon the view of the evidence which the Court will take in trying the complainant on a charge under section 211 of the Indian Penal Code. In my opinion, having regard to the view expressed by the trial Court, a conviction will not be possible.

Then as regards the charge of perjury, the petition before the District Magistrate sets out five specific statements alleged to have been knowingly false. With regard to two the learned Honorary Magistrate has submitted what seems to me to be a complete explanation. The learned District Magistrate does not discuss these statements and the general order made by him is of little assistance.

I have, however, examined the evidence of the complainant in regard to these statements and I am satisfied that they have not been shown to be maliciously false. With regard to the three statements not referred to by the Honorary Magistrate in his explanation, the deposition of the complainant shows that there is an explanation in the complainant's favour which would entitle him to an acquittal in the event of prosecution.

In these circumstances the order of the District Magistrate must be set aside and further proceedings against the complainant dropped.

Revision accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 765 OF 1916.

CRIMINAL REVISION PETITION No. 617 OF 1916.

February 2, 1917.

Present:—Mr. Justice Sadasiva Aiyar.

In re MANTRIPRAGADA VENKATARAMA RAO AND OTHERS—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), s. 447—Criminal trespass—Possession of property by complainant, whether essential.

In a prosecution for criminal trespass it is necessary to determine in whose possession the property was at the date of the alleged trespass.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Bhadrachalam, in Criminal Appeal No. 6 of 1916, preferred against that of the Court of the Sheristadar, Second Class Magistrate, Bhadrachalam, in Calendar Case No. 68 of 1916.

Messrs. *G. Venkataramiah* and *P. Somasundaram*, for the Petitioners.

Mr. *E. R. Osborne*, Public Prosecutor, for the Crown.

ORDER.—It appears from the documentary evidence that the first accused obtained a mortgage with possession from one of two undivided brothers in May 1915 (Exhibit J), first accused having been already a mortgagee without possession from both the brothers. The other brother gave a *cowle* to the complainant more than a year afterwards in June 1916 (Exhibit A).

Prima facie, the complainant was the aggressor in trying to take possession of a land which had been mortgaged with possession to 1st accused a year before the complainant's *cowle*.

The Appellate Magistrate refused to go into the question, "who was in possession of the land in the year preceding the date of offence and up to and on the date of offence." See *Veerappa Naick, In re* (1).

I set aside the decision of the Appellate Magistrate and direct that the appeal be re-heard and a fresh decision pronounced after considering the question of possession and if the first accused is found to have been in possession prior to and up to the date of occurrences, whether more force than was legally permissible was used by the accused or any of them in maintaining that possession in the exercise of the right of self-defence against the complainant and his party. The accused will continue released on the same bail till disposal of the appeal.

Petition allowed; Case sent back.

(1) 40 Ind. Cas. 752; 8 Cr. Law Rev. 314; 18 Cr. L. J. 752.

V.R P.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1004 OF 1916.
December 12, 1916.
Present:—Mr. Justice Teunon and
Mr. Justice Beachcroft.
K. SIMHACHALAM—ACCUSED—PETITIONER
versus
RATI KANTA LAHA—COMPLAINANT—
OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 403—Criminal Procedure Code (Act V of 1898), ss. 179, 181 (2)—Criminal misappropriation—Jurisdiction.

Section 179, Criminal Procedure Code, does not in terms apply to a trial for criminal misappropriation, as the offence does not depend on an act done and the consequences ensuing therefrom but only on the act which has been done. [p. 138, col. 2]

Money paid by the complainant on account of an insurance policy was misappropriated within the jurisdiction of Court B, but loss to the complainant was caused in the jurisdiction of Court N:

Held, that Court N had no jurisdiction to try the offence. [p. 139, col. 1.]

Mr. *K. N. Chaudhuri* and Babu *Debendra Narain Bhattacharyya*, for the Petitioner.

Babus *Manmatha Nath Mukerjee* and *Narendra Kumar Bose*, for the Opposite Party.

Mr. *Camell*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The question for our consideration in this Rule is one of jurisdiction. The complainant has brought charges under sections 403, 406 of the Indian Penal Code in the Court of the Magistrate at Krishnagar in the District of Nadia, against the petitioner, an official of an Insurance Company having its Head Office at Bimlipatam in the Madras Presidency, alleging that he has misappropriated certain sums of money paid on account of an insurance policy. The question is whether the case can be tried in the Nadia Court.

Chapter XV of the Code of Criminal Procedure deals with the jurisdiction of Criminal Courts. Section 177 provides the general rule that an offence must ordinarily be tried in the Court, within the local limits of whose jurisdiction it was committed. Then follow a number of enabling sections which extend the jurisdiction of Courts. One of these, section 181 (2), provides specially for the trial of the offence of criminal misappropriation. By it the offence may be tried by a Court, within the local limits of whose jurisdiction any part of the property, the subject of the offence, was received or retained as well as by the Court which is given jurisdiction by section 177.

Now when the Code in express terms enumerates the Courts which have jurisdiction in language which is apparently exhaustive, if it is sought to establish the fact that another enabling section still further extends the jurisdiction, we must only give effect to the argument if the Court claiming jurisdiction comes strictly within the terms of the section.

The Crown contends that section 179 is such an enabling section. That section provides that "when a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be...tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued." In the present case the money was received at Bimlipatam and it is not suggested that the conversion of the property to the use of the accused took place anywhere else. But it is argued that loss was caused to the complainant in Nadia and, therefore, by the application of section 179 the Nadia Court has jurisdiction.

Now for the application of section 179 it is essential that the offence should depend on an act done and on a consequence which has ensued. But loss to one person, though a normal result of an act of misappropriation by another, is not an essential ingredient of the offence of criminal misappropriation. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender, irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which has ensued, but only on the act which has been done. Section 179, therefore, does not in terms apply

There is no reported decision on the point in this Court. The case of *Colville* v. *Kristo Krishore Bose* (1) has no application, as the charge there was of cheating. In the Madras Court the case of *In re Rambilas* (2) is in favour of the petitioner.

(1) 26 C. 746; 13 Ind. Dec. (N. S.) 1077.

(2) 26 Ind. Cas. 136; (1914) M. W. N. 894; 16 M. L. T. 505; 29 M. L. J. 175; 15 Cr. L. J. 688.

DEONANDAN SINGH *v.* RAMAJODHYA SINGH.

In the Allahabad Court there have been contrary decisions. The case of *Queen-Empress* v. *O'Brien* (3), which was followed in *George Langridge* v. *Grace Atkins* (4), supports the Crown while that of *Ganeshi Lal* v. *Nand Kishore* (5) supports the petitioner. The case of *Mahadeo* v. *Emperor* (6) is not exactly in point, as the Court held that the acts of embezzlement must have taken place at Mirzapur or at one of the Districts where the accused travelled. It also held that section 182, Criminal Procedure Code, was applicable. The cases of *Ganeshi Lal* v. *Nand Kishore* (5) and *Rambilas, In re* (2), in our opinion, express the correct view.

The Rule is, therefore, made absolute and the proceedings against the petitioner are quashed.

Rule made absolute.

(3) 19 A. 111; A. W. N. (1896) 191; 9 Ind. Dec. (N. S.) 72.

(4) 17 Ind. Cas. 792; 35 A. 29; 13 Cr. L. J. 856; 10 A. L. J. 431.

(5) 15 Ind. Cas. 319; 34 A. 487; 13 Cr. L. J. 479; 10 A. L. J. 45.

(6) 6 Ind. Cas. 563; 32 A. 397; 7 A. L. J. 319; 11 Cr. L. J. 372.

PATNA HIGH COURT.

CRIMINAL REVISION No. 170 OF 1917.

May 11, 1917.

Present:—Mr. Justice Jwala Prasad.

DEONANDAN SINGH AND OTHERS—2ND PARTY—PETITIONERS

versus

RAMAJODHYA SINGH AND OTHERS—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 145 — *Proceedings, ground for—Cancellation of proceedings — Fresh proceedings, institution of, whether permissible.*

Proceedings under section 145 of the Criminal Procedure Code can be instituted only upon overt acts or preparation by the parties showing a present and an imminent danger of the breach of the peace, and not merely upon an imaginary event that might lead to a breach of the peace. [p. 140, col. 2.]

Where a proceeding under section 145 of the Criminal Procedure Code has been once cancelled a fresh proceeding can be instituted only when the Magistrate on further material, either on the report of the Police or any other information is satisfied that there is a likelihood of a breach of the peace. In that case the procedure prescribed by clause 1 of section 145 of the Criminal Procedure Code should be observed. [p. 140, col. 1.]

Criminal revision against the order of Deputy Magistrate, Muzafferpore, dated the 16th April 1917.

Messrs. *P. R. Dass* and *Harnandan Sahai* for the Petitioners.

Mr. *Gour Chandra Pal*, for the Respondents.

JUDGMENT.—This is an application against an order of the Deputy Magistrate of Muzafferpore, dated the 16th April 1917, declaring that the land in dispute is in the possession of the first party in a proceeding under section 145 of the Code of Criminal Procedure. The dispute was concerning a portion of some 18 *bighas* of land which belonged to the first party. It was sold in execution of a rent decree obtained by one Mr. Toomey and purchased by himself some time in 1911. Mr. Toomey sold this land by means of a *kebala* to the second party on the 19th of August 1916. The *dakhildehani* by virtue of which Mr. Toomey was put in possession is dated the 23rd of July 1914. On the 17th of November 1916 the proceeding under section 145 of the Code of Criminal Procedure was drawn up by the Magistrate. There was also an order for the attachment of the crops under section 145, clause (4); and the 12th of December was the date fixed for the parties to file their written statements and for taking evidence. It appears that on that day the first party instituted a civil suit for having the sale set aside as being fraudulent. The written statement in the 145 proceeding on behalf of the second party was filed on the 14th of December 1916, and that on behalf of the first party on the 17th of January 1917. A petition was also filed by the first party on the same day and in the petition the first party alleged that as a civil suit had already been instituted by the first party for a declaration of right over the property and for setting aside the sale, there was no likelihood of a breach of the peace and that further proceedings under section 145 of the Code of Criminal Procedure were unnecessary. This point appears to have been seriously pressed before the Magistrate and the Magistrate on that date passed the following order: "The parties have gone to the Civil Court, the first party having filed a plaint in the Civil Court on 12th December 1916. The paddy crop has not been cut, and it seems to me that the matter can be brought to a decision there, without any further immediate fear of breach of the peace."

This order of the Magistrate was obviously under clause (5) of section 145 of the Code of Criminal Procedure, which says that at any stage of the proceeding if the Magistrate is satisfied that no dispute as mentioned in clause 1 of the section exists or has existed, the Magistrate shall cancel his order and all further proceedings thereon shall be stayed. The effect of an order of the Magistrate under clause 5 cancelling a proceeding or dropping it is as final as an order passed under clause (4) declaring a party to be in possession; and the order under neither clause can be re-opened by the Magistrate. The proceeding, therefore, which was initiated by the Magistrate by his order of the 17th of November 1916 must be taken to have been finally cancelled by him. A fresh proceeding under section 145 can be instituted only when the Magistrate on further material, either on the report of the Police or any other information, is satisfied that there is a likelihood of a breach of the peace. In that case the procedure prescribed by clause 1 of section 145 shall be observed.

The Magistrate in this case on the 23rd of January 1917 revived the proceeding by the following order:—"According to the Police report there is still apprehension of breach of the peace inspite of the cutting of the crop and the institution of a civil suit. I accordingly revive the proceedings under section 145, Criminal Procedure Code, and order issue of summons on 1st party's witnesses for 5th February 1917." The Police report referred to in this order does not proceed upon any fresh investigation and does not disclose any subsequent act done by the parties tending to show their intention to commit a breach of the peace. The report in fact is a protest against the Magistrate dropping the proceeding.

The only reason for making the report is said to be that the Civil Court will take a long time to dispose of the question of possession of the parties over the land and that each party will try to take possession and that, therefore, there is an apprehension of a breach of the peace when the land is released. It cannot be said that these contingencies must necessarily happen. After the initiation of the proceeding under section 145, one of the parties, namely, the first party, had the good sense of taking the matter to the Civil Court and taking away the fight from the Criminal Court. Apparently, therefore, the first party did not intend to create a breach of the peace on the land. No proceeding can be instituted upon an imaginary event that might lead to a breach of the peace, but can be instituted upon overt acts or preparations by the parties shewing a present and an imminent danger of the breach of the peace.

I hold, therefore, that the order of the Magistrate, dated the 23rd of January 1917, was without jurisdiction.

Upon this order no proceeding under section 145 was instituted but simply summons was issued upon the parties to bring their evidence in Court. Therefore, there is no fresh proceeding upon which the Magistrate could pass his order under section 145. It further appears that the first party appeared in accordance with the summons issued upon him, he repeated his petition that was filed before the proceedings were dropped, namely, that there was no apprehension of a breach of the peace, that he had already taken the case to the Civil Court and that further proceedings, under section 145, were unnecessary. But the Magistrate proceeded to make an enquiry and ultimately concluded it by declaring the first party to be in possession.

The Magistrate has held that notwithstanding the purchase at the auction sale by Mr. Toomey and the delivery of possession to him by the Civil Court neither he nor his vendees, the second party, were in possession of the land. The second party has now come to this Court in revision to have the said order of the Magistrate set aside.

The first party, who had all along been taking objection to the jurisdiction of the Magistrate to initiate proceedings on the ground that there was no danger of a breach of the peace, has opposed this application apparently because the order made is in his favour.

As observed above, I consider the order to be without jurisdiction and I accordingly set aside the order and allow this application.

Application allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 301 OF 1917.

May 25, 1917.

Present:—Sir George Knox, KT., Ag. Chief Justice.

MADHO GIR—APPLICANT

versus

RASHID AHMAD AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *ss.* 200, 202, 439—*Magistrate taking cognisance of complaint, duty of—Procedure—Revision—Irregularity — High Court, interference by.*

A Magistrate taking cognisance of a case, who proceeds under section 202 of the Criminal Procedure Code, must record the reasons showing why he is not satisfied as to the truth of the complaint of the offence of which he is taking cognisance. [p. 141, col. 2.]

A Magistrate proceeding under section 202, Criminal Procedure Code, is not entitled to enquire into the case himself and also to authorise a previous local investigation by a Police Officer. [p. 141, col. 2.]

A Magistrate who has taken cognisance of an offence under section 200 of the Criminal Procedure Code is until he is relieved, if relieved at all of the case, the person who ought to make final orders in the case. He cannot relieve himself of the responsibility by shifting the burden on to the District Magistrate. [p. 141, col. 2.]

A District Magistrate ought not to direct a Subordinate Magistrate in a case pending before that Magistrate to proceed to the spot and to make a report to him. If he considers that the Magistrate is for any reason not proceeding properly with the case, he should withdraw the case, proceed with it himself and take the responsibility upon his own shoulders. [p. 142, col. 1.]

Where an applicant has not in any way been prejudiced by an irregularity, the High Court will not interfere in revision on the ground of that irregularity. [p. 142, col. 1.]

Application in revision against the order of the Sessions Judge, Cawnpore.

Mr. *Peary Lal Banerji*, for the Applicant.

Mr. *Nehal Chand*, for the Opposite Party.

JUDGMENT.—This application in revision is presented on behalf of one Madho Gir Goshain. It appears that Madho Gir Goshain instituted a complaint in the first instance against a Sub-Inspector and five other persons in the Court of a 1st Class Magistrate, who was Sub-Divisional Officer and apparently a Sub-Divisional Officer for the sub-division in which the alleged offence was supposed to have occurred. The 1st Class Magistrate took cognizance of the case and acted under section 200 of the Code of Criminal Procedure. He proceeded also to follow it up with action under section 202, but in doing so omitted one important point. He did not record the reasons showing why he was not satisfied as to the truth of the complaint of the offence of which he was taking cognizance. It is most unfortunate to find the almost systematic neglect with which some Magistrates treat this provision contained in section 202. It is a most important provision, as has already been pointed out in *Ram Pershad* v. *Moti* (1). He appears also to have committed a further irregularity, for he proceeded to enquire into the case himself and also authorized a previous local investigation to be made by a Police Officer. Before the return had been made he was replaced by another Magistrate who was placed in charge of the sub-division who, on the 13th of December 1916, made a report to the District Magistrate. I cannot help calling attention to this, which appears to have been a distinct irregularity. A Magistrate who has taken cognizance of an offence under section 200 is, until he is relieved, if relieved at all of the case, the person who ought to make final orders in the case. He cannot relieve himself of the responsibility by shifting the burden on to the District Magistrate. I asked whether in the present case he had been so relieved and it was not pointed out to me that the District Magistrate had by any order removed this case from the file of this Sub-Divisional Officer. A Magistrate charged with this responsibility and falling back upon the District Magistrate shows himself in this respect to be not a person who ought to hold charge of a sub-division. Upon this report being received by the District Magistrate, I find the following order: "I direct you to proceed to the spot and make a full investigation into the allegations and to send in a report with your finding after

(1) 20 Ind. Cas. 749; 14 Cr. L. J. 493; 11 A. L. J. 754.

examining all persons likely to be of assistance." This was a direction no District Magistrate ought to have made to a Subordinate Magistrate in a case pending before that Magistrate. If he considered that the Magistrate in charge of the sub-division was for any reason not proceeding properly with the case, he should have withdrawn the case, proceeded with it himself and taken the responsibility upon his own shoulders. It is represented to me that this is what the District Magistrate virtually did. But the result was that there were from the 15th December 1916 until the 24th of February 1917 two Magistrates conducting this investigation—the Magistrate in charge of the sub-division and the District Magistrate, who was instructing him how he was to proceed. However, the result has been that we have had in this investigation several Magistrates independent of each other investigating into this case and arriving at the conclusion—one and all of them—that the complaint is not a true complaint. The Sessions Judge of Cawnpore has also taken part in this investigation and he arrives at the same conclusion. I cannot find that the applicant has been in any way prejudiced and think it very inexpedient that this complaint should be further pursued. I, therefore, refuse to interfere and dismiss the application.

Application dismissed.

PATNA HIGH COURT.
CRIMINAL APPEAL No. 130 OF 1917.
June 14, 1917.
Present:—Mr. Justice Atkinson and
Mr. Justice Jwala Prasad.
SEAT ALI—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (*Act XLV of* 1860), *ss.* 84, 302—*Murder committed deliberately but under superstition—Insane delusion, plea of.*

The fact that the accused, while committing the crime with which he is charged, was under some insane delusion is not *per se* sufficient to exempt him from criminal liability for his wrongful act, unless the impulse was such as to render him unconscious of what he was doing, or to make him ignorant of the fact that the act which he was about to commit was wrong. [p. 142, col. 2.]

Where a man commits murder deliberately, the fact that he acts under a superstitious belief and under some insane delusion is not sufficient to exempt him from punishment. [p. 143, col. 1.]

Appeal from a decision of the Sessions Judge, Champaran.

Mr. *Fakhruddin*, Government Pleader, for the Crown.

JUDGMENT.—The accused in this case was tried upon the charge of murder. He was alleged to have murdered his wife, who believed herself to be possessed of evil spirits and who repeatedly pressed her husband to kill her saying that if he killed her the evil spirits would leave her; she would come to life again; and he would acquire money and comforts. The accused confessed openly and freely that he had killed his wife. The main feature of the evidence against the accused is the clear and positive nature of the admission of guilt contained in the six or seven confessions made by him, each confession reiterating and substantiating the admissions contained in the former confession. He met a neighbour on his way home a few hours after he had killed his wife and he told him that he had killed her in the hope of getting money but that as the head would not rejoin the body he would be hanged.

The only defence that has been suggested and feebly suggested by some of the witnesses is that the accused was under some insane delusion. That *per se* would not be sufficient to exempt the accused from criminal liability for his wrongful acts, unless the impulse was such as to render him unconscious of what he was doing; or to make him ignorant of the fact that the act which he was about to commit was wrong. It cannot for a moment be suggested that the case put forward on behalf of the accused can be deemed to exempt him from liability. The learned Sessions Judge has found as a fact that the accused knew and understood the nature and consequences of his acts at the time that he killed his wife. That in itself was quite sufficient to negative the suggestion that there was working in the mind of the accused at the time that he committed the murder a strong superstition which made him commit the act he did.

There would be no difficulty in the case at all, were it not for the concluding paragraph of the learned Sessions Judge's judgment in which he says: "It is a case of sacrificial murder actuated by superstition working on a mind doubtless to some extent disordered." We think that what the learned Judge meant by that was that although the accused knew and understood what he was doing, he was no doubt a weak man with a weak mind labouring under strong religious superstition and belief which actuated him in cutting off his wife's head in the belief that profit and gain would come to him thereby. That may be so, but that is not sufficient to justify us in saying that the accused is not responsible for his acts and we think that this is not a case where a person has been wrongfully convicted of murder.

Mr. Fakhruddin who appears on behalf of the Crown properly points out that after the accused had committed the murder, he went off to the *thana* and lodged a first information, not confessing his guilt but charging another with the commission of the crime. This is relied on by the Crown for the purpose of showing that the accused knew and understood the gravity of the situation; that he was sane enough to try to shift the responsibility for the crime upon another; and that there can be no substance in the suggestion that he was labouring under an insane delusion. We think that the point raised by Mr. Fakhruddin deserves every consideration in testing whether the accused was or was not in an unsound state of mind. We think that he was not, and after giving the case our careful consideration we are satisfied that the accused was rightly convicted of the murder of his wife.

The learned Sessions Judge thought fit to impose upon the accused the sentence of transportation for life. We see no reason for quarrelling with the learned Sessions Judge's order.

We, therefore, direct that the conviction and sentence passed upon the appellant Seat Ali do stand and that this appeal be dismissed.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 71B OF 1916.

September 7, 1916.

Present:—Mr. Justice Ormond.

THEIN ME—APPLICANT

versus

PO GYWE—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 488—*Maintenance - Buddhist Law, Burmese—Dissolution of marriage—Desertion by wife.*

A wife who is driven away from her husband by his cruelty cannot be said to have "left the house not having affection for the husband" within the meaning of the *Dhammathats*. [p. 144, col. 1.]

A wife who refuses to rejoin her husband without sufficient reason or who is living apart from her husband by mutual consent is not entitled to maintenance; but a husband under Burmese Buddhist Law, who is bound to maintain his wife, cannot evade that liability by declaring that the marriage has been dissolved by reason of the wife's absence from him. [p. 144, col. 1.]

Mr. *Sutherland*, for the Applicant.

Mr. Ginwala, for the Opposite Party.

JUDGMENT.—The applicant, Ma Thein Me, applied under section 488 of the Criminal Procedure Code for maintenance against her husband. The application was dismissed on the ground that the wife had left her husband and lived separately from him for more than $4\frac{1}{2}$ years and that the husband by opposing this application had shown his election, which he had, of treating the marriage as dissolved.

The parties were married in November 1906. In February 1912 the wife left her husband; in July 1912 the husband took a lesser wife; in July 1913 the wife applied for maintenance for herself and her son; maintenance for herself was refused because she delayed the progress of the case, without prejudice to her right to bring another application. In August 1913 the husband sued for restitution of conjugal rights and in December 1913 his suit was dismissed on the ground of cruelty. In July 1915 the wife made this application for maintenance. There is no doubt that after a husband's suit for restitution of conjugal rights has been dismissed the husband is liable to maintain his wife; but it is contended for the husband that the wife had deserted her husband for more than a year since the decree in that suit, and that it is clear by the husband's opposition to this application for maintenance

that he has elected to treat the marriage as being dissolved under Burmese Buddhist Law. The *Dhammathats* (Richardson, Vol. V, section 17) say: "If the wife, not having affection for the husband, shall leave the house where they were living together, and if during one year he does not give her one leaf of vegetables or one stick of fire-wood, let each have the right of taking another husband and wife. They shall not claim each other as husband and wife. Let them have the right to separate and marry again." In my opinion that passage refers to the voluntary desertion by the wife without the consent of the husband. And the wife who is driven away from her husband by his cruelty cannot be said to have 'left the house not having affection for the husband.' A wife who refuses to rejoin her husband without sufficient reason or who is living apart from her husband by mutual consent is not entitled to maintenance; and I doubt if a husband under Burmese Buddhist Law, who is bound to maintain his wife, can evade that liability by declaring that the marriage has been dissolved by reason of the wife's absence from him. The order of the Magistrate is, therefore, set aside. Maintenance of Rs. 15 a month has been granted for the son and an order will be made for maintenance of the applicant at Rs. 30 a month.

Application allowed.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 25 OF 1917.
May 19, 1917.
Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.
EMPEROR—APPELLANT
versus
MUKANDI LAL—RESPONDENT.

Penal Code (Act XLV of 1860), s. 294A, scope of—"Drawing," meaning of—Lottery, essential factors of—Result dependent solely upon chance.

Section 294A of the Penal Code does not attack lotteries themselves; what has been rendered indictable is the running of public lotteries and the precise offence envisaged by the section is that of keeping any place for the purpose of drawing any unauthorised lottery. [p. 147, col. 1.]

The word "drawing" is used in the section in its physical sense and the actual drawing of lots is an essential ingredient of the offence provided for in section 294A, Indian Penal Code. [p. 147, col. 1.]

The essential factor in a lottery is that there should be a scheme for distribution of a prize or prizes to be determined solely by chance, and if chance so decrees that no prize is to be distributed to the adventurers and the stakes are to be appropriated by the organiser of the lottery, the scheme is nonetheless a lottery. [p. 145, col. 2.]

The accused ran two lotteries in the following manner: (*i*) Tickets numbered 1 to 100 were put into a pitcher and the public purchased other tickets and chose a number consisting of either one or two digits which at the time of the sale was written upon their tickets. In the evening three tickets were drawn from the pitcher, their sum was taken and the last two figures of their sum became the winning numbers. Those persons were then adjudged to be winners whose tickets bore either one or both of the last two digits of the total so obtained: (*ii*) Instead of drawing three tickets from a pitcher the average price at which the various sales of opium had taken place that month in Calcutta was calculated and prizes were awarded to those persons who had predicted the last or the last two figures of that price:

Held, (1) that in the first case the distribution of prizes was determined solely by the fortuitous issue of numbers from the pitcher and that it was essentially a lottery within the meaning of section 294A of the Code; [p. 146, col. 1.]

(2) that in the second case also the result of the lottery was determined solely with reference to the two inferior digits of the price, there being no scope for skill, and that this also was a lottery within the meaning of the section, but that since there was no drawing in this particular case, the transaction did not render the accused liable to punishment under section 294A, Indian Penal Code. [p. 147, col. 1.]

Hall v. *Cox*, (1899) 1 Q. B. 198; 68 L. J. Q. B. 167; 47 W. R. 161; 79 L T. 653; 15 T. L. R. 82; *Ram Pratap Nemani* v. *Emperor*, 16 Ind. Cas. 171; 16 C. W. N. 858; 39 C. 968; 16 C. L. J. 250; 13 Cr. L. J. 603, distinguished.

Appeal from the order of the Magistrate, 1st Class, Jullundur, dated the 31st July 1916, acquitting the respondent.

Kanwar *Dalip Singh*, for the Government Advocate, for the Appellant.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Respondent.

JUDGMENT.—This is an appeal by the Local Government against an acquittal on a charge under section 294-A, Indian Penal Code. The reason given by the Magistrate for acquitting the respondent is that his operations did not amount to the drawing of a lottery and that the acts with which he was charged were merely wagering and betting and constituted no offence.

The learned Counsel for the Crown has explained that this appeal has been brought as a test case and that Government is desirous of securing judicial opinion whether the

two forms of 'lottery' which were operated by the respondent were lotteries within the meaning of section 294A.

It is clear from the evidence that one of the 'lotteries' was run in the following manner:—Tickets numbered 1—100 were put into a pitcher and the public purchased other tickets and chose a number which at the time of sale was written upon their tickets. This number could consist of either one or two digits. In the evening three tickets were drawn from the pitcher above mentioned, their sum was taken and the last two figures of their sum, *i. e.*, the unit and ten digits, became the winning numbers. Those persons were then adjudged to be the winners whose tickets bore either one or both of the last two numbers of the total so obtained; *e. g.*, if the sum of the three tickets drawn was 43, the purchaser of a ticket bearing the number 3 would be a winner and would get ten times the amount he had paid for his ticket. Similarly, a person who backed the number 43 would also be a winner, and in his case his prize might vary from fifty to eighty times the amount he had paid for his ticket.

The second type of 'lottery' was worked in very much the same manner, for the only variation consisted in this, that instead of drawing three tickets from a pitcher the average price at which the various sales of opium had taken place that month in Calcutta was calculated and prizes were awarded not to the person who had guessed or predicted the average price of opium but to those persons who had predicted the last or the last two figures of that price; for instance, if the average of the opium sales was Rs. 2,149, only those persons who had backed the number 9 or the number 49 became the winners.

On behalf of the Crown it has been urged that the result of these 'lotteries' was determined purely by chance and that the element of skill in no way entered into the matter. On behalf of the respondent it has been pointed out that if the exercise of skill in any way contributes to success in these competitions, they are *ipso facto* removed from the category of lotteries; *secondly*; that the method employed by the respondent was a very unusual one, inasmuch as in ordinary lotteries the amount to be distributed by way of prize is entirely contributed by the adventurers: and *thirdly*, that in this species of 'betting' it was possible that none of the adventurers might win any prize at all and that circumstance alone distinguished the respondent's operations from the usual type of lotteries.

Section 294A renders penal the keeping of any place for the purpose of drawing any lottery not authorised by Government; and it is found by the Magistrate and admitted before us by the respondent that he did in fact keep such a place for the drawing of the results of the 'lotteries' above mentioned, so that the only point which we are called upon to decide is whether the operations described above are lotteries. Now, the principle underlying a lottery is that there should be a distribution of prizes determined solely by chance; but if the results of the lotteries are such that no prize at all is distributed and the organizer of the lottery pockets the whole of the stakes adventured, the transaction does not cease to be a lottery. The actual distribution of a prize or prizes and contribution of the whole stake by the adventurers are not essential; the essential factor in the case is that there should be a scheme for distribution of a prize or prizes to be determined solely by chance, and if chance so decrees that no prize is to be distributed to the adventurers and the stakes are to be appropriated by the organiser of the lottery, the scheme is nonetheless a lottery. *Cf. Bartlett* v. *Parker* (1). Consequently the second and third grounds on which the learned Counsel for the respondent attempted to differentiate between this and an ordinary lottery appear to us to have no force. The lower Court has referred to the following rulings in support of its finding: *Queen Empress* v. *Narottamdas Motiram* (2), *Ram Pratap Nemani* v. *Emperor* (3). On these, however, the learned Counsel for the respondent places no reliance, for it is obvious that they have little direct bearing on the case before us. They are not cases dealing with prosecutions under section 294A, Indian Penal Code, but are concerned with prosecutions under the Calcutta or

(1) (1912) 2 K. B. 497; 81 L. J. K. B. 857; 106 L. T. 869; 76 J. P. 280.

(2) 13 B. 681; 7 Ind. Dec. (N. S.) 451.

(3) 16 Ind. Cas. 171; 16 C. W. N. 858; 39 C. 968; 16 C. L. J. 250; 13 Cr. L. J. 603.

Bombay special Acts. The case reported as *Ram Pratap Nemani* v. *Emperor* (3) was, however, referred to by the learned Counsel for the respondent by reason of a *dictum*, it contains to the effect that the system of cotton gambling with which that case dealt was not a lottery, and it is contended that the system of cotton gambling was parallel in its method with the opium lottery conducted by the respondent in this case. The *dictum* referred to, however, is not a judicial pronouncement, for the question whether the system of cotton gambling constituted a lottery was not before the learned Judges who decided that case and they delivered themselves of that *dictum* solely for the purpose of meeting a decision by the Recorder of Rangoon, which was quoted before them to the effect that a lottery is a game, inasmuch as some apparatus was necessary for drawing the lots. The sole question that arose in the case before them was whether the premises on which defendant carried on the cotton gambling was a common gaming house within the definition given in the Act, and they held that that system of cotton gambling was not a lottery, inasmuch as it was not a game or contest, and consequently that the premises on which that cotton gambling was carried on was not a common gaming house.

This case, then, dealing with a prosecution under section 294A of the Code appears to be one of first impression, for Counsel on both sides have failed to cite any ruling under the section. As stated above, in a lottery the distribution of prizes is determined solely by chance, and it is common ground that where exercise of skill may affect the result the scheme is removed from the category of lottery. With regard to the first type of "lottery" with which this case deals, no attempt has been made by the learned Counsel for the respondent to argue that the skill of the adventurers could in any way affect the result of the lottery. It is obvious that the distribution of the prizes was determined solely by the fortuitous issue of numbers from the pitcher, and that particular type of lottery we hold is essentially a lottery within the meaning of section 294A of the Code.

With regard to the second type of lottery, *i.e.*, the system of determining the winning numbers not by drawing from a pitcher but by taking the average of the prices fetched at the opium sales and communicated to the organiser of the lottery by telegram, it was suggested in a lukewarm manner that skill on the part of an adventurer might affect his success. No attempt, however, was made to show in detail how in the peculiar conditions of this lottery a knowledge of supply and demand and of statistics could guide an adventurer to a selection of the winning numbers In *Hall* v. *Cox* (4) the doctrine that the exercise of skill can guide an adventurer to success was pushed to a very extreme limit, for in that case the defendant published a newspaper containing an offer of money prizes for a correct prediction of numbers of births and deaths in London during a named week, and competitors were to fill in the predicted numbers on coupons which were published in the issue of the number which contained the offer. The points, however, which distinguish that case from this are, *firstly*, that the exact numbers of births and deaths had to be predicted, and *secondly*, that the competitors were not restricted to one prediction. Each case must be decided on its own peculiar circumstances; and we have to determine whether in the peculiar conditions under which the 'lottery', we are now considering, was conducted any statistical skill was likely to affect the result of the lottery. Now, it is a matter of notoriety that the price of opium fetched at opium sales varies enormously, the variations are not of units or even tens or even hundreds of rupees, and we have seen that the successful competitor in this case has not to predict the exact average figure at which opium will be sold in any given month. He has merely to predict the two last figures of the price, *i.e.*, the unit digit and the ten digit. Thus a competitor who *ex hypothesi* had worked out the price to 22481 and had backed the figure 81 would, if the average price were subsequently found to be 12,481, win the lottery, whereas a competitor who had worked out the price to 12,482 would be a loser inspite of the fact that he was by 10,000 less one more accurate than the winner in the calculation of the average price. Were the question of predicting the average price confined within a range

(4) (1899) 1 Q. B. 198; 68 L. J. Q. B. 167; 47 W. R 161; 79 L. T. 653; 15 T. L. R. 82.

of a few rupees, the element of skill would probably enter into the competition, but where, as in this case, the price varies enormously and the result of the lottery is determined solely with reference to the two inferior digits of the price we cannot hold that there is any scope for skill. This form of lottery, too, we hold to be a lottery within the meaning of section 294A, Indian Penal Code.

There is, however, in this case one other point not argued at the Bar, which has struck us and that bears reference to the language of the section under which this prosecution was brought. It will be noticed that the Legislature had not attacked lotteries themselves. What has been rendered indictable is the running of public lotteries and the precise offence envisaged by the section is that of keeping any place for the purpose of drawing any unauthorised lottery. Now we are considering a penal law and are, therefore, bound to interpret it in the strictest possible manner in favour of the respondent.

Though there is ample authority for holding that a lottery does not cease to be a lottery because the winners are determined by a method other than the actual drawing of the winning numbers, still we have no doubt that in the offence provided for in section 294A of the Code the actual drawing of lots is an essential ingredient. The word 'drawing', we think, is used in the section in its physical sense and when the section was enacted in 1870, it seems probable that the only form of lottery envisaged by the Legislature was a lottery run on the usual lines in which the winning numbers are actually drawn out of an urn, box or other receptacle. If this our view of the meaning of the section be correct, then the second form of lottery which is before us, *i.e.*, the lottery on the opium sales, was not a lottery which was drawn in the place kept by the respondent. Consequently although we hold that his transactions on the average price of opium amounted to the running of a lottery, those transactions do not render him liable to conviction under section 294A, Indian Penal Code.

This flaw in the prosecution case, however, would bear reference only to the opium lottery, but is entirely absent so far as the first kind of lottery described is concerned. Our conclusion then is that both schemes fall within the meaning of the word lottery but that only the first scheme, which was practised by the respondent in a place kept by him for that purpose, rendered him liable to conviction under the section.

His action produced very undesirable and pernicious results and he appears to have made considerable profits thereby. We accordingly accept the appeal, reverse the order of acquittal and convict the respondent under section 294A, Indian Penal Code, inflicting upon him a fine of Rs. 500 and in default of payment direct that he suffer simple imprisonment for six weeks.

Appeal accepted.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 56 OF 1917.

February 23, 1917.

Present:—Mr. Justice Atkinson.

KHOBHARI RAI AND OTHERS—PETITIONERS

versus

BHAGWAT RAI—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 147, 379—Criminal Procedure Code (Act V of 1898), s. 344—Riot and theft—Stay of proceedings—Civil suit in respect of same property already pending, effect of.

Where accused are charged with theft and riot and the charges have reference to property which forms the subject-matter of a Civil suit already pending, it is desirable in the interests of the fair administration of justice that the Criminal proceeding should be stayed until the disposal of the Civil suit. [p. 148, col. 2.]

Criminal revision against an order of the Sub-Divisional Officer, Gopalgunge, District Saran.

FACTS.—On 10th November 1916, the Police reported to the Sub-Divisional Officer, Gopalgunge, that there was likelihood of a breach of the peace between the opposite party and the son of the petitioner No. 1 and asked for action under section 107, Criminal Procedure Code, against both the parties. The Sub-Divisional Officer started proceedings under section 145, Criminal Procedure Code, and ultimately the opposite party was declared in possession of the disputed land on 9th December 1916. This order was confirmed by the High Court on 10th January 1917; on the 8th January 1917 the opposite party complained against the petitioners under sections 147 (Riot) and 379 (Theft), Indian Penal Code, for their

having cut and removed crops standing on the disputed lands on 10th November 1916. The Sub-Divisional Officer started the prosecution of the petitioners under those sections. On the 26th January 1917 the petitioner No. 1 instituted a suit in the Court of Munsif, Gopalgunge, District Saran, for a declaration of his title to and recovery of possession of the lands in dispute, and moved the Sub-Divisional Officer for stay of the Criminal proceedings pending the Civil suit—but he was unsuccessful. Hence this application.

Mr. *Gour Chandra Pal*, for the Petitioners.

Mr. *Manohar Lal* (Assistant Government Advocate), for the Crown.

Mr. *Baidyanath Narayan Sinha* watched proceedings on behalf of the Opposite Party.

JUDGMENT.—Having considered the facts of this criminal revision, I am of opinion that the Criminal prosecution should be stayed pending the disposal of the Civil suit pending in the Court of the Munsif at Gopalgunge in the District of Saran. The suit is numbered 65 of 1917, in which Khobhari Rai is the plaintiff and Bhagwat Rai and two others are the defendants. I shall direct the learned Munsif to take up the hearing of this Civil suit at once; and try it *de die in diem* until the case is disposed of; and I will stay the prosecution instituted against the petitioners by the Police on the 8th of January 1917 until the disposal of the Civil suit, that is to say, immediately after the Munsif has disposed of the Civil suit, the stay in the Criminal proceeding will be dissolved unless the Court, for good reasons, should extend the same for a further period of time. In the meantime I would ask the Sub-Divisional Magistrate of Gopalgunge to forthwith take proceedings under section 107 of the Code of Criminal Procedure to bind the accused to keep the peace and be of good behaviour towards Bhagwat Rai and all His Majesty's subjects and likewise to institute proceedings under the same section against Bhagwat Rai to be of good behaviour towards the petitioners and towards the rest of His Majesty's subjects until the Criminal proceedings have been disposed of. The reason why I stay the proceedings is that the charge of riot and theft made has reference to the property which forms the subject-matter of the Civil suit pending before the Munsif; and, in my opinion, it would be undesirable in the interest of the fair administration of justice that the Criminal proceeding should be continued for the present, as it might in a material way affect the plaintiff's Civil rights. Accordingly the Criminal proceedings are hereby stayed until the disposal of the Civil suit.

I shall issue a separate order to the Munsif requesting him to dispose of the case pending before him as expeditiously as possible and I would ask the Sub-Divisional Magistrate of Gopalgunge to press the Munsif to do so.

Proceedings stayed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 216 OF 1917.

June 12, 1917.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

GOPI NATH PANDA—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 193—False statement—Intention.

In a case under section 193 of the Penal Code it is essential to show that the accused gave false evidence or made a false statement intentionally. [p 149, col. 1.]

Motion against the order of the Sessions Judge, Cuttack, dated the 14th May 1917, in Criminal Appeal of 1917, 2nd quarter, being originally tried before the Magistrate, 1st class, Cuttack, dated the 4th May 1917.

Mr. *G. C. Pal*, for the Petitioner.

Mr. *Fakhruddin*, Government Pleader, for the Crown.

JUDGMENT.—The accused in this case has been charged and convicted under section 193 of the Indian Penal Code. It appears that the accused had purchased the property which formed the subject-matter of a dispute between himself and Padma Charan Naik, Fakir Sahu, Brindaban Naik and Jambu Naik. On the 10th of July 1916, shortly after the accused got possession of the property purchased by him, the above-mentioned persons are alleged to have uprooted a fence on the accused's land. The accused went to the

thana and informed the Police of what had happened. The Police in reply told him to go to the Civil Court and seek relief there. On the 26th of July, that is, a few days later, the accused on his own responsibility preferred a charge before the Magistrate against the persons named above in respect of the offence committed by them on the 10th of July. The case was ready for hearing on the 31st July and it was finally disposed of on the 11th of August 1916 when the accused was examined. In the course of his examination he was asked whether he had given information to the Police. The answer was, "I did not give information to the Police about any uprooting of the fence by these three accused."

We do not know the exact nature of the question put to the accused, we can merely surmise the vague nature of the question put by the general nature of the form in which the answer given has been recorded. It is alleged that the answer of the accused to the effect that he had given no information to the Police was false, and deliberately false, inasmuch as the accused must have known that he had given information to the Police on the 10th of July.

In a case under section 193 it is essential to show that the accused gave false evidence or made a false statement intentionally. With regard to the proceeding of the 26th of July we think that it was essentially different in character to the complaint made to the Police on the 10th of July. Before the Police the accused made no information in the strict sense of the word and there is no record of what he stated then, except a note made behind the back of the accused by the Sub-Inspector in his diary. The accused may have thought that he had given no information in the strict sense according to law on the 10th of July. On the other hand it may just as well be that he thought that he was being questioned in regard to the charge preferred by him on the 26th of July, and he may have meant to say that he had given no information in the matter then being inquired into. If he had stated this, it would have been perfectly true because the complaint that was made on the 26th of July upon the accused's own responsibility was in no way connected with the Police; nor is it alleged that the Police had any concern with this charge.

Moreover, we find that the attention of the accused was not drawn to his statement before the Police on the 10th of July in order that he might, if possible, reconcile the statement that he was then making with the true state of things if indeed he was referring, in answering the question put to him, to the incident of the 10th of July.

Having carefully considered the case, we think that it would be unsafe to uphold the conviction of the accused under section 193 of the Indian Penal Code, having regard to the vague nature of the statement forming the subject-matter of the charge.

We accordingly direct that the conviction and sentence passed upon the accused be set aside and that the accused be acquitted and released.

Conviction set aside.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 227-A OF 1916.

September 9, 1916.

Present:—Mr. Justice Twomey.

EMPEROR—PROSECUTOR

versus

PO WUN—ACCUSED.

Whipping Act (IV of 1909), s. 3—Appeal—Whipping, sentence of, after part of sentence of imprisonment has been served, legality of—Appellate Court, power of—Criminal Procedure Code (Act V of 1898), s. 423.

Under section 3 of the Whipping Act a whipping can only be imposed in lieu of any other punishment and the intention of the law is infringed by ordering a man to be whipped after he has already served part of a sentence of imprisonment. [p. 149, col. 2; p. 150, col. 1.]

JUDGMENT.—The Magistrate sentenced the accused to suffer rigorous imprisonment for six months, the offence of which he was convicted being theft under section 379, Indian Penal Code.

On appeal the Sessions Judge altered the sentence to one of whipping. On the date of the Sessions Judge's order the accused had already served fourteen days of the sentence of imprisonment.

The effect of the appellate order is that the accused has suffered a whipping in addition to imprisonment. Under the Whipping Act 1909, section 3, a whipping can be imposed only in lieu of any other punishment, and the

intention of the law is clearly infringed by ordering a man to be whipped after he has already served part of a sentence of imprisonment.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 24—33 OF 1917.

March 27, 1917.

Present:—Mr. Rigg, J. C.

NGA SAN NYEIN AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (*I of* 1872), *ss.* 30, 114 (b)—*Confession of co-accused, whether constitutes sufficient basis for conviction—Retracted confession, value of—Accused, examination of, object of.*

The confession of a co-accused is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case. But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by the other confessions, whether these have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not. [p. 151, col. 2.]

Case-law discussed.

The weight to be given to a retracted confession depends on the circumstances under which it is made, and on the intrinsic credibility of the confession. [p. 152, col. 2.]

Chit Tun v. *Crown*, 1 L. B. R. 238, relied on.

The object of examining an accused person is to afford him an opportunity of explaining away evidence against him. Each point appearing in evidence should be put to the accused and he should be invited to offer his explanation or comment on it. Anything in the nature of cross-examination should be avoided. [p. 154, col. 2; p. 155, col. 1.]

Messrs. *C. G. S.* and *L. Pillay*, for the Appellants.

Mr. *H. M. Lutter*, for the Crown.

JUDGMENT.—Nga San Nyein, Nga Ngwe Zin, Nga Kyi Byu, Nga Hme, Nga San Byaw, Nga Shin, Nga Yan Nyein, Nga Po Min, Nga Thu Daw and Nga Tet Si have all been convicted by the Sessions Judge, Magwe, of committing dacoity with murder at Kyaungyagan on the 19th September last and with the exception of Nga Tet Si had been sentenced to death. There is no doubt whatever that a dacoity was committed in the course of which Maung Nyi Maung was killed by some of the dacoits. The evidence shows that late at night, six or seven men came armed with *dahs*, sticks and a tube-gun to the house of Maung Shwe Daik. They demanded money and some of them called out that they had caught one of the inmates of the house. Thereupon San Kwin and Nyi Maung attacked the dacoits with *dahs*. Both of them were wounded and Nyi Maung died three days later in the Yenangyaung hospital. The fight took place whilst the dacoits were still near the house of Shwe Daik and not whilst they were retreating after abandoning their attempt to commit the robbery. Section 396 clearly applies to the case. San Kwin and Nyi Maung were justified by the right of private defence in attacking the dacoits, who were not justified by the provocation thus given in killing Nyi Maung. Nyi Maung was cut several times with a *dah*, one of the wounds being a severe one on the back, and there can be no doubt that in causing his death, his assailants committed murder. San Kwin wounded one of the dacoits on the head. The dacoits left behind them Exhibits Nos. 1—7, of which the most important are a *pawa* with a *dah*-cut and some human hair, and three sticks of *dahat* wood. The wounded dacoit managed to escape. Nag San Nyein was found wounded after the dacoity, and his wounds correspond in respect of position and age with those of the man attacked by San Kwin.

The rest of the evidence in the case is found in five confessions, all of which have been retracted in Court. The evidence of corroboration is of very little or no value, and except in the case of San Nyein, the convictions rest upon the credit to be given to the confessions. The Sessions Judge believed that the confessions were voluntary and were true. He failed to consider whether confessions of co-accused persons are proper material upon which to base a conviction unless they are corroborated in material particulars and as regards the identity of the persons alleged to be concerned in the crime. In *Emperor* v. *Kehri* (1) it was held that a retracted con-

(1) 29 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360.

fession may be taken into consideration against co-accused persons, and although corroborative evidence may be necessary, it is not necessary that such evidence should be by itself sufficient to support a conviction. Richards, J., said that he could see no reason why a Court could not legally convict an accused person on the unsupported confession of a co-accused. He remarked that at the same time it is very seldom that a Court ought to convict on such unsupported evidence. In *Gangapa Kardepa* v. *Emperor* (2) Heaton, J., thought that the confessions of seven co-accused, who had independently implicated four others, was a sufficient basis for supporting the convictions of these four men, and he referred to illustration (*b*) to section 114, Evidence Act, as affording precisely the kind of corroboration which in certain circumstances is a sound foundation for belief. This view was not, however, accepted by two other learned Judges of the same Court, who held that it was a rule followed in all the High Courts in India that a conviction founded solely on the confession of a co-accused could not be sustained. They also held that illustration (*b*) to section 114, Evidence Act, only applies to the testimony of an accomplice. An examination of the authorities leaves no doubt in my mind that the decision of the majority of the learned Judges in *Gangapa Kardepa's* case (2) is correct: *Queen* v. *Jaffir Ali* (3), *Queen* v. *Naga* (4), *Queen-Empress* v. *Dosa Jiva* (5), *Queen-Empress* v. *Khandia* (6), *Queen-Empress* v. *Ram Saran* (7), *Queen-Empress* v. *Nirmal Das* (8), *Giddigadu, In re* (9), *Empress* v. *Ashootosh Chuckerbutty* (10), *Yasin* v. *King-Emperor* (11). In *Queen* v. *Sadhu Mundul*

(2) 21 Ind. Cas. 673; 38 B. 156 at p. 164; 15 Bom. L. R. 975; 14 Cr. L. J. 625.

(3) 19 W. R. Cr. 57.

(4) 23 W. R. Cr. 24.

(5) 10 B. 231; 10 Ind. Jur. 383; 5 Ind. Dec. (N. S.) 541.

(6) 15 B. 66; 8 Ind. Dec. (N. S.) 45.

(7) 8 A. 306; A. W. N. (1885) 311; 4 Ind. Dec. (N. S.) 1023.

(8) 22 A. 445; A. W. N. (1900) 169; 9 Ind Dec. (N. S.) 1334.

(9) 1 Ind. Cas. 867; 9 Cr. L. J. 404; 33 M. 46; 8 M. L. T. 116.

(10) 4 C. 483; 3 C. L. R. 270; 1 Shome L. R. Cr. R. 79; 2 Ind. Dec. (N. S.) 307.

(11) 28 C. 689; 5 C. W. N. 670.

(12) Phear, J., said: "It is true that the instance of corroboration which is appended to illustration (*b*) of section 114, Evidence Act,...is corroboration to be found in accounts of an occurrence given by the accomplices; but it is noticeable that the Legislature... makes it a condition...that these accomplices should have been 'captured on the spot and kept apart from each other' and... there is not the slightest indication that the Legislature intended in this passage by the term 'accounts given by the accomplices' anything other than accounts given in due course of examination as witnesses." Section 133, Evidence Act, modifies the general rule laid down in section 114, but it clearly refers only to accomplices who have been examined as witnesses. The result of the decisions cited above appears to be that the confession of a co-accused person is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case. But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by the other confessions, whether these have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not. Mr. Lutter, who has appeared in this Court for many years, informs me that it has been the rule not to uphold convictions based merely on the confessions of co-accused persons. He is not prepared to support the convictions of Yan Nyein, Po Min, San Byaw or Nga Shin. These convictions rest entirely on the retracted confessions of other appellants, and are set aside. Nga San Nyein, Nga Po Min, Nga San Byaw and Nga Shin are acquitted and will be set at liberty.

San Nyein, Yan Nyein and Po Min belong to Kyunbosan village, whilst San Byaw, Nga Shin and Nga Hme come from Kyetthaukkwin. Maung Shwe Ge is headman of Kyunbosan. Yan Nyein and Po Min are his sons, San Byaw and Nga Shin are brothers and his nephews, whilst San Nyein is another nephew. San Nyein disappeared after the dacoity, and was induced to surrender by Shwe Ge, who seems to have been chiefly

(12) 21 W. R. Cr. 69 at p. 71.

instrumental in detecting this case. Maung Chet, a cousin of San Nyein, said in the Committing Magistrate's Court that Shwe Ge mentioned the names of all the appellants to him before San Nyein was arrested, but this piece of evidence was not elicited in the Sessions Court, and Shwe Ge was not questioned about it in either Court. Maung Chet also told the Committing Magistrate that Shwe Ge was very anxious and asked him to help him with reference to his sons and nephews, but this important statement was alo overlooked in the Sessions Court. San Nyein was arrested on the 7th October, and confessed to his uncle, to Maung Chet, Maung Hmo and the Kama headman Tun Tin. He implicated Ngwe Zin, Thu Daw, Tet Si, Kyi Byu and Nga Hle. He described Nga Hle as a villager of Magyi-yo. The other four men all come from Yeson village. Thu Daw probably is the father of Tet Si, but this relationship has not been clearly ascertained and the conjecture of its existence rests upon the headings of the examination forms. On the 8th, San Nyein confessed to a Magistrate and stated that he did so as he had no chance of escape. In that confession he suppresses all mention of the visit to Kyetthaukkwin village by the members of the gang. and he puts the gun in the hands of Ngwe Zin. He also says there were six men concerned. As the other four were all relatives, his reason for silence is obvious. There can be no doubt that this confession is a voluntary one. San Nyein was wounded, and the explanation now put forward by him of the way he received those wounds is incredible. They are the kind of wounds that one man would receive when fighting with another. The evidence of his identification of his own *pawa* at the Police Station is inadmissible and should not have been recorded, as it is excluded by section 25, Evidence Act. The evidence as to his pointing out the place where sticks were cut is of no value. The sticks found at the scene of crime did not correspond with the stumps. There can be no doubt about San Nyein being one of the dacoits, and he has been rightly convicted.

Thu Daw and Ngwe Zin were arrested on the 8th of October but did not admit their guilt. On the 13th Kyi Byu was arrested and he confessed the next day. He said that his motive for confessing was that he knew that he could not escape from the Police and San Nyein had already confessed. Prior to this he had confessed to Tun Tin, who says that he named the Yeson men, San Nyein, Yan Nyein, Po Min, San Byaw, Nga Hme and Nga Shin. Maung Hmo was also present at the confession. In the Committing Magistrate's Court he said that Kyi Byu named all the accused, but in the Sessions Court he said that he implicated the Yeson men and Nga Shin. He was not asked to explain the difference between his two statements. He is related to Shwe Ge on his wife's side and he may have intentionally suppressed some names in the Sessions Court. In his confession before the Magistrate, Kyi Byu mentions Nga Shin, San Nyein, Tet Si, Thu Daw, Ngwe Zin and three unknown men from Kyetthaukkwin, and says that ten men were concerned in the dacoity. He has retracted his confession, which he declares was made under ill-treatment by the Police. There is not the slightest reason to suppose that he was in any way ill-treated. He denied that he ever confessed to the village headman. The evidence against Kyi Byu consists solely of these retracted confessions, with such support as they derive from other confessions. The law relating to retracted confessions was fully discussed in *Chit Tun* v. *Crown* (13), and I adopt the conclusions of the learned Judges of the Chief Court in that case. The weight to be given to such confessions depends on the circumstances under which they were made, and on the intrinsic credibility of the confessions. In my experience confessions in Burma are seldom the result of physical ill-treatment by the Police.

Sometimes the person confessing is under Police surveillance and is induced to confess under threat of prosecution coupled with a promise that if he confesses, he will be given a pardon. Sometimes the Police have a certain amount of evidence against the man, and induce him to confess under a similar promise. Relatives are not infrequently called in to persuade him that it will be better for him to confess. Others confess in the hope that they will derive some benefit from doing so, and will be less severely punished. Some confessions are made out of resentment against those who have already confessed and with a view of securing their punishment, whatever may happen to the person confess-

(13) 1 L. B. R. 238.

ing. Not infrequently confessions are due to a belief that every thing is lost, and that the result of deeds in a former state of existence has brought the prisoner into peril. He succumbs to his ill luck and does not attempt to fight against it. It is not possible to enumerate exhaustively all the motives that may lead to a confession but the present case seems to afford illustrations of the motives just suggested. I have no doubt that Kyi Byu's confession was due to a feeling that he could not escape from punishment, and that he might as well yield to his fate. He gave himself up to the headman, and has entirely failed to explain why he did so, if he was not concerned in the crime. I am of opinion that the confession is substantially true, so far as the part played by him in the crime is concerned, although for some reason he has concealed the names of some of his companions. He has been rightly convicted.

The day after Kyi Byu confessed, both Thu Daw and Ngwe Zin, who had been in the same lock-up, confessed. They had been in Police custody for a week. Thu Daw was closely examined by the Magistrate about his reasons for confessing. He said that his mind was in a state of confusion or bewilderment, that he knew he would not escape punishment, and although he was afraid, he could not avoid what he could not keep to himself, and he felt himself unsafe. Nga Zin said that he knew he would be punished, but he wanted all who had taken part in the dacoity to be punished. He was asked why he had delayed and said that he had been considering the matter and wondering whether, if he spoke out, the wives and children of the others concerned would be oppressed or put to trouble. He probably meant to say that he felt a certain amount of sympathy with them. Both men now say that they were ill-treated by the Police. There is not the slightest reason for believing this assertion. They both come from the same village as Kyi Byu and are neighbours. The fact that both confessions were made the day after Kyi Byu confessed is very significant. The men were all confined in the same Police Station, and Kyi Byu had mentioned the names of Ngwe Zin and Thu Daw. It was pointed out in *Queen-Empress* v. *Basvanta* (14) that the law in India is not identical with that in England on the relevancy and admissibility of confessions. In England if there is any doubt about the admissibility of a confession, it has to be proved to be free and voluntary. In India the question to be decided is whether the confession appears to have been induced by any of the means mentioned in section 24, Evidence Act. There are no grounds for supposing that the confessions of Thu Daw and Ngwe Zin were induced by any of those means. They are, therefore, admissible and the only question is whether they are credible. There is very little corroboration. Chit Po says that he saw Ngwe Zin and Tet Si leave the village of Yeson about sunset on the day the dacoity was committed. Maung Kaung says he saw Ngwe Zin leave the gate alone. Ma Kaw states that So Pe told her that he saw blood on Thu Daw's jacket on the night of the dacoity. So Pe and Maung Hla depose to having seen the blood, which Thu Daw told them was fowl's blood. There is nothing to show what the nature of the blood was. This evidence does not corroborate any of the incidents mentioned in the confessions. The prosecution must, therefore, fall back on the inherent credibility of the confessions as sufficient ground for the conviction. The motive for the confessions of Ngwe Zin and Thu Daw seems to me clearly to lie in the fear and annoyance caused by the fact that Kyi Byu had confessed and implicated them. The Sessions Judge remarks that the five confessions in the case differ considerably in the details of the going and coming of the dacoits and the course of the dacoity. But he thought that in spite of these differences, they were correct and true. The greatest differences are between San Nyein's confession and those of the other four men. There are strong reasons for thinking that San Nyein has suppressed much of what he knew to shield his friends, if they were concerned.

If the confessions of the other four men are compared carefully, there are no serious discrepancies in the accounts given. Nga Hme says that San Byaw had one of the guns when he went into the village, and the others say that Nga Shin had it. The gun may have passed from one hand to another. I have carefully considered whether the confessions were the result of Police tuition and I think that it is impossible to believe that

(14) 25 B. 168; 2 Bom. L. R. 761.

they were. The Kyetthaukkwin men were arrested on the confession of Ngwe Zin. It is very unlikely that the names of these men were inserted at the suggestion of any Police Officer. Four of them were close relatives of Shwe Ge, who had assisted the Police to detect the case. There is no reason why the Police should wish for the gang to be enlarged. If the Kyetthaukkwin and Kyunbosan men were included in the members of the gang as an afterthought, it must have been due to the wish of Kyi Byu, Thu Daw and Ngwe Zin to revenge themselves on Shwe Ge. Kyi Byu only mentions one of the men by name, and Thu Daw only knew two men. If Thu Daw and Ngwe Zin had conspired to confess out of revenge, Thu Daw would probably have mentioned the same names of the Kyetthaukkwin-Kyunbosan party as Ngwe Zin did. But the theory becomes still more difficult to believe when Nga Hme's confession is taken into consideration. He comes from Kyetthaukkwin (Wetchok is the same village) and was only in Police custody for half a day at Yenangyaung before he confessed. He admits that he was kept away from the other men in the lock-up.

His confession, therefore, was not the result of conference with Thu Daw or Ngwe Zin, and he had no reason whatever for implicating his fellow villagers. He is also known as Hnget Kyi, by which name he was mentioned in Ngwe Zin's confession. He states that he was taught what to say by Min Gyaw, a Sergeant of Police. He was in the charge of the headman after arrest, and if there was tuition, the headman must have been aware of it. It seems to me impossible that any policeman could have taught Nga Hme so well in the short time before he confessed, that he, an ordinary Burman yokel, would have been able to give a detailed account of the crime and of the part played in it by ten men so as to make that account tally with Nga Zin's confession. His reason for confessing is that he thought he could not escape punishment. As was remarked in Chit Tun's case, "it is not improbable that a person under arrest may think his fate is certain, and that the only hope for him lies in either obtaining a pardon or a less severe punishment by confession and implicating his fellow-criminals." This motive is a common one amongst Burmans, who are much influenced by their belief in 'kan' or the result of deeds in a former existence. After careful consideration, I have come to the conclusion that the Sessions Judge is right in believing that the confessions were substantially true as far as they affected those making them. Against Tet Si the only evidence is that of the confessing co-accused and that is an insufficient basis for a conviction. The conviction of Tet Si is set aside and he is acquitted. The Sessions Judge has sentenced the others to death. It was pointed out in *Queen-Empress* v. *Nga Pyon Cho* (15) that sentences of death should be passed in cases under section 396, Indian Penal Code, unless there are extenuating circumstances. The gang in this case went out armed with the two tube guns and *dahs* and the probability of some villager being killed must have been present to their minds. The persistency with which these offences are committed in Burma calls for the severest punishment. According to the confessions, Nga Hme and Kyu Byu waited outside the village. They were keeping watch there, and according to the map, were 125 yards from the house attacked. They are equally liable under section 37, Indian Penal Code, for the dacoity, and their mere presence at the actual scene of the crime is immaterial: *Queen-Empress* v. *Teja* (16) The *alibis* set up are so weak as not to require serious discussion.

I dismiss the appeals of San Nyein, Ngwe Zin, Kyi Byu, Thu Daw and Nga Hme.

The manner in which the Committing Magistrate has examined some of the accused is open to most serious objection. He has cross-examined them and asked such question as "if you did not commit the dacoity, who did?" It ought not to be necessary to point out that it was for the prosecution to prove who committed the crime. The object of examining an accused person is to afford him an opportunity of explaining away evidence against him. Each point appearing in evidence should be put to the accused and he should be invited to offer his explanation or comment on it. Anything in

(15) S. J. L. B. 636.
(16) 17 A. 86; A. W. N. (1895) 12; 8 Ind. Dec. (N. S.) 380.

the nature of cross-examination should be avoided.

Appeals dismissed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 598 OF 1916.

October 18, 1916.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

SHER KHAN AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Confession, retracted, value of—Corroboration—Penal Code (Act XLV of 1860), s. 302—Murder—Evidence.

It is unsafe to base the conviction of an accused for murder on his retracted confession unless it is corroborated by trustworthy evidence in all the material particulars detailed therein. [p. 157, col. 1.]

Appeal from the order of the Sessions Judge, Jhelum, dated the 12th July 1916, convicting the appellants and sentencing them to death.

Mr. *Nand Lal*, for the Appellants.

Mr. *Jai Gopal Sethi* (for the Government Advocate), for the Respondent.

JUDGMENT.—The Sessions Judge of Jhelum has convicted three persons, namely, Sher Khan, Baz, and Murid, of the murder of Sultan Khan by strangling him on the night of the 30th April and 1st May 1916, and has inflicted the capital sentence upon each of the convicts. They have preferred an appeal to this Court through Counsel, and the case is also before us upon a reference under section 374, Criminal Procedure Code, for confirmation of the death sentences.

It is beyond dispute that on the night in question Sultan Khan was sleeping at his threshing floor about two or three miles from the village Jhund, and that the next morning his corpse was found lying on a bed there. The persons, who went to the place, noticed the injury on the neck which clearly indicated that he had been strangled; and his widow *Musammat* Banno suggested that the offence had been committed by four of his collaterals who were his enemies. Her brother Fatta accompanied by the *chaukidar* of the village proceeded to the *thana*, and recorded the first information report which mentions the names of the four relatives as the suspects and specifies the motive for the crime. It appears that Sher Khan, one of the appellants, overtook Fatta and his companion on their way to the Police Station; but neither of these persons suggests that Sher Khan took any active part in making the report. The Police proceeded to the village, and started the usual investigation, in the course of which they discovered that Sher Khan, with the help of two hired assassins Baz and Murid, had done the deed, and this theory has been accepted by the learned Sessions Judge.

The story for the prosecution, as disclosed in the confessions of Baz and Murid made before the Committing Magistrate on the 3rd May 1916, but retracted before the Sessions Judge, is to the effect that Sher Khan approached Baz and Murid a few days before the night of the occurrence, and offered them Rs. 60 each on condition that they rendered him assistance in killing Sultan Khan. After some hesitation they agreed to the proposal, but as Sher Khan was unable to pay them the money at once, they took him on the evening of the 30th April to a mosque in the village, where he took a solemn oath to pay them Rs. 60 each afterwards. The three men then proceeded to the threshing floor, found Sultan Khan asleep on a bed, strangled him with a piece of cloth which was found lying near the bed, and after concealing it in a heap of fodder returned to their houses in the village.

This is a brief narrative of the case for the prosecution and it remains only to describe the motive, which is alleged to have induced Sher Khan to plan and bring about the murder of Sultan Khan. It is contended that Sher Khan was anxious to marry his daughter to Sultan Khan's son, but that the latter objected to the proposal on the ground that the former was a comparatively poor man. Sultan Khan'e wife, *Musammat* Banno, whose sister is married to Sher Khan, was eager for the match, and as Sultan Khan was the only obstacle in the way, Sher Khan decided to put an end to his life.

Now, this dispute about the betrothal, even taken at its face value, does not seem to be an adequate motive for the commission of such a heinous crime. Be that as it may, there is no reliable evidence to

establish the theory. It will be observed that, at the time of reporting the occurrence at the *thana*, even the *chaukidar*, who had been despatched by the *lambardar*, did not refer to this matter and that the deceased's son, Muhammad, states that his father and Sher Khan were on good terms. Further, Fatta, *Musammat* Banno's brother, deposes that he never heard of any dispute between the two men. Two witnesses (Fateh Khan P. W. No. 5 and Sultan Khan P. W. No. 6) have come forward to give evidence in support of the incident about the betrothal; but a perusal of their depositions makes it abundantly clear that they are hostile to Sher Khan. There can be no doubt whatever that Sher Khan's mother and brother have figured as witnesses in criminal cases against the witnesses or their relations, and no reliance can, therefore, be placed upon their word. Indeed, the learned Sessions Judge, while discussing the evidence of these witnesses and also that of Nawab Khan (P. W. No. 8), Fateh Khan (P. W. No. 9) and Jahana (P. W. No. 10), who depose to having seen the convicts together on the evening in question, makes the following observations:—

"It must, however, be remembered that Thurd is a typical Chakwal village. Some 15 months' close experience of life in the Chakwal villages has left me in great doubt as to whether any law, social, political or religious, is observed in that Tahsil. Robbery, arson, rape, incest, adultery, perjury and murder are, so far from being abnormal incidents, the natural elements of village life breathed in as it were with the very air, whilst murderous assaults are almost of every day occurrence. The state of affairs entails constant litigation, and hence it is well nigh impossible to get any evidence against any one accused person which may not be challenged on the ground that the witness has already been concerned either as principal or as witness in a former case in which the accused person has been similarly concerned. The objection to the present corroborating evidence is that it is given by persons related by marriage to a person against whom the brother of the accused gave evidence some years ago. It is deplorable that such a circumstance should be seriously alleged as a reason for disbelieving the evidence or rather that such a remote cause of enmity should be alleged to be good reason for witnesses attempting to get an innocent man hanged. It is even more deplorable that we must allow very considerable weight to the allegation. I regret to say that these circumstances are in Chakwal quite sufficient cause for attempting to get Sher Khan hanged."

It appears from the above extract that the learned Judge himself was not inclined to regard the aforesaid witnesses as reliable persons, and independent examination of their testimony leads us to the same conclusion. We must accordingly hold that neither the alleged motive, nor the convict's association on the evening of the 30th April, has been satisfactorily established.

As regards the discovery of *patka* in consequence of the information supplied by Sher Khan, it is sufficient to quote here the following finding of the Sessions Judge :—

"In addition to this I may say at once that I doubt very much whether Sher Khan's production of the *patka* is conclusive evidence against him. The Head Constable says he made a thorough search of the place in which the body was found. He did not discover the *patka*. Yet Sher Khan next day produced the *patka* from a place which was easily accessible to the Police. It is at least possible that the *patka* was put there by some one else and its "production" by Sher Khan could easily have been " arranged " in the presence of hereditary enemies. Again on subjecting the *patka* to close examination I come to the conclusion that it was not the ligature employed by the murderer. If it were twisted as tightly as possible, I do not think it would have made so narrow a mark on the neck of Sultan Khan as was discovered by the Doctor. That mark was in no place more than $\frac{3}{4}$ of an inch wide. I am tolerably certain that the twisted *patka* would have made a mark at least two inches wide. My opinion may be quite worthless, but I think that Sher Khan is entitled to the full benefit of the doubt engendered in my mind. I leave aside, therefore, the evidence relating to the production of the *patka* and eliminate from the case against Sher Khan the presumption as to his guilt that the prosecution base upon this part of the evidence."

SUDHANYA BAWALI *v.* EMPEROR.

In the face of the practical demonstration referred to above, it is idle to urge this *discovery* as an incriminating circumstance against any one of the convicts. It will be observed that the piece of cloth, with which the unfortunate man was strangled, has not been discovered, and we must take it that when Baz and Murid in their confessions, made after the discovery, stated that Sher Khan had concealed the cloth in a heap of fodder, they referred to the *patka* as the cloth in question. That the *patka* was not employed for strangling the deceased throws a considerable doubt upon the genuineness of the confessions. Further, Murid mentions a conversation among the convicts at Baz's house before their departure for the mosque (*vide*) paper-book, page 17, lines 13–14), but Baz does not even allude to the alleged consultation. It appears that the learned Sessions Judge himself was not prepared to accept the story contained in the confessions in its entirety, because in convicting Sher Khan of the abetment of murder under section 302 read with section 199, Indian Penal Code, he observed as follows :—" As to Sher Khan I have some doubt as to whether he was actually engaged in the act of murder, but I have no doubt but that he was the instigator, and that without his instigation the murder would not have been committed." Now, this finding can mean only one thing, and that the allegation as to his actual participation, which finds a place in the confessions, cannot be accepted as correct.

These, *inter alia*, are the reasons, which lead us to the conclusion that it would be unsafe to sustain the convictions upon the retracted confessions, unless they are corroborated in material particulars. It is undeniable that so far as the confessing accused are concerned, there is no evidence to support their confessions, and as against Sher Khan we consider that, in view of the unsatisfactory nature of the evidence discussed above, the case stands upon no better footing. That Sher Khan once before made an abortive attempt to hire one Nadu as an assassin rests upon very flimsy evidence, and does not deserve any serious consideration.

The above discussion concludes the case for the prosecution, and it is observable that the assessors were by no means agreed as to the guilt of the appellants. One of them was of opinion that no case had been made out against any of the accused, and that they were all innocent. The second assessor thought that Baz and Murid were the murderers and that Sher Khan was innocent : while the last thought that all of them were guilty. We have given our anxious consideration to the entire material upon the record, and are unable to hold that there is sufficient reliable evidence to bring the guilt home to the convicts.

Accordingly we accept the appeal, set aside the convictions and sentences, and direct that the appellants be released forthwith.

Appeal accepted.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 592 OF 1916.

October 31, 1916.

Present:—Mr. Justice Chaudhuri and Mr. Justice Newbould.

SUDHANYA BAWALI AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), s. 19 (b)—Gun found in room of joint family house accessible to many—Offence.

Where the place in which an incriminating article is found is one to which several persons have equal rights of access, it cannot be said to be in the possession of any one of them. [p. 158, col. 1.]

A gun was found in an abandoned room of a joint family house belonging to three accused, who were all adults and who, as joint members of the family, managed the affairs of the joint family and exercised equal rights. The house was not enclosed by any fence or wall and the room was accessible from outside:

Held, that the accused could not be convicted under section 19 (*b*) of the Arms Act. [p. 158, col. 1.]

Appeal against the order of the Additional Sessions Judge, Faridpur, dated the 8th August 1916.

Babus *Dasarathi Sanyal* and *Debendra Narain Bhattacharjee*, for the Appellants.

Mr. *Camell*, for the Respondent.

JUDGMENT.—A gun was found in an abandoned room of the house belonging to the accused in which they and others reside. It is a dark room under the staircase about 8 feet or 9 feet *by* 3 feet. One side of the room is open and leads into a passage. There is a door leading from the passage into an open yard outside. The door is on the east of the

house. There is clear evidence that there is a pathway running north to south on the east of the house which is used by the neighbours. The house itself is not enclosed by any fence or wall. The door leading from the passage into the open yard outside has not got a bolt. It does not appear whether it had ever a bolt. It appears from the evidence that this room is accessible from outside. At the time of the search and before the Police entered into this room there is some evidence that this door was open. The Inspector himself is not clear whether it was open or shut at the time that he surrounded the house. The learned Sessions Judge has not been able upon the evidence to determine as to who was actually the *karta* of the house. The family is apparently joint and the three accused persons are all adults who, as joint members of the family, manage the affairs of the joint family and seem to exercise equal rights. The learned Judge thinks that, therefore, they must be held criminally liable. We are unable to agree with him. Quoting the words in the judgment of *Jagjiban Ghose* v. *Emperor* (1), "It is well established, and is an elementary rule founded on common sense, that where the place in which an article is found is one to which several persons have equal right of access, it cannot be said to be in the possession of any one of them". That being the clear law, we are unable to uphold the conviction.

The assessors thought that some enemy of the accused put the incriminating things into the room. That there was such a possibility is clear from the evideuce. These persons who have arisen from a very humble position to a position of some affluence have enemies round about them. There is nothing at all against the character of the accused. They are not political suspects. The evidence does not show that they have any sporting instincts or that they have ever used a gun in their life. Their conduct at the time of the search led the searching officer to form an opinion that they were unconscious that a gun was in the room where it was found.

The conviction and sentence passed on the accused are set aside and they are acquitted. Their bail bonds must be discharged.

Accused acquitted.

(1) 2 Ind. Cas. 681 at p. 693; 13 C. W. N. 861 at p. 892; 9 C. L. J. 663; 10 Cr. L. J. 125.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 37 OF 1917.

April 4, 1917.

Present:—Mr. Justice Batchelor and Mr. Justice Shah.

MANUEL PHILIP AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (*Act V of* 1898), *s.* 188—*Offence committed on high seas—Local Government, sanction of, necessity of—"Where there is no Political Agent", meaning of—"Place", meaning of.*

The first proviso to section 188 of the Criminal Procedure Code refers only to offences which are said to have been committed on any territory and not to offences committed on the high seas. [p. 159, cols. 1 & 2.]

Per *Batchelor, J.*—The words "where there is no Political Agent" in the first proviso to section 188 of the Criminal Procedure Code mean where there is no Political Agent for the territory in which the offence is alleged to have been committed. [p. 159, col. 2.]

Per *Shah, J.*—The word "place" in the first paragraph of section 188 of the Criminal Procedure Code includes high seas in its ambit. [p. 160, col. 1.]

Criminal application for revision from convictions and sentences passed by the first class Magistrate, Bandra, confirmed on appeal by the Sessions Judge, Thana.

Mr. *Gupte* (with him Messrs. *Daphtary*, *Farreira* and *Divan*,) for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

BATCHELOR, J.—This is an application in revision against a conviction recorded by the first class Magistrate of Bandra and confirmed on appeal before the Sessions Judge of Thana. The applicants have been convicted of being members of an unlawful assembly under section 143 of the Indian Penal Code and of mischief under section 426 of the Penal Code in that they, with common intent to cause wrongful loss to the complainant, pulled up certain fishing stakes which he had put down in the sea at a distance of five or six miles beyond low water mark.

On the merits it is contended by Mr. Gupte that no offence is proved to have been committed, inasmuch as the applicants were protected by the existence of a certain custom among these fishermen, which had been infringed by the complainant. It appears to me, however, that on this point

the finding of the learned Sessions Judge puts the defence out of Court. For the finding is that this violent uprooting of the complainant's stakes had nothing to do with any supposed violation of custom by the complainant, but was intended to injure the complainant because the complainant's wife was reputed to be a witch. Moreover, it is held, in regard to this custom, that the applicants had excommunicated the complainant and had excluded him from having any such chance as the custom would have afforded him of putting down his stakes in the locality in question. On these grounds there is, in my judgment, no substance in the defence based upon the alleged custom.

Then it was said that inasmuch as the offence was committed on the high seas, it was outside the jurisdiction of the Bandra Court. The learned Counsel admitted that the only ground upon which this objection could be put was that under section 188 of the Criminal Procedure Code the prosecution was not entertainable by the Magistrate without the sanction of the Local Government. No such sanction was in fact obtained. It was expressly admitted that if this objection was overruled no other objection to the jurisdiction could be made. Now it seems to me that section 188 has no concern with such facts as are here before us. Section 188 occurs in a chapter of the Code which deals with the jurisdiction of the Courts. It provides for the liability of native Indian subjects of His Majesty who commit offences "at any place without or beyond the limits of British India". to be dealt with in respect of such an offence as if it had been committed at any place within British India at which the subject may be found. Now it is quite true that the words "any place without or beyond the limits of British India" may, as a mere matter of the meaning of the English words, be read to include a place situate on the high seas between Bombay and Aden. But whether that be the true meaning or not, seems to me to be immaterial, inasmuch as the objection which we are considering is based only on the first proviso to the section, and that proviso is, I think, limited to territorial jurisdiction and has no bearing upon the question of jurisdiction to try an offence committed on the high seas. For the proviso enacts that no charge as to any offence shall be inquired into in British India unless the Political Agent, if there is one, "for the territory in which the offence is alleged to have been committed," certifies that the charge ought to be inquired into in British India; that is to say, the offence which the proviso contemplates is, I think, an offence contemplated to have been committed within some territory. This word, territory, in my view, excludes the notion of the high seas and it occurs in the earlier paragraphs of the section, where it is confined to the territories of a Native Prince or Chief in India. Mr. Gupte contends that the words as to territory are not repeated in the latter limb of this proviso which was added by the Code of 1898 and which consists of the words "and where there is no Political Agent, the sanction of the Local Government shall be required." But the omission of the words as to territory from this limb of the proviso does not, in my opinion, alter the case. The words "where there is no Political Agent" would mean in their context where there is no Political Agent for the territory in which the offence is alleged to have been committed, so that in all cases the contemplation of the Legislature is that the offence shall have been committed in some territory or other. There is no reason whatever to suppose that the words added in the Code of 1898 were intended to limit the meaning of the words as to territory already occurring in the proviso. Indeed there is good reason to think that the addition of the words in 1898 was intended to remove the difficulty which had previously existed in cases where offences had been committed, for instance, in such places as Goa, where there is no Political Agent: see *Queen-Empress* v. *Daya Bhima*.

On these grounds I am of opinion that the objection to jurisdiction fails. The Rule, therefore, must be discharged, the convictions and sentences being confirmed.

SHAH, J.—I agree. I desire to add that I accept the interpretation put by my learned brother upon the first proviso to section 188 of the Code of Criminal Procedure, upon which Mr. Gupte has relied. I am clear that the proviso refers only to offences which are said to have been committed in any territory,

(1) 13 B. 147; 7 Ind. Dec. (N. S.) 98.

In re, BASAPPA SHIVAPPA.

and not to offences committed on the high seas. In coming to this conclusion I assume that the word 'place' in the first paragraph of the section includes high seas within its ambit. The construction of the proviso is in no way dependent upon the meaning of the word 'place' in the beginning of the section. I wish to make it clear that in holding that the proviso does not apply to offences said to have been committed on the high seas, I do not suggest that the first paragraph of the section would not apply to such offences.

Rule discharged.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 51 OF 1917.

April 10, 1917.

Present:—Mr. Justice Batchelor and Mr. Justice Shah.

In re BASAPPA SHIVAPPA—APPLICANT.

Penal Code (Act XLV of 1860), s. 206—Fraudulent removal of property—Accused not liable under decree—Offence.

A person who, in order to protect his own property, not legally liable for a decree, from confusion with property which is so liable, makes it over to another person, does not commit an offence under section 206 of the Indian Penal Code.

Criminal application for revision from an order passed by the Assistant Judge, Dharwar.

Mr. *Tyabji* (with him Mr. *G. S. Mulgaonkar*), for the Applicants.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

BATCHELOR, J.—It appears to me that the Rule here must be made absolute and that the learned Judge's order directing the prosecution of this applicant for an offence under section 206 of the Indian Penal Code must be set aside.

The matter arises in this way: In Suit No. 51 of 1915 a certain money-lender made a claim for money against three brothers on the footing that the money had been lent for the benefit of the family and that the brothers were joint. The present applicant was one of these three brothers and he was defendant No. 2 in the suit. He pleaded that he was not liable inasmuch as he was separate in estate from the other defendants, and that plea was upheld by the Court, which dismissed the suit against the present applicant, though it decreed the claim against the other defendants. Then Suit No. 11 of 1916 was brought against the present applicant for the price of certain cotton sold, the plaintiffs averring that the present applicant was their agent for sale. The present applicant retorted with a claim in the nature of a set-off, and his own description of the claim is the material upon which the learned Judge has made this order. The words upon which the Judge below has relied are these: "Shivappa", says the applicant, "brought a suit against me and secured a decree for Rs. 3,700. He put in an application for execution and sought to attach my moveable property. With the intention of defeating that attachment I sent Rs. 3,700 cash and some gold jewels to Shankargavda and Nilkanthgavda." Without going further into the matter the Assistant Judge ordered the prosecution of the applicant on the strength of this, the applicant's own admission. It appears, however, on inquiry and on reference to the relevant judgments that the applicant's admission was made under a misapprehension and that the facts are otherwise than the applicant supposed them to be. It is clear from the judgments—and is not now contested—that the decree in Suit No. 51 of 1905 was not obtained against the applicant, but against his brothers only, and the judgment-creditor's application for execution sought to attach only the brothers' moveable property and not the applicant's property.

On these facts, therefore, the case against the applicant is merely this, that in order to protect his own property not legally liable for the decree from confusion with property which was so liable he made it over to another person; and such a transfer would not, in our opinion, constitute the offence described in section 206. It was nobody's case in the Court below that the applicant transferred this property as being not his own, but his brothers' property, and so liable to forfeiture. Indeed the order of the Assistant Judge proceeds, I think, on the footing that the property was the separate property of the applicant. On that footing the Assistant Judge's order is in my view unsustainable for the reasons which I have given and must, therefore, be discharged.

SHAH, J.—I am of the same opinion.

Order discharged.

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

RAJ KUMAR SINGH *v.* RAJ KESWAR KOERI.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 385 AND 431 OF 1916.

May 15, 1917.

Present:—Mr. Justice Mullick.

IN APPEAL No. 385 OF 916

RAJ KUMAR SINGH—DEFENDANT—APPELLANT

versus

RAJ KESWAR KOERI—PLAINTIFF AND RAILAK AHIR AND OTHERS—RESPONDENTS.

IN APPEAL No. 411 OF 1916

JIAN LAL—DEFENDANT—APPELLANT.

versus

LALJI KOERI AND ANOTHER—PLAINTIFFS AND TILAK AHIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud—Decree obtained in one Court—Suit to set aside decree in another Court—Jurisdiction—Cause of action, accrual of—Civil Procedure Code (Act V of 1908), ss. 20, 21—Appeal, second—Objection as to place of suing, when to be taken.

The defendants obtained a fraudulent *ex parte* decree in Bilaspur against the plaintiffs, who were the residents of Arrah District, by suppressing summons in the District of Arrah. They then got the decree transferred from Bilaspur to Arrah and applied for execution of it by issuing warrants of arrest against the plaintiffs. Notice under Order XXI, rule 22, of the Civil Procedure Code was issued and then the plaintiffs came to know of the decree against them. They then instituted the suit in the Munsif's Court at Arrah to set aside the decree on the ground of fraud:

Held, that the Arrah Court had jurisdiction to entertain the suit. [p 162, col 2.]

No objection as to the place of suing can be taken for the first time in second appeal. [p. 162, col. 2.]

Appeal from a decision of the District Judge, Shahabad.

Messrs. *S. N. Palit* and *Akbari*, for the Appellants.

Messrs. *P. C. Bose*, *Parmeshwar Dyal* and *Sahebuddin Khan*, for the Respondents.

JUDGMENT.—On the 4th of September 1912 two *ex parte* money-decrees were obtained in the Court of Small Causes at Bilaspur in the Central Provinces one by Rajkumar Singh, resident of Baraduara, district Bilaspur, against Rajkeshwar Koeri, resident of *pergana* Behea in the district of Arrah; and the other by Jian Lal, resident of Baraduara, against Lalji Koeri and Debi Dusadh, both residents of *pergana* Behea.

These decrees were transferred for execution to the Court of the Subordinate Judge of Arrah, and it is alleged that a notice was issued upon the judgment-debtors under Order XXI, rule 22, calling upon them to show cause why the decrees should not be executed. There was also an application by the decree-holders for the arrest of the judgment-debtors.

On the 7th of November 1913, the judgment-debtors above named each brought a suit, namely Suits Nos 267 and 259 of 1913, in the Court of the Munsif of Arrah against the decree-holders, praying that the decrees might be set aside on the ground of fraud and also that a temporary injunction might be issued on the respondents prohibiting them from proceeding with the execution. The plaintiffs in these two suits impleaded defendants Nos. 2 to 6 on the allegation that they were residents of the Arrah district with whom they (the plaintiffs) were at enmity and that these defendants had instigated the above named decree-holders to bring the false suits at Bilaspur and assisted them in obtaining the fraudulent decrees.

The Munsif found that the decrees were fraudulent and set them aside.

Then the matter went up in appeal to the District Judge of Arrah. The decree-holders preferred Appeals Nos. 24 and 25 of 1915 while the other defendants, namely the alleged instigators, preferred Appeals Nos. 17 and 22 of 1915. We are not concerned with the further progress of these last two appeals; we are only concerned with the decree of dismissal of the District Judge in respect of Appeals Nos. 24 and 25 of 1915. The present Second Appeal No. 385 of 1916 relates to these decrees of dismissal.

The only point taken by the learned Counsel on behalf of the appellants is that the Munsif of Arrah had no jurisdiction to set aside on the ground of fraud a decree obtained at Bilaspur, which is a district situated neither within the same Province nor under the jurisdiction of the same High Court as the district of Arrah.

Reliance is placed upon the case of *Umrao Singh* v. *Hardeo* (1). In that case the decree was obtained in the Small Cause Court in Calcutta and the suit to set aside the decree was filed in the Munsif's Court at Agra. A Divisional Bench of the Allahabad High Court held that a suit to set aside a decree obtained by fraud, in which no other relief is claimed,

(1) 29 A. 418; A. W. N. (1907) 112; 4 A. L. J. 392.

cannot be maintained in any district outside the district in which the fraud was committed and the fraudulent decree was obtained. Reliance is also placed upon *Dau Dial* v. *Munna Lal* (2). In that case the decree was obtained in the High Court in Calcutta and the suit to set it aside was instituted before the Subordinate Judge of Mainpuri in the United Provinces. A Divisional Bench of the Allahabad High Court, relying upon *Umrao Singh* v. *Hardeo*(1), held that the Subordinate Judge of Mainpuri had no jurisdiction to set aside the decree on the ground that whatever the plaintiffs complained of happened in Calcutta and, therefore, the cause of action arose in Calcutta and at no other place.

If the learned Judges in these two cases intended to hold that, even where a part of the cause of action arose in a district outside the district in which the fraudulent decree was obtained, a suit to set aside the fraudulent decree would not lie in the district in which such part of the cause of action arose, then I am respectfully of opinion that the two cases above mentioned were wrongly decided. I am supported in my view by *Jawahir* v. *Neki Ram* (3) decided by a Divisional Bench of the Allahabad High Court.

On the other hand, there is a long course of decisions of the High Court at Calcutta to the effect that a suit to set aside a decree on the ground of fraud will lie wherever the provisions of section 20 of the Civil Procedure Code are satisfied. If by reason of an attachment or sale of property in execution of a fraudulent decree the judgment debtor is damnified, then his cause of action arises in the district in which such attachment or sale takes place; or if, as here, an application is made for issue of warrant or a notice is issued upon the judgment-debtor to show cause why the decree should not be executed, in my opinion, the cause of action will arise in the district in which such application is made or such notice issued. There is also a further ground for holding that the cause of action arose in the district of Arrah. It is alleged that the service of summons in the original suit was made in the Arrah district, and the case of the present plaintiffs is that defendants Nos. 2 to 6, who are local residents, fraudulently caused a false return to be submitted. Upon the findings of the Courts below this part of the fraud at any rate was committed within the jurisdiction of the Munsif of Arrah. I, therefore, hold that the suit to set aside the decree lay in that district. I observe that in the case of *Jawahir* v. *Neki Ram* (3) their Lordships of the Allahabad High Court observed that it was unnecessary, though they dissented from the view in *Umrao Singh*'s case (1), to refer the case before them to a Full Bench because upon the findings, a part of the fraud, by the suppression of service of notice, was clearly committed within the jurisdiction of the Court which eventually set aside the decree.

The case of *Umrao Singh* v. *Hardeo* (1) above referred to has been dissented from in *Abdul Haque* v. *Abdul Hafz* (4), where their Lordships held that a suit to set aside a decree on the ground of fraud obtained in Calcutta would lie in the district of Chittagong because the defendant resided there. It does not seem to have been followed by any Court except in *Dau Dial's* case (2) above referred to.

It is quite clear in the present case that a part of the cause of action arose within the district of Arrah and, therefore, the suit before the Munsif of Arrah was competent.

This disposes of the only ground upon which the appeals are pressed before me. The learned Vakil for the respondent, however, supports the decree of the Courts below on a further ground, namely, that the question of jurisdiction ought not to be allowed to be raised in second appeal by reason of the provisions of section 21 of the Civil Procedure Code. In my opinion this objection is well founded. It is true that where there is an inherent defect as to powers an objection may be taken at any stage, but section 21 was expressly enacted for the purpose of curing defects based upon the venue. If the parties did not raise the question of jurisdiction as regards the place of trial at the earliest opportunity, then an objection founded upon this ground cannot be subsequently maintained.

On both grounds, therefore, the appeals fail and are dismissed with costs.

Appeals dismissed.

(2) 24 Ind. Cas. 978; 36 A. 564; 12 A. L. J. 955.
(3) 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190.
(4) 5 Ind. Cas. 648; 14 C. W. N. 695; 11 C. L. J. 636.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1421 OF 1913.

May 8, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

LAL SHAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HIRA LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption, suit for—Admission by mortgagee of receipt of portion of mortgage-money in previous suit, whether binding—Appeal, second—Substantial error or defect in procedure.

The land in suit was mortgaged with possession by the plaintiffs' ancestor to the defendant for Rs. 900, out of which Rs. 200 was to carry interest at 12 per cent. per annum with half yearly rests. Plaintiffs having sued for possession by redemption, the defendant claimed that the mortgage could not be redeemed without payment of the Rs. 200 together with interest that had accrued due. It appeared that the sons of the mortgagor had some time after their father's death sold a portion of the mortgaged property to the sons of the mortgagee and one *F.* had brought a suit for pre-emption. In the proceedings that followed the mortgagee had been examined and had admitted that he had received the Rs. 200 and that the mortgage could be redeemed at any time on payment of Rs 700. The first Court held that he was bound by his admission and gave plaintiffs a decree for possession on payment of Rs. 642-4-0. On appeal the Divisional Judge held that the mortgagee was not bound by the admission and that the plaintiffs had failed to prove that the sum of Rs. 200 had, as a matter of fact, been paid. He, therefore, varied the decree of the first Court by decreeing possession on payment of Rs. 3,042-4-0. On a second appeal being preferred to the Chief Court:

Held, (1) that the onus was on the defendants to show that the decision of the primary Court was erroneous; [p. 166, col. 1.]

Dinomoni Chowdhrani v. *Brojo Mohini Chowdhrani*, 29 C. 187; 29 I. A. 24; 6 C. W. N. 386; 12 M. L. J. 83, 4 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P. C.); *Ghulam Nabi* v. *Allah Din*, 19 Ind. Cas. 964; 143 P. W. R. 1913; 241 P. L. R. 1913; 204 P. W. R. 1913, followed.

(2) that the lower Appellate Court committed a substantial error or defect in procedure and that, therefore, a second appeal lay; [p. 166, col. 1.]

(3) that the mortgagee was bound by his admission and could not claim payment of the sum of Rs. 200 or interest thereon. [p. 166, col. 2.]

Second appeal from the decree of the Divisional Judge, Shahpur at Sargodha, dated the 14th May 1913, modifying that of the District Judge, Shahpur, dated the 5th February 1913, decreeing the claim.

FACTS of the case are given in sufficient detail in the judgment.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Respondents, raised the preliminary objection that the finding with regard to the payment of Rs. 200, being a finding of fact, could not be attacked in second appeal, and that, therefore, the plaintiffs were bound to pay Rs. 200 principal and Rs. 4,600 interest on that sum.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.—The lower Courts have wrongly placed the onus on the plaintiffs, and the defendant is estopped from denying the receipt of Rs. 200. The defendant admitted payment of this sum of Rs. 200 in a previous suit. This admission shifted the onus on to the defendant to prove that this money had not in fact been paid. *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1). Even if the onus be assumed to have been rightly placed on the appellants, the fact of their having obtained a decree in their favour shifted the onus on to the other side to show that the first Court's decision was wrong. *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (2), *Ghulam Nabi* v. *Allah Din* (3).

The principle of estoppel applies in this case. Acting on the admission of the defendant that the Rs. 200 carrying cash interest had been paid, the appellants have been induced to sleep over the mortgage, with the result that the interest on this small sum amounts to Rs. 4,600. Section 115, Evidence Act.

The Hon'ble Pandit *Sheo Narain*.—The admission is simply a piece of evidence, and the learned District Judge has taken this evidence into account and arrived at a finding with regard to the payment of this sum of Rs. 200. That finding cannot be upset by a Court of second appeal. *Ram Chandra Bhanj Deo* v. *Secretary of State* (4), *Gadian Chetti* v. *Veerappa Chetti* (5).

(1) 29 A. 184; 9 Bom. L. R. 267; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A. L. J. 102 (P. C.).

(2) 29 C. 187; 29 I A. 24; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P. C.).

(3) 19 Ind. Cas. 964; 143 P. W. R. 1913; 241 P. L. R. 1913; 204 P. W. R. 1913.

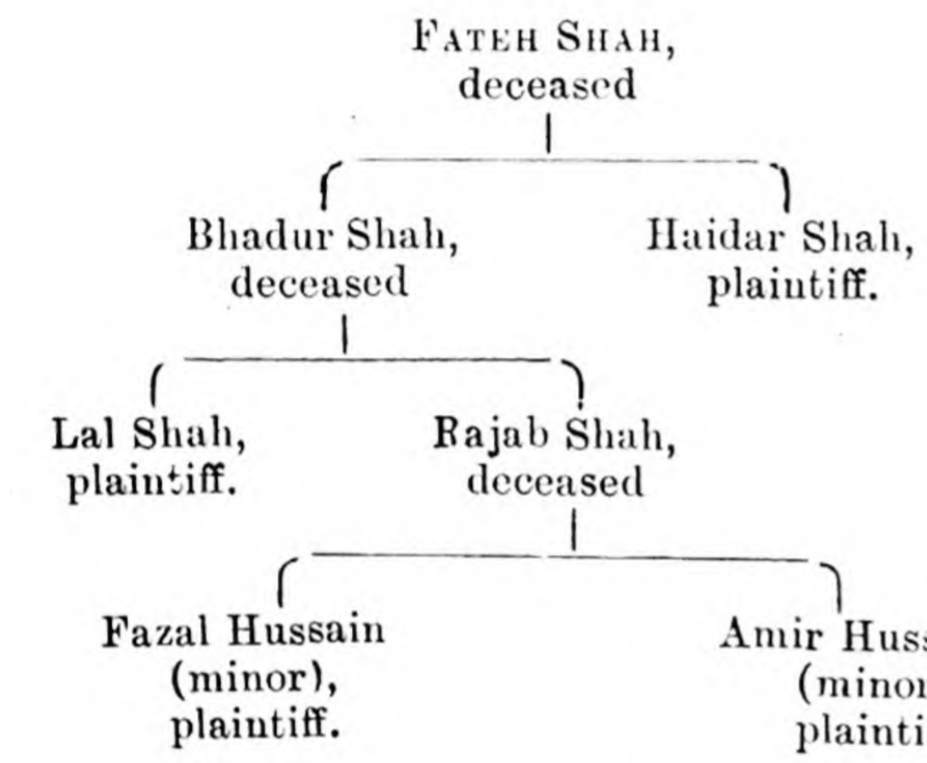
(4) 37 Ind. Cas. 223; 43 C. 1104; 20 C. W. N. 1245; 20 M. L. T. 235; (1916) 2 M. W. N. 175; 4 L. W. 251; 14 A. L. J. 1009; 18 Bom. L. R. 838; 24 C. L. J. 296; 31 M. L. J. 745; 43 I. A. 172 (P. C.).

(5) 26 Ind. Cas. 899; 28 M. L. J. 92.

It was the business of the lower Appellate Court to determine what weight is to be attachad to an admission of the defendant. In *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1) there were several admissions, in the present case there is only one admission.

No question of estoppel arises in this case. Estoppel only arises if a representation is made to a party who is ignorant of the real state of affairs and as a result of that representation alters his position.

JUDGMENT.—The following pedigree-table will assist in the understanding of this case: —



On the 18th December 1884 Fateh Shah mortgaged certain lands to one Maya Das. The mortgage was with possession and the consideration money was Rs. 900. Of this sum Rs. 200 was to carry interest at 12 per cent. per annum with half yearly rests whilst Rs. 700 was to carry no interest at all. The mortgage was to subsist for a term of seven years and the mortgagor and the mortgagee were to share the profit and loss equally from the date of the execution of the deed to date of redemption. It was specifically provided that the mortgagor could within the period of the mortgage release a one-third share of the property by payment at one time of one-third of the Rs. 700, but that before the mortgagor could exercise this right he was bound first of all to pay up the Rs. 200 carrying interest together with such interest as might then be due. Fateh Shah died sometime before 1891 (the exact date is not known), and on 19th October 1891 his sons Bahadur Shah and Haider Shah sold a portion of the property mortgaged to Kalyan Das and Hira Lal, sons of Maya Das mortgagee, (father and sons being members of a joint Hindu family) for a sum of Rs. 900 made up as follows:—

Rs. 315 were to be paid by the vendees to one Wasdeo.

Rs. 268 were credited to a bond and book account due to the vendees by the vendors.

Rs. 7 were for the costs of the conveyance.

Rs. 310 was stated to have been received at home as earnest money.

Fateh Khan and others thereupon instituted a suit claiming to pre-empt the land sold, the vendors and the vendees being made parties to the suit In the course of the proceedings in that case Maya Das was examined as a witness on the 16th December 1892 and, on cross-examination by the pre-emptors, he clearly stated that he had received the Rs. 200 bearing interest and that the mortgage could be redeemed at any time on payment of Rs. 700. He admitted that he was joint with his sons and that the sale money was paid really by him. Bahadur Shah was also examined as a witness with regard to the passing of consideration for the sale, and he stated that he had received credit for Rs. 200 odd on account of a debt due by him to the vendees, that Rs. 310 had been received by him at home and that Rs. 315 had been left with the vendees for payment to Wasdeo. Fateh Khan and others were granted a decree for pre emption on payment of Rs. 590, the Courts being of opinion that the Rs. 310 alleged to have been paid at home had not been proved to have been paid.

Bahadur Shah died sometime prior to the 4th July 1912—the exact date has not been stated—and Haidar Shah, Lal Shah, Fazal Husain and Amir Hussain instituted the present case claiming to redeem the above recited mortgage on payment of Rs. 559. In their plaint it was alleged that Rs. 200 carrying interest had been included in the sum of Rs. 310 referred to above as forming part of the consideration for the sale of a portion of the land mortgaged to the sons of Maya Das. Maya Das denied the receipt of this Rs. 200 carrying interest and claimed that the mortgage could not be redeemed without payment of that sum together with interest that had accrued due, amounting to several thousand rupees. The primary Court

came to the conclusion that Maya Das was bound by his admission made in the pre-emption suit, and held that the plaintiffs had proved by that admission that the sum of Rs. 200 carrying interest had been liquidated and granted a decree for possession of the land in suit in favour of the plaintiffs on payment of Rs. 692-4-0. Against this decision Maya Das preferred an appeal to the Divisional Judge who held that Maya Das was not bound by the admission made by him in the pre-emption suit with regard to the Rs. 200 carrying interest, and that the plaintiffs had failed to prove that this sum as a matter of fact had been paid. He, therefore, varied the decree of the primary Court by decreeing possession on payment of Rs. 3,042-4 0. Against this decree the plaintiffs-appellants, Lal Shah and others, have preferred this second appeal to this Court through Mr. Shafi and we have heard Mr. Sheo Narain on behalf of the respondents Pindi Das, Sita Ram and others, Maya Das having died in the meantime. Mr. Shafi admitted that the plaintiffs had erroneously stated that the Rs. 200 in question had been included in the sum of Rs. 310 paid in connection with the sale above referred to, which was effected on the 19th October 1891. He pointed out that at the date of this suit both Fateh Shah and Bahadur Shah were dead and that the plaintiffs did not really know how or when that sum had been liquidated, but that the admission made by Maya Das in the pre-emption suit was a strong piece of evidence in their favour and shifted the onus on to Maya Das to prove that his admission was wrong and that as a fact this money had not been paid. In support of his contention he cited *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1). This decision certainly supports Mr. Shafi's contention. Their Lordships of the Privy Council there stated that "the learned Chief Justice in his judgment points out that the burden of proving that the adoption relied upon took place, rests upon the defendant. That is undoubtedly so, but it is difficult to conceive how she could, as against Makund Singh, *prima facie* at all events, discharge that burden more effectually than by proving his solemn statement under hand and seal that it did take place. The proof of this admission shifts the burden, because, as against the party making it, as Baron Parke says in *Slatterie* v. *Pooley* (6): 'What a party himself admits to be true may reasonably be presumed to be so.'" No doubt it was open to Maya Das to rebut this presumption but as was held in the case cited "unless and until that is satisfactorily done, the fact admitted must be taken to be established." Mr. Shafi pointed out that in the present case the statement in which this admission was made was one that Maya Das made on solemn affirmation and that the fact of the payment was elicited from him in cross-examination by the pre-emptors, who were clearly interested in ascertaining what amount of the mortgage-debt was outstanding. He also drew our attention to the fact that Maya Das in the course of the proceedings in the present case was not able to deny having made this admission, but was only able to say that to the best of his *aqal* (recollection) he did not receive this sum of Rs. 200. Mr. Shafi also urged that this statement by Maya Das amounted to an estoppel, inasmuch as the plaintiffs were induced to allow the mortgage to run on under the impression that the only charge on the property was the sum of Rs. 700 which bore no interest. He further urged that even assuming that the onus of proving the payment of this Rs. 200 in question had been rightly placed on his clients, inasmuch as they had obtained a decision in their favour, the onus was shifted on the other side on appeal to shew that the conclusion arrived at by the primary Court was incorrect, and he relied on *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (2) and *Ghulam Nabi* v. *Allah Din* (3), in both of which cases it was held that when a person had obtained a decree in his favour the onus is on the appellant in a Court of Appeal to shew that the decision was wrong.

On behalf of the respondents Mr. Sheo Narain contended on the authority of *Ram Chandra Bhanj Deo* v. *Secretary of State* (4) that inasmuch as the District Judge had considered the evidence and come to a finding thereon, this finding could not be disturbed on second appeal. He also cited *Gadian Chetti* v. *Veerappa Chetti* (5), where it was held that whether a specific piece of evidence is enough for discharging the burden of proof is a question primarily concerned

(6) (1840) 6 M. & W. 664 at p. 669; 10 L. J. Ex. 8; 4 Jur. 10 8; 151 E. R. 579; 55 R. R. 760.

with the weight to be given to that piece of evidence, and is not a question of law, and that where each party had adduced evidence tending respectively to prove and disprove a fact in issue the importance of burden of proof disappears almost entirely. An examination of the judgment of the lower Appellate Court shows that the learned Divisional Judge has misunderstood what happened in the pre-emption suit. It appears that he was under the impression that Maya Das and Bahadur Shah had both stated in *that* suit that the sum of Rs. 200 now in question had formed a part of the Rs. 310 alleged to have been paid in connection with the sale dated the 19th October 1891, whereas the Court trying the pre-emption suit held that as a matter of fact this Rs. 310 had not passed. A reference to the statements of Maya Das and Bahadur Shah clearly shews that this was not the case, and it was not till the present suit was instituted that any allegation was made to the effect that this sum of Rs. 200 was included in the sum of Rs. 310 alleged to have been paid by the sons of Maya Das to Bahadur Shah. This misunderstanding very considerably detracts from the value of the conclusions arrived at by the learned Divisional Judge, for it is clear that in the pre-emption suit no finding with regard to the non-payment of this Rs. 200 was arrived at and that the payment of this sum was not in issue in that case. In our opinion the lower Appellate Court also erred in thinking that the onus was on the plaintiffs to prove in his Court that the sum of Rs. 200 had been paid. As was held in *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (2) and *Ghulam Nabi* v. *Allah Din* (3), the onus was on the defendants to show that the decision of the primary Court was erroneous. It, therefore, committed a substantial error or defect in procedure and we, therefore, consider that a second appeal lies. In our opinion the plaintiffs produced the best evidence possible to prove the payment of this sum of Rs. 200, namely an admission by Maya Das himself to that effect. Maya Das' explanation is utterly worthless and in fact we may say that he makes no attempt to explain his statement, contenting himself by saying that to the best of his recollection he had not received this sum. It should be borne in mind that to all intents and purposes he was the purchaser in the pre-emption suit and the pre-emptors naturally considered it of vital importance to them to ascertain the exact sum that formed a charge on the property they were seeking to pre-empt, and Maya Das' statement made in such circumstances is, therefore, of considerable importance. He there clearly stated that the property mortgaged could be redeemed on payment of Rs. 700 only, thereby admitting that the Rs. 200 bearing interest had been liquidated in full. We fail to see any hardship in pinning him to this admission, although we are not prepared to say that this admission amounted to an estoppel as contended by Mr. Shafi. As has been said above no real attempt has been made to refute this admission and we, therefore, consider that the primary Court came to the right finding on this point.

It was next contended by Mr. Sheo Narain that even assuming that this sum had been paid, the learned Divisional Judge had found that on the 17th October 1891 there was a sum of Rs. 234-3-9 due on account of interest, a finding which has not been challenged by Mr. Shafi and he, therefore, claimed that the decree should be allowed to stand. No doubt if this sum of Rs. 234-3-9 was due at the date of sale, there would still remain a large sum of money as a charge upon the property. The learned Divisional Judge says at page 8 (paper-book) that this sum of Rs. 234-3-9 had been admitted to be outstanding at the date of sale. We have been, however, unable to find any admission to this effect, and having regard to the statement made by Maya Das in the pre-emption suit, it seems to us clear that the only construction to be placed on that statement is that Rs. 700 alone were outstanding as a charge against that property.

We accordingly accept this appeal, set aside the decree passed by the lower Appellate Court and restore that of the primary Court with costs throughout.

Appeal accepted.

NARAYANI AMMAL *v.* SECRETARY OF STATE.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 987 OF 1913.

February 9, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

M. NARAYANI AMMAL—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, BY THE COLLECTOR OF THE CHINGLEPUT DISTRICT, AND OTHERS—DEFENDANTS NOS. 1 TO 4, 6, 7, 9 TO 14, 16 TO 18, 20, 23 TO 26, 28, 29, 32 TO 34, 36 TO 47—RESPONDENTS.

Court Fees Act (VII of 1870*), s.* 7, *cl. V* (b) *and* (c)—*Suit for possession of* inam *lands wrongly entered as* ryotwari—*Valuation—Court-fee—Appeal—Objection as to valuation—Appellate Court, duty of—Civil Procedure Code (Act V of* 1908*), O. VII, r.* 11 (b)—*Undervaluation, dismissal for, legality of—Limitation Act (IX of* 1908*), Sch. I, Art.* 144—*Symbolical delivery as against Government*—Ryotwari *tenants, continuance of possession by—Adverse possession, title by.*

A suit for possession of *inam* lands wrongly classed by Government as *ryotwari* and in respect of which *pattas* were issued to tenants may be valued by the plaintiff as *ryotwari* lands held on *patta* at five times the revenue payable thereon under clause V (*b*) of section 7 of the Court Fees Act. The fact that, after the institution of the suit, the lands are classed as *inam* does not affect the question. [p. 168, col. 1]

An Appellate Court should not entertain an objection based on undervaluation to the jurisdiction of the Trial Court, unless, for reasons to be recorded by it in writing, it is satisfied that the undervaluation has prejudicially affected the disposal of the suit on its merits, and the mere change of *forum* consequent on the undervaluation cannot of itself be treated as prejudicially affecting it. [p. 168, col. 1.]

In any event the proper course is not to dismiss a suit for undervaluation but to return the plaint to be re-presented in a Court of competent jurisdiction where the proper valuation necessitates a change of *forum*. [p. 168, col. 1.]

Where possession of *inam* lands wrongly classed as *ryotwari* is decreed to the *inamdar* and symbolical delivery is made in execution of the decree, a suit brought to oust the *ryotwari* tenants who acquiesced in such delivery within 12 years thereof is not barred by limitation. [p. 169, col. 1.]

In 1885 plaintiff sued Government for recovery of land granted as *inam* but classed by them as *ryotwari*. On 24th February 1891 he obtained a decree for possession. In 1897 he got symbolical delivery, but the tenants continued in possession thereafter paying assessment to Government. In 1909, *i. e.* within 12 years from the date of the symbolical delivery, he brought a suit for possession against the Government and the tenants. After the institution of the suit, the lands were registered as *inam*:

Held, (1) that the plaintiff was entitled to value the suit on the basis that the lands sued for were *ryotwari* lands; [p. 168, col. 1; p. 169, col. 2.]

(2) that the suit was in time. [p. 168, col. 2; p. 170, col. 2.]

Gossain Dalmar Puri v. *Bepin Behary Mitter*, 18 C. 520; 9 Ind. Dec. (N. S.) 347, distinguished.

Per *Spencer, J.*—The *ryotwari* tenants, when they attorned to Government could not simultaneously prescribe for any title which could endure after the title of Government was negatived in the suit of a third party, and, so long as they were tenants of the plaintiff or her predecessors-in-interest, their possession was not adverse to that of their landlord. A *ryotwari pattadar* does not acquire any rights against Government superior to what he gets at the initial grant of *patta*. [p. 168, col. 2; p. 169, col. 1.]

The rights of a *pattadar* holding land upon *ryotwari* tenure under Government are not the same as those of an occupancy tenant under a landholder of an estate. So it cannot be maintained that the occupant of land under the former tenure can by means of such occupation acquire by prescription a title under the latter tenure [p. 169, col. 1.]

Per *Phillips, J.*—The original possession of the *ryotwari* tenants having been terminated by the delivery in execution, any fresh title by virtue of their subsequently continuing in physical possession would not be perfected until the expiry of 12 years after the symbolical delivery. [p. 170, col. 2]

Second appeal against the decree of the District Court, Chingleput, dated 26th August 1912, in Appeal Suit No. 341 of 1910, preferred against that of the District Munsif, Tiruvallur, in Original Suit No. 137 of 1909.

Messrs. *T. R. Ramachandra Aiyar* and Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Messrs. *V. Ramesam* (Government Pleader) and *K. Ramanatha Shenai*, for the Respondents.

This second appeal coming on for hearing on the 29th August, 11th and 12th September 1916, respectively, and having been posted as spoken to on the 25th and 27th September 1916, respectively, and having stood over for consideration till 3rd October 1916, the Court (Spencer and Phillips, JJ.) delivered the following

JUDGMENT.

SPENCER, J.—On the preliminary objection taken by the Counsel for defendants other than 1st defendant that the suit was insufficiently valued both in respect of Court-fees payable on the plaint and for purposes of jurisdction, the District Munsif decided before commencing the trial that the plaintiff's valuation was correct. This decision was final as between the parties to the suit, subject to the power of a Court of Appeal to require an additional fee in a case of loss of revenue being occasioned by a wrong decision on the question of valuation (section 12 of the Court Fees Act).

The District Judge was of opinion that the suit had been undervalued and that it ought, therefore, to be dismissed. In this he was wrong, *firstly*, because he applied section 7, clause V (*a*), of the Court Fess Act to these lands although the revenue from them is admittedly not permanently settled; *secondly*, because under section 11 of the Suits Valuation Act he had no power to entertain an objection based on undervaluation to the jurisdiction of the District Munsif's Court, unless for reasons to be recorded by him in writing he was satisfied that the undervaluation had prejudicially affected the disposal of the suit on its merits; and *thirdly*, because the mere change of *forum* consequent on the alleged undervaluation could not of itself be treated as prejudicially affecting it [*vide Raghava Chariar* v. *Raghava Chariar* (1)]; and in any case the proper course would have been not to dismiss the suit but to return the plaint to be represented in a Court of competent jurisdiction.

The lands in suit were not actually registered as *inam* till after the institution of this suit. I consider, therefore, that the plaintiff when she filed her suit was entitled to treat these lands for purposes of valuation on the same footing that the Government was at the time of her suit treating them for purposes of revenue, namely, as *ryotwari* lands held on *patta*, and to value them at five times the revenue payable thereon under clause V (*b*), section 7 of the Court Fees Act. Neither the Government, who is 1st defendant having classed the lands as fully assessed *ryotwari* lands, nor the other defendants, who have been paying such annual revenue to the 1st defendant, could now be allowed to take the objection that the lands were, as a result of their own act or acts in which they have acquiesced, wrongly classed at the time of suit.

I am equally unable to accept the District Judge's finding on issues I, V and VII.

On the 5th issue the District Judge states in paragraph 12 of his judgment that it appears clear that the Menkaval lands constitute a permanently settled estate within the meaning of Madras Act I of 1908, but in paragraph 10 he says that "the assessment is, of course, subject to revision after 30 years." This being so, the plaintiff's estate is not an estate described as a permanent estate in Regulation XXV of 1802 and as such is not one falling under section 3, clause 2 (*a*) of the Estates Land Act.

Nor does it fall under sub-clause (*d*) unless the plaintiff is a person "not owning the *kudiiaram*", which raises the very question that had to be decided in the 3rd issue.

The plaintiff could recover possession from Government and those who attorned to Government only by suing in a Civil Court.

On the first issue which relates to misjoinder I agree with the District Munsif and I think that Order I, rule 3, of the Civil Procedure Code applies to this case. Common questions of law and fact arise between the plaintiff and the several defendants, the principal being the question whether the grant to plaintiff's predecessor-in-title consisted of the lands, or only the *melvaram* on them. Section 99, Civil Procedure Code, should have prevented the Appellate Court from treating the suit as bad for misjoinder [*vide Rup Narain* v. *Gopal Devi* (2).]

On the issue as to limitation the District Judge in paragraph 10 rightly decided that the plaintiff's claim to be recognized as landlord could not be barred as the present suit was filed within 12 years of her obtaining symbolical possession. But he finds that the defendants other than 1st defendant have been in adverse possession over 12 years since they were granted permanent leases or *pattas* by the 1st defendant and, therefore, he thinks that they are entitled to remain in possession, although they are bound to attorn to the plaintiff. The District Judge failed to see that when the tenants attorned to Government, they could not simultaneously prescribe for any title which could endure after the title of Government was negatived in the suit of a third party, and that so long as they were tenants of the plaintiff or her predecessors-in-interest, their possession

(1) 8 Ind. Cas. 545; 20 M. L. J. 726; 8 M. L. T. 404.

(2) 3 Ind. Cas. 382; 36 C. 780; 6 A. L. J. 567; 10 C. L. J. 58; 13 C. W. N. 920; 5 M. L. T. 423; 11 Bom. L. R. 853; 93 P. R. 1909; 68 P. L. R. 1910; 146 P. W. R. 1909; 36 I. A. 103; 19 M. L. J. 548 (P. C.).

was not adverse to that of their landlord. The rights of a *pattadar* holding land upon *ryotwari* tenure under Government are not the same as those of an occupancy tenant under a landholder of an estate. So it cannot be maintained that the occupant of land under the former tenure can by means of such occupation acquire by prescription a title under the latter tenure. A *ryctwari pattadar* does not acquire any superior rights against the Government by continuing as such *pattadar* for a term of over 12 years to what he gets at the initial grant of *patta*. Moreover both the lower Courts have found that the tenants had notice of the plaintiff's symbolical possession.

The District Munsif held on the 4th issue that the grant of the Menkaval lands comprised both the *kudivaram* and the *melvaram*. In paragraph 16 he mentioned four facts which in his opinion indicated the correctness of this conclusion, and elsewhere in his judgment he thoroughly discussed the evidence on the issue.

The District Judge in paragraph 7 decided differently but he was influenced solely by consideration of the question of the existence of *mirasi* rights in the landholder. He has practically left the real question of occupancy rights undecided. It is obvious that, apart from any title which a landholder may assert by virtue of his being a *mirasidar* in a *mirasi* village, his tenants may or may not have an independent occupancy right. I think that the Judge's failure to consider the other evidence, including Exhibits A and L, and his reliance on the evidence in Original Suit No. 10 of 1885, while treating the High Court's judgment in the same case as irrelevant, vitiated his decision. We must remand the appeal for a fresh finding on this 4th issue. Finding should be given on the evidence on record within six weeks. Ten days are allowed for objections.

PHILLIPS, J.—I agree generally with the judgment just read by my learned brother, but would like to add a few remarks. The first question for determination in this appeal is whether the suit has been rightly valued for purposes of Court-fees and jurisdiction.

The plaintiff sues to recover possession of the plaint lands, called the Menkaval lands, from the 1st defendant, the Secretary of State for India, and the other defendants, who are tenants in possession under the 1st defendant. Government resumed the village in which this *inam* is situated in 1873, and treating the plaint *inam* as also resumed registered the land as *ryotwari*, fixed an assessment and issued *pattas* to tenants.

In 1885 the plaintiff brought a suit against the 1st defendant alone and obtained a decree for possession on 24th February 1891, on the ground that it was her *inam* and had not been resumed by Government. In 1897 the plaintiff obtained delivery of symbolic possession, but Government still retained the lands in the registers as *ryotwari* and continued to levy assessment until the date of the suit. The registry has since been altered. The question, therefore, is whether the Court-fee should be calculated under clause V (*b*) or under clause V (*c*) of section 7 of the Court Fees Act. The District Judge has held that clause V (*a*) applies, but this view is supported by neither party before this Court, and is clearly wrong for the revenue payable to Government has not been permanently settled. As between the plaintiff and the first defendant it was held in the suit of 1885 that the land is *inam* land bearing a fixed quit-rent and as such the plaint property would come within the definition of clause V (*c*) of section 7 of the Court Fees Act. The registry in the revenue register was not altered by Government and consequently at the date of suit the land was not registered as *inam* although it had been held to be such, but continued to be registered as *ryotwari*, and the assessment was levied by Government from the tenants. The land was, therefore, an estate paying annual revenue to Government, and was recorded in the Collector's register as separately assessed and the revenue was settled but not permanently. Consequently the plaint lands form an estate coming within the definition of clause V (*b*) of section 7 of the Court Fees Act. It seems to me that as between the plaintiff and the 1st defendant, the plaint land is within the definition of clause V (*c*), but so far as the other defendants are concerned, it comes under clause V (*b*)

and, therefore, the plaintiff can value her suit either according to clause V (*b*) or according to clause V (*c*). She has chosen the former valuation and I think she was justified in doing so, the more especially as her claim to the land as *inam* was not admitted by the defendants other than the first defendant and they cannot now be heard to say that her classification is wrong. I would hold, therefore, that the suit has been correctly valued and the District Munsif had jurisdiction to try it.

Defendants (except the first) have been in possession of the suit lands as *ryots* holding on *ryotwari* tenure under Government. Some were in possession originally as tenants under the *inamdar*, plaintiff's predecessor, but others have been let into possession by Government since 1873, when the Government purported to resume the *inam*. In execution of the decree confirming her right against Government, the plaintiff obtained symbolic delivery in 1897 and the finding of fact, which is binding on us now, is that defendants were present at the delivery and were cognizant of it. It is contended on the defendants' behalf that as they were in possession for over 12 years as *ryotwari* tenants under Government they prescribed for such an interest, that is, the right to hold on *ryotwari* tenure as against the plaintiff and have perfected their right by prescription, and reliance is placed on *Gossain Dalmar Puri* v. *Bepin Behary Mitter* (3), but that case is only authority for the proposition that where a wrongful owner in possession granted a permanent lease and was subsequently dispossessed by symbolical delivery, the permanent lessee who was not a party to the symbolical delivery was not affected by it nor was his adverse possession disturbed thereby, the *ratio decidendi* being that the grantor of the lease had no power of resumption, and consequently the possession of the lessee had always been adverse to and not on behalf of the grantor. It is unnecessary now to consider whether defendants would have acquired any right if they had been unware of the symbolical delivery of possession to the plaintiff in 1897 They were not unaware of it, and acquiesced in it, thereby recognising that the possession of their landlord had ceased, and consequently that there was a cessation of their possession also in so far as they claimed possession under Government, *vide Kocherlakota Venkatakristna Row* v. *Vadrevu Venkappa* (4). No doubt they subsequently continued to be in physical possession and paid revenue to Government, but their original possession having been terminated by the delivery in execution, any fresh title would not be perfected until the expiry of twelve years after the symbolical delivery, and this suit has been brought within twelve years of that date, and is, therefore, within time.

A further objection is taken that some of the defendants were not impleaded in the suit originally, but were added as parties more than twelve years after the date of delivery. The plea does not appear to have been taken before, nor can it be gathered from the record before us which defendants were impleaded more than twelve years after the date of delivery. I do not think this plea can be allowed to be taken for the first time in second appeal.

I agree that the District Judge's finding on issue IV cannot be upheld. He appears to have considered the question from one standpoint alone, that is, whether as a *mirasidar* the plaintiff is entitled to the *kudivaram*, but the question that has to be decided in this suit is whether the *inam* granted to the plaintiff's predecessor consisted of the land, including both *varams*, or of the *melvaram* only and the District Judge has not considered the evidence on this point. I agree, therefore, in the order proposed.

In compliance with the order contained in the above judgment, the District Judge of Chingleput submitted the following

FINDING.—The High Court has called for a finding on the 4th issue, *viz.*, whether the *inam* granted to the plaintiff's predecessor consisted of the lands including both the *melvaram* and *kudivaram* or of the *melvaram* only.

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The evidence on either side is meagre,

(3) 18 C. 520; 9 Ind. Dec. (N. S.) 347.

(4) 27 M. 262.

JANG BAHADUR SINGH *v.* CHANDREJ SINGH.

On a consideration of the above circumstances, I find that the *inam* granted to the plaintiff's predecessor consisted of the lands including both the *melvaram* and *kudivaram*.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding (the respondents other than the 1st not appearing). The lower Appellate Court's decree is set aside and the District Munsif's decree is restored with costs on the respondents (other than the 1st respondents) in this and in the lower Appellate Court payable to plaintiff. First defendant will bear his own costs throughout.

Appeal allowed; *Suit decreed.*

V. R. P.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 427 OF 1914.

August 17, 1916.

Present: - Mr. Lindsay, J. C.

JANG BAHADUR SINGH—DEFENDANT No. 2—APPELLANT

versus

CHANDREJ SINGH—PLAINTIFF, CHANDIKA SINGH AND ANOTHER—DEFENDANTS NOS. 5 AND 6—RESPONDENTS.

Evidence Act (I of 1872), s. 89—Mortgage-deed—Attesting witnesses dead—Mortgagor, failure of, to produce mortgage-deed—Execution, proof of—Partition—Revenue Court—Co-sharers, position of, after partition—Ejectment suit—Redemption, whether can be allowed.

The attesting witnesses of a mortgage-deed, required by law to be attested, were dead. It was, however, proved that the mortgagor had executed the deed, and that it had been returned to him at the time of the sale of the mortgaged property to the mortgagee. The mortgagor was called upon to produce the deed before Court, but he failed to do so:

Held, that under the above circumstances the execution of the mortgage-deed was, in view of section 89 of the Evidence Act, satisfactorily established, irrespective of the provisions of section 68 *et seq.* of the same Act. [p. 173, col 2]

A partition effected through a Revenue Court between the co-sharers of a village creates a fresh title in each co-sharer to whom a share in the village is allotted, and the parties to the partition case cannot subsequently be allowed to set up a title other than that assigned to them at the time of the partition. [p. 174, cols. 1 & 2.]

Where in a simple suit for ejectment the plaintiff set out in the relief clause that, if it were found by the Court that there were any encumbrances on the property in suit, an order might be made permitting him to have redemption:

Held, that the plaintiff could not have redemption in such suit. [p. 174, col. 2.]

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 5th June 1914, upholding the order of the Probationary Munsif, Sultanpur, dated the 7th February 1914.

Mr. *S. N. Sinha*, for the Appellant.

Babu *Lachman Prasad Varma*, for Respondent No. 1.

JUDGMENT.—This case has already been before me and by my order dated the 8th of March last three issues were remitted to the Court of the Subordinate Judge for disposal*. The Subordinate Judge has re-

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* The order referred to is as follows :—

"This appeal arises out of a suit brought by one Chandrej Singh to recover possession of 6/25ths share of a certain *patti*, the area of which is given as 49 *bighas* 11 *biswas* 10 *biswansis*, situated in *Mauza* Saidpur Kalan. A short pedigree may be set out in order to elucidate the matters now in dispute:—

JANGA SINGH.

Jaikaran Singh	Jagat Narain Singh, defendant No. 6.
Chandika Singh, defendant No. 5.	Chandrej Singh, plaintiff.

"It was alleged that this *patti* had once belonged to Janga Singh and the case for the plaintiff was that the *patti* had been divided off by a partition which was effected in the years 1900 and which was to come into force on the 1st of July 1901. The other two persons who were given shares in this *patti* were the defendants Nos. 5 and 6 in the present case, namely, Chandika Singh defendant No. 5, who is a brother of the present plaintiff, and Jagat Narain defendant No 6, who is the plaintiff's uncle. The suit was contested by the second, third and fourth defendants, and of these the appellant who is now before me is the defendant No. 2, Jang Bahadur Singh. The defence was that Janga Singh who was the grandfather of the plaintiff had mortgaged this whole *patti* to Sahae

corded the evidence produced by the parties and has submitted his findings: the findings being in favour of the contesting defendants-respondents.

Singh, the grandfather of the third and fourth defendants, on the 20th of July 1881. This mortgage, it was said, was with possession and the sum secured by it was a sum of Rs 800. It was also alleged that a deed of further charge had been executed on the same property on the 16th of July 1891 by Jagat Narain Singh defendant No. 6 and by Chandika Singh defendant No. 5, the latter acting both for himself and for his brother the plaintiff Chandrej Singh who was minor at that time. Then it was said that on the 27th of February 1899 the whole of the *patti* was sold by these last mentioned persons to two persons Sahae Singh and Dalpat Singh. Jang Bahadur Singh the present appellant is the son of Dalpat Singh. Both the Courts have decreed the plaintiff's claim holding that the defendants Nos 2 to 4 could not now set up proprietary right in this *patti* by reason of the partition which was come to in the year 1900. It has been proved that those defendants were parties to the partition and it is also proved that when the partition took place, they failed to put forward their claim as proprietors on the strength of the two sale-deeds alleged to have been executed on the 27th of February 1899. It may further be noted here that the defendants failed to produce the original sale-deeds in the Court of first instance, and it was held both there and in the lower Appellate Court that they had not proved circumstances which entitled them to give secondary evidence of the same. It appears, moreover, that these defendants claimed to have a right to retain possession of the property in suit by reason of the mortgage and the deed of further charge which have been mentioned above. Here again it was held that the defendants had failed to show their right to adduce secondary evidence of the mortgages and it was, therefore, held that the mortgages were not proved. Dealing with this part of the case the lower Appellate Court further remarked that as the defendants had set up a sale-deed, it must be taken that the mortgagee rights under the previous deeds had become extinct. It has been argued here in second appeal that the appellant was entitled to retain possession of the property as a mortgagee. The learned Counsel admitted that no satisfactory reason had been given at the time of the trial for the non-production of the original deeds of sale. But it was represented here that as a matter of fact these sale-deeds were on the file of another suit to which I must now refer. In the year 1912 a suit was brought in the Court of the Subordinate Judge of Sultanpur by Chandika Singh and Jagat Narain Singh who are now arrayed as the 5th and 6th defendants. They claimed under the partition just referred to a 19/26ths share of the *patti* in question. This case ultimately came up to this Court and was decided by the Second Additional Judicial Commissioner on the 30th of July 1915, that is to say, more than a year after the date of the lower Court's decision in the present case. A reference to the appellate record in the former case shows that the sale-deeds must have been produced before the Subordinate Judge, for he found that execution of them had been proved. The Subordinate Judge dismissed the claim in that case, holding that the plaintiffs were not entitled to recover possession by reason of the fact that the property was held in mortgage by Jang Bahadur and others, defendants Nos. 2 to 4 in the present case. This decision of the Subordinate Judge was reversed in appeal by the District Judge but in second appeal to this Court it was held by the Second Additional Judicial Commissioner that although these defendants, that is to say, Jang Bahadur and others, had lost all right to claim proprietary possession over the property in suit, they were nevertheless entitled to retain possession as mortgagees. The learned Second Additional Judicial Commissioner held that the partition proceedings could not be taken to affect any mortgagee rights already in existence and that, therefore, Jang Bahadur and those who were interested with him were entitled to retain possession as mortgagees over 19/25ths of the *patti*. It will be obvious that the facts in issue in that case were exactly the same as those which are in issue now, though of course it is not pretended that the judgment of this Court constitutes *res judicata* in the present case. I have, however, referred to what was decided in the earlier case in order to show that the defendant-appellant here had, as a matter of fact, a good reason for non-production of the original documents in the Court below, although he and his Pleader failed to give those reasons to the Court. So far as the question of the mortgage is concerned, it was pointed out by the learned Counsel for the appellant that the deeds of mortgage had been returned to the vendors when the two sale-deeds were executed on the 27th of February 1899, and he referred in this connection to an endorsement recorded on the back of one of the sale-deeds a certified copy of which is upon the record. It would, I think, work great hardship upon the appellant if the judgment of the lower Appellate Court were allowed to stand without any further inquiry, and so I find it necessary to send the case back for further trial. The Subordinate Judge is directed to give findings upon the following issues:—

"(1) Whether the property in suit was mortgaged as alleged in the written statement on the 20th of July 1881 and whether a deed of further charge dated the 16th of July 1891 was executed in respect of the same property?;

(2 Whether the defendant-appellant Jang Bahadur Singh and his predecessors-in-title had been in possession of the property in dispute under the mortgages in question?; and

(3) Whether the mortgages just mentioned are still in force?

This last issue arises out of what has been stated in the lower Court's judgment, to the effect that the mortgages have become extinct by reason of the sale-deeds which are alleged to have been executed on the

JANG BAHADUR SINGH *v.* CHANDREJ SINGH.

The first issue sent down for trial was as to whether the property in suit had been mortgaged on the 20th of July 1881 as alleged in the written statement, and whether a deed of further charge on the same property had been executed on the 16th of July 1891. These deeds were said to have been executed in favour of the predecessors-in-interest of the defendants Nos. 1 to 4. The finding of the lower Court to the effect that the execution of both these documents has been challenged here on behalf of the plaintiff and it is now necessary to consider whether the finding of the Court below is correct. I will deal first with the document of further charge said to have been executed on the 16th of July 1891. That document is a document which is required by law to be attested, and it is mainly with reference to the provisions of section 68 and the following sections of the Evidence Act that it has been contended that there is no legal proof of this document upon the record. I have examined the evidence taken before the Subordinate Judge. It appears to be quite clear that the witnesses who attested the execution of this deed are dead. There was evidence on the record to show that this document had been executed by Jai Karan and Jagat Narain, Jai Karan being the father of the plaintiff-respondent Chandrej Singh. It was proved that two sale-deeds relating to the property alleged to have been mortgaged under these two deeds of mortgage were executed in the year 1899 and the evidence goes to show that when these two deeds of sale were executed, the original deeds dated the 20th of July 1881 and the 16th of July 1891 respectively were handed over to one of the vendors Chandika Singh, who is the defendant No. 5 in the case. These sale deeds were produced in Court and it appears from the endorsements on the back of them that at the time the deeds were registered, the original deeds of mortgage and further charge were handed back to the vendor. There is also direct evidence on the record to show that these deeds were handed back to Chandika Singh. Chandika Singh was called upon, therefore, to produce these documents before the Subordinate Judge. He appeared and made a statement on oath to the effect that no such documents had ever been in existence and no such documents had been returned to him. This statement of Chandika Singh has not been believed by the Subordinate Judge and I think there can be no doubt whatever that the statement is untrue. This being the state of affairs, it is not necessary for me to scrutinize the evidence in order to ascertain whether the conditions laid down in section 68 *et seq.* of the Evidence Act have been complied with. The learned Counsel who appears to support the objection did not refer to the terms of section 89 of the Evidence Act. That section lays down that the Court shall presume that every document called for and not produced after notice to produce was attested, stamped and executed in the manner required by law. If we hold, as I think we must, that Chandika Singh had these original deeds in his possession, it necessarily follows that the Court was bound to presume the execution and due attestation of these documents. I, therefore, refrain from making any reference to the statements of the witnesses who were called to prove, as far as they could, that these documents were duly executed. I might remark, however, with reference to the earlier deed of 1881, which is not a document required by law to be attested, that there is proof on the record that it was executed by Janga Singh, and further that its execution may be inferred from the admission contained in the deed of further charge dated 1891. There is a distinct reference in that document to the existence of this earlier deed of mortgage. It is not necessary for me to support the reasons which the learned Subordinate Judge has given for his finding that the execution of these documents has been proved, for he too seems to have ignored or to have forgotten the provisions of section 89 of the Evidence

27th of February 1899. As I have pointed out, the learned Second Additional Judicial Commissioner seems to have held that the mortgagees were still entitled to hold possession in spite of the fact that they lost all right to set up a claim to the proprietary interest in the *patti*. The Subordinate Judge ought to allow the parties to adduce such evidence as they can upon these issues, and he will submit his findings within three months from the date of the receipt of this order of remand. Ten days, to run from the date of the lower Court's finding, will be allowed to the parties to file objections, if they so desire."—(*Ed*).

Act. I hold, therefore, that the execution of the documents in question is satisfactorily established.

The next issue which was sent down for trial was with regard to the possession of the defendant-appellant Jang Bahadur Singh. Jang Bahadur Singh's case was that he had all along been in possession of the property in suit under the two mortgage-deeds already referred to. There is abundance of evidence on the record to show that he has had such possession and in fact the plaintiff has to admit that Jang Bahadur Singh is in possession over the property, for the suit which the plaintiff has brought is a suit in ejectment.

The third issue which the Subordinate Judge was asked to determine was whether the mortgages mentioned were still in force. A good deal of argument has been addressed to me with the object of showing that the sale-deeds, which were executed in the year 1898, put an end to these mortgages and it has been contended therefore that Jang Bahadur Singh the defendant-appellant is not in a position to maintain the case that he is now a mortgagee of the property in suit. I think it is not necessary for me to examine this argument, because having regard to the nature of the suit I am clearly of opinion that it is not open to the plaintiff here to allege that the defendant-appellant is not a mortgagee. The suit is professedly based upon a title which was brought into existence by reason of certain partition proceedings undertaken in the year 1899. The partition took effect from July 1901, and it is upon the basis of the title which was created in the plaintiff's favour in this year that the present suit has been brought. There can be no doubt that a partition effected between the co-sharers of a village creates a fresh title in each co-sharer to whom a share in the village is allotted. We have, therefore, to consider what was the nature of the title which was conferred upon this plaintiff Chandrej Singh by the partition proceedings which took effect from the year 1901. It is admitted that in the *khewats* which were drawn up in the course of the partition proceedings, Chandrej Singh was described as being mortgagor of a 9/25ths share of the property included in the *patti*, while the predecessors-in-interest of the defendants Nos. 1 to 4 were described as mortgagees. It has been held against the defendants Nos. 1 to 4 that they are not entitled in this suit to set up the defence that they have become proprietors of the land in question by reason of the sale deeds executed in their favour in the year 1899. The reason for this decision is that when the partition proceedings took place these defendants failed to put forward their proprietary title and to get an adjudication from the Revenue Court. But if the defendants are not in a position now to plead that they have become proprietors of this land, neither is the plaintiff in a position to put forward a case that he has got any title other than that which was assigned to him at the time of the partition. As I have said, the plaintiff was described in the proceedings as a mortgagor and the predecessors-in-interest of the first four defendants were described as mortgagees. Both parties are bound by the proceedings in the Revenue Court and it must, therefore, be held that the only title which came into existence by reason of the partition was in the plaintiff's case the title of a mortgagor. In the plaint as it is framed no mention whatever is made of any of these mortgagors, although I notice that in the relief clause the plaintiff set out that if it were found by the Court that there were any encumbrances on the property, an order might be made permitting him to have redemption. The plaintiff cannot have redemption in this suit however. If he wants to have possession of this property in this way, he must bring a separate suit for redemption. I may mention that a similar decision was arrived at by my learned colleague Pandit Kanhaiya Lal in a previous case between the present defendent-appellant and the other co-sharers in this *patti*.

The result, therefore, is that this appeal must be allowed. The plaintiff Chandrej Singh is not entitled to succeed in this suit for ejectment and I hold that the suit must be dismissed and I order accordingly. The defendant-appellant will have his costs from the plaintiff Chandrej Singh in all three Courts.

Appeal allowed.

STOCKING, B. *v.* TATA IRON AND STEEL CO.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 733 OF 1916.

May 31, 1917.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

B. STOCKING—DEFENDANT—APPELLANT

versus

THE TATA IRON AND STEEL COMPANY —PLAINTIFF AND ANOTHER—*Pro forma* DEFENDANT—RESPONDENTS.

Estoppel—Trespasser building upon another's land, effect of—Suit for demolition—Building with knowledge of defective title—Principal and agent—Principal, liability of, extent of, for acts of agent—Power-of-Attorney, construction of—Agent's authority, limitation of.

If a stranger builds knownigly upon another man's land, there is no principle of equity which prevents the owner from insisting on having back his land with all the additional value which the occupier has imprudently added to it [p. 178, col. 1.]

The question whether the knowledge or acts of an agent can be attributed to his principal depends upon the terms of the authority that the agent has received. [p. 178, col. 1.]

Per *Atkinson, J.*—If a person deals with a known agent endowed with limited authority and power, he is bound to ascertain the scope of the agent's authority; otherwise if such a person deals with such an agent and the agent exceeds the limits of his authority and the person so dealing with him incurs loss or damage by reason of the agent exceeding his authority, then such a person cannot hold the principal liable for the acts of his agent done outside and beyond the scope of his authority. [p. 179, col. 1.]

The authority conferred by a power-of-attorney must, therefore, be strictly adhered to. If the authority is exercised in excess of and outside the reasonable scope of the special powers conferred upon the agent, a third party dealing with the agent will be unable to make the principal liable. [p. 176, col. 2.]

Appeal from a decision of the Subordinate Judge, Singhbhum, dated the 10th April 1916.

Syed *Hassan Imam*, Messrs. *Yunus*, *Lal Mohan Ganguli* and *Rai Guru Saran Prasad*, for the Appellant.

Messrs. *Pugh* and *Mrityunjay Lal*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This appeal arises out of a suit in ejectment. The plaintiffs are the Tata Iron and Steel Co. They hold a sub-lease of 21 villages in the district of Singhbhum. One of these villages is named Beldih. From the *prodhan* of Beldih Mr. Stocking took a lease of 23 *bighas* odd of land.

The case for the plaintiffs was that the *prodhan* had no right to give Mr. Stocking this lease and that Mr. Stocking had erected buildings upon the land in spite of the protest made on behalf of the plaintiff Company. The plaintiffs, therefore, ask for a decree declaring their right to direct possession of the land and for ejectment.

The suit was contested only by Mr. Stocking. He contested the suit upon the ground that the *prodhan* had the right to lease the land to him. His case was that the *prodhan* had authorised him to erect buildings upon the land. These buildings were erected close to the factory of the plaintiff Company, and without any objection by the General Manager. That on the contrary the Resident Engineer, Mr. W. O. Ranken, suggested to the defendant that he might secure his title by obtaining a confirmatory lease from the plaintiff Company and that he was put in formal possession of the land by Mr. Ranken, and also by Mr. Ghosh, the *zemindari* Manager of the Company. That this was done with the consent of the General Manager, Mr. R. G. Wells, who was fully aware of what the defendant was doing; that the defendant had spent some Rs. 40,000 on this understanding; that he received no notice of any objection by the Company until he had almost completed the buildings, when he received a notice from Mr. Padshah who was officiating as General Manager in March 1911, requesting him to stop further operations. Thereafter Mr. Wells, the General Manager, returned from leave. No further objection was taken on behalf of the Company until the 25th November, when Mr. Darlington who was officiating for Mr. Wells wrote another letter protesting against the erection of the buildings by the defendant. By that time the buildings had all been completed. Mr. Stocking claims that if the plaintiffs were held to be entitled to eject him, he should get compensation for the amount which he expended upon the erection of the buildings with the consent of the plaintiff Company.

The suit was decreed in the first Court and Mr. Stocking's first appeal has been dismissed. He now appeals to this Court. The rights of the *prodhan* depend partly upon a *patta* for a period which has long expired and partly upon customary rights. The *prodhan's* lease is proved by the *kabuliyat* (Exhibit D.) dated the 1st June

1882. It is for a period of 15 years; it expired, therefore, in the year 1897 and it has not since been renewed. It might be held, however, that the *prodhan* is holding over under that lease. The lease recites that the total quantity of land in the villages is 89 *bighas*, but that certain residential and other lands are excluded from the lease leaving only 64 *bighas* odd. The land is culturable or cultivated land, whereas it is quite clear that the land let to Mr. Stocking was not cultivated land. The land is, therefore, not included in the land which was specifically leased to the *prodhan* in 1882. The *prodhan's kabuliyat*, however, recognises his right to settle land outside the land in his possession. The contention, however, on behalf of the plaintiff Company is that the *prodhan* had no right to give a lease of any of the valuable forest land and that he has no right in any case to settle land for building purposes. The land which is the subject of the case appears from the Survey Report to be outside of the area which the *prodhan* could settle. It is entered as "*sal* jungle," and *sal* is a valuable timber. For the purposes of determining the customary rights of the *prodhan* we have been referred only to Mr. Reid's commentary on the Chota Nagpur Tenancy Act, and from that commentary it would appear that the *prodhan* has no right to settle land for purposes other than cultivation. This would be confirmed by the fact that in the *prodhan's kabuliyat* the residential part of the village is expressly excluded. The result is that we must concur in the conclusion arrived at by both the original Court and the Court of first appeal that the *prodhan* had no right to lease these lands to Mr. Stocking for the purpose of erecting buildings upon them, and that these lands were lands which the *prodhan* had no right to settle at all. The result is that unless there be some equity or estoppel in the way of the plaintiffs they would be entitled to obtain a decree in ejectment.

In order to determine the question of estoppel, the relations between Mr. Stocking and the plaintiff Company have to be carefully considered. The Tata Iron and Steel Company appear to have started a construction of their main works in the adjoining village of Sakchi in the year 1909. The plaintiff Company entrusted the construction of their works to a Company named Julian Kennedy Sahlin and Company, Engineers, whose headquarters appear to be in Brussels. The Resident Engineer in charge of the construction work on behalf of the Brussels firm is named Mr. Ranken. Mr. Stocking came to Sakchi at the end of the July 1908 as a contractor under the Brussels firm Jullian Kennedy Sahlin and Co. At that time the plaintiff Company held a sub-lease of several villages including the village of Beldih which adjoins the village of Sakchi. When the main factory was being constructed in October 1909, Mr. Stocking took an informal lease from the *prodhan* of Beldih of the land which forms the subject of this case. There appears to be no reason to doubt his evidence that in consultation with Mr. Ranken and Mr. Ghosh, the *zemindari* Manager of the plaintiff Company, Mr. Stocking selected sites for the erection of buildings in the hope that the buildings would be employed for some purpose connected with the factory in the adjoining village of Sakchi. The buildings were of the nature of store houses, aerated-water factory and so forth. Mr. Stocking continued the construction of the buildings and had apparently practically completed the stores in March 1911. In that month he received a letter from Mr. Padshah, the acting Manager, in which it was suggested that Mr. Stocking should defer further operations until the return of Mr. Wells, the permanent Manager, Mr. Stocking in spite of this letter continued to spend money upon erections on the land until he received in November 1911 an express warning that if he continued to do so it would be at his own risk and that the Company entered a protest. He then appears to have ceased any further construction.

The documentary evidence appears to commence with a letter from C. C. Ghosh, the *zemindari* Manager of the plaintiff Company, dated the 1st October 1910 which supports Mr. Stocking's evidence that the sites of the buildings were selected in consultation with him and Mr. Ranken. There was then a letter from Mr. Stocking dated the 21st October 1910, addressed to Mr. Ranken, the Resident Engineer of the plain-

tiff Company enclosing a rough sketch of the project of the land *you have been so good to give me*. The letter suggests that the town which it is proposed to put up should be named after Mr. Ranken. Reference is made to the nature of the building which it is proposed to erect as a store. In this letter Mr. Stocking says that he would like to arrive at a thorough understanding with the plaintiff Company about the rent of the land so that he should not be put to difficulty when Mr. Ranken had left, and informs Mr. Ranken that he intends to finish the buildings immediately. Mr. Stocking's evidence, that Mr. Wells the General Manager was aware of what was being done, is confirmed by the correspondence which passed between Mr. Ranken and Mr. Wells towards the end of March 1911, after Mr. Padshah had warned Mr. Stocking that he had better not proceed further until Mr. Wells returned. In a letter dated the 22nd March 1911 Mr. Ranken, during the latter's absence, says that Mr. Darlington had privately informed him, Mr. Ranken, that the Board of the Company objected to Mr. Stocking building shops without the matter having been put before them. He refers to the fact that he, Mr. Ranken, had talked the matter over with Mr. Wells on several occasions and that Mr. Wells had not given any stop order. We may take it, therefore, that up to the date of the receipt of the letter from Mr. Padshah Mr. Stocking was given to understand that Mr. Wells, the General Manager of the plaintiff Company, did not disapprove of what he was doing, and that the only question which remained to be determined was the rent which Mr. Stocking should pay to the plaintiff Company for the land upon which he was erecting these buildings.

Now the powers of Mr. Wells as General Manager were contained in the powers-of-attorney which are on the record of the case. In these powers-of-attorney it is expressly provided that Mr. Wells shall have no power to transfer, assign or otherwise dispose of any of the property of the Company without the consent of the Managing Agents in writing previously obtained, and that such consent in writing should be annexed to the deed of transfer, assignment or lease as the case may be.

I have been unable to find anything in the evidence to suggest that Mr. Wells was held out as having the power to dispose of the land of the Company in lease, and the letter written by Mr. Stocking to Mr. Ranken above referred to in October 1910 (Exhibit 6) seems to suggest that Mr. Stocking was aware that the power of settling the terms upon which he should hold the land did not lie in the hands of Mr. Wells. He says in that letter, "I should like to get a thorough understanding with Messrs. Tata Iron and Steel Company about the rent of the land so that I should not be put to difficulty when you have left." If it is permissible to speak of one's knowledge about commercial arrangements in India apart from evidence, there can be little doubt that the power to dispose of landed property of a Company does not usually lie in the hand of the local Manger. No doubt, a principal is liable for all the acts of an agent which are within the authority usually confided to an agent of that character, but it was not suggested that the power to lease land is an authority usually confided to an agent such as Mr. Wells was. So far as Mr. Ghosh the *zemindari* Manager is concerned, we have no evidence whatever as to what powers he actually had or what powers Mr. Stocking believed that he had. There is nothing in Mr. Stocking's evidence to suggest that he was given to understand that either Mr. Wells or Mr. Ghosh had power to dispose of the lands belonging to the Company. There is another difficulty in the case, and that is this. It is very difficult to ascertain from Mr. Stocking's evidence how much he had spent or what buildings had been erected when he got the first warning from Mr. Padshah. There is reason to believe that the storehouse at least was erected, but even that cannot be said with any degree of certainty.

The principle of law upon which the majority of the House of Lords were agreed in the case of *Ramsden* v. *Dyson* (1) was as follows:—

(1) (1866) 1 H. L. 129 at p. 171; 12 Jur. (N. S.) 506; 14 W. R. 926.

"If a stranger build on my land supposing it to be his own and I knowing it to be mine do not interfere but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land with all the additional value which the occupier has imprudently added to it." Now it has not been made out that Mr. Stocking was led by Mr. Wells' acquiescence to be confirmed in the supposition that the land was his. On the contrary at the very initial stage Mr. Stocking recognised that the Company might claim the land, and with that in view enlisted the services of Mr. Ranken and the *zemindari* Manager. For these reasons the principle does not apply.

The other principle may be stated as follows:-

"If a man,...under an expectation created or encouraged by the owner that he shall have a certain interest in land, takes possession of the land with the consent of the owner and upon the faith of such an expectation with the knowledge of the owner and without objection by him lays out money upon the land, a Court of Equity will compel the owner to give effect to such ...expectation." [*Gregory* v. *Mighell* (2) and *Plimmer* v. *Wellington Corporation* (3)].

In the present instance even if it is possible to say that Mr. Wells created or encouraged any expectation, Mr. Wells could not in fact give Mr. Stocking any interest in the land without sanction. That being so, I fear that the case does not fall within the principle.

The question whether the knowledge or acts of an agent can be attributed to his principal depends upon the terms of the authority that the agent has received. *Blackburn* v. *Vigors* (4). Having regard to the limitation of Mr. Wells' authority, it is not possible to say that his knowledge or acts with reference to Mr. Stocking's activities can be attributed to the Company.

The result is that with some reluctance I feel compelled to say that Mr. Stocking has failed to make out any case of equity or estoppel as against the Company and I would, therefore, dismiss the appeal except in the matter of costs. I would direct that there be no award of costs in any Court. The parties must bear their own costs throughout.

ATKINSON, J.—I fully and entirely agree with my learned colleague. I would, however, desire to add a few observations of my own by way of addition to his judgment.

In my opinion, having carefully perused the power-of-attorney under which Mr. Wells was appointed Agent and Manager of the Tata Iron and Steel Company, it would be quite impossible for Mr. Stocking to hope that he could successfully resist the plaintiff's claim in this suit.

Mr. Wells was appointed, by power-of-attorney duly registered, Agent and Manager of the plaintiff Company with limited powers. Mr. Wells was thus a limited or conditional, as opposed to general, agent of the plaintiff Company. The appointment of Mr. Wells was by deed under seal. The description of Mr. Wells as General Agent and Manager of the plaintiff Company cannot override the express limitation of authority contained in the deed itself. Where a principal gives an agent express authority to do a particular act or class of acts on his behalf, the principal is bound as against third persons by every act done by the agent, who is so expressly authorised, which is necessary for the proper execution of the business, even though the express authority is unknown to the third person; *Hambro* v. *Burnand* (5) and *Montaignac* v. *Shitta* (6).

In so far as Mr. Wells transferred, agreed to transfer or acquiesced in Mr. Stocking's occupation of the Company's land

(2) (1811) 18 Ves. (Jun.) 328; 34 E. R. 341; 11 R. R. 207.

(3) (1884) 9 A. C. 699; 53 L. J. P. C. 104; 51 L. T. 475; 49 J. P. 116.

(4) (1887) 12 A. C. 531 at p. 537; 57 L. J. Q. B. 114; 57 L. T. 730; 36 W. R. 449; 6 Asp. M. C. 216.

(5) (1904) 2 K. B. 10 at p. 19; 73 L. J. K. B. 669; 90 L. T. 803; 52 W. R. 583; 9 Com. Cas. 251; 20 T. L. R. 398.

(6) (1890) 15 A. C. 357.

in village Beldih as a tenant of the Company, for the purpose of building a town or village thereon, he acted in violation of the authority conferred upon him under the power-of-attorney whereby he was appointed to act. If a person deals with a known agent endowed with limited authority and power, he is bound to ascertain the scope of the agent's authority; otherwise if such a person deals with such an agent and the agent exceeds the limits of his authority, and the person so dealing with him incurs loss or damage by reason of the agent exceeding his authority, then such a person cannot hold the principal liable for the acts of the Agent done outside and beyond the scope of his authority. This, I think, is the settled principle of law and applies with greater force and stringency to a case in which the Agent (as here) is appointed by deed. When an agent is appointed by a deed it is termed a power-of-attorney and such documents are always strictly construed by the Courts, according to well-recognised rules—*Bryant* v. *La Banque Du Peuple* (7) and *Russo Chinese Bank* v. *Li Yau Sam* (8).

In the first case cited above, their Lordships of the Privy Council say: "Nor was it disputed that powers-of-attorney are to be construed strictly, that is to say, that where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power it is necessary to show, on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication".

In the second case cited their Lordships lay down the general law as to the limited authority of an agent in the following words: "If the agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by any act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorised."

The authority conferred by the power-of-attorney must, therefore, be strictly adhered to. If the authority is exercised in excess of and outside the reasonable scope of its special powers, the third party will be unable to make the principal liable, *Jacobs* v. *Morris* (9).

Mr. Stocking admits in his evidence that although he knew that Mr. Wells was the Agent and Manager of the plaintiff Company he made no enquiry at any time as to the nature or measure of his authority. In this state of things it would be impossible to hold the plaintiff Company liable for the acts of its agent in excess of his authority. Now would acts by Mr. Wells which amounted to an acquiescence by him in the granting of the proposed lease to Mr. Stocking, coupled with his use and enjoyment of the land in suit for building purposes, create a right by way of estoppel in favour of Mr. Stocking as against the plaintiff Company?

No argument was addressed to us on behalf of the plaintiff touching the question of Mr. Wells having exceeded his authority under the terms of the power-of-attorney; but that seems to me to be the real and vital matter in the case and one which renders the defence put forward by Mr. Stocking quite unsustainable.

I regret very much that Mr. Stocking has no legal redress, as it appears to me that he has suffered much inconvenience and loss by the acts of the servants of the plaintiff Company for which, however, the Company is not responsible in point of law.

I agree, therefore, with my learned colleague that this appeal should be dismissed and I concur with the form of the order as to costs in all Courts.

Appeal dismissed.

(7) (1893) A. C. 170 at p. 177; 62 L. J.P.C. 68; 1 R. 336; 68 L. T. 546; 41 W. R. 600.

(8) (1910) A. C. 174; 79 L. J. P. C. 60; 101 L. T. 689; 26 T. L. R. 203.

(9) (1902) 1 Ch. 816; 71 L. J. Ch. 363; 50 W. R. 371; 86 L. T. 275; 18 T. L. R. 384.

DADASAHEB DASRATHRAO *v.* BAI NAHANI.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL NO. 1 OF 1916.
February 2, 1917.
Present:—Mr. Justice Beaman and
Mr. Justice Heaton.

DADASAHEB DASRATHRAO—
PLAINTIFF—APPELLANT
versus
BAI NAHANI AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel—Minor, representation by, that he is major, effect of—"Person," whether includes minor.

The meaning of "a person" in section 115 of the Evidence Act cannot be contracted so as to exclude from its connotation all persons declared under the Contract Act incompetent to contract. [p. 180, col. 2; p. 181, col. 1]

Where a person, not being clearly a minor in appearance, represents to another, and so intentionally causes that other to believe, that he is a major and on the faith of that belief causes that other to part with his money, he is estopped from subsequently pleading minority and proving it. [p. 180, col. 2; p. 181, col. 1.]

Ganesh Lala v. *Bapu*, 21 B. 198; 11 Ind. Dec. (N. S.) 133, followed.

Per *Heaton, J.*—In general the word 'person' when used in the Evidence Act is used in its ordinary sense, and it is used in that ordinary sense in the case of section 115 of the Act also. There is nothing in that section which suggests that there should be any limitation put upon the word "person." [p. 181, col. 1.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 16 of 1913, confirming the decree passed by the Additional Joint Subordinate Judge, Ahmedabad, in Civil Suit No. 660 of 1911.

Mr. *T. R. Desai*, for the Appellant.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.

BEAMAN, J.—The plaintiff sued to recover possession of a house which he bought under a registered sale-deed from defendants Nos. 1 and 2. The defendant No. 1 is the mother of the defendant No. 2. The defendant No. 2 pleaded minority. The lower Appellate Court found as facts that the defendant No. 2, not being clearly a minor in appearance, represented to the plaintiff, and so intentionally caused the plaintiff to believe, that he was a major and on the faith of that belief to part with her money. The learned Judge of first appeal is clearly of opinion that the belief was induced by the express declaration of the defendant No. 2 and that in all the circumstances it was a reasonable belief.

The question, then, is whether the learned Judge below was right in holding that the defendant No. 2 was now estopped from pleading minority and proving it. The point is directly covered by authority. It was held in the case of *Ganesh Lala* v. *Bapu* (1) that in precisely similar circumstances a person situated as the defendant No. 2 is situated here was estopped under section 115 of the Indian Evidence Act, 1872. We have been referred to numerous decisions in the Calcutta High Court which take a somewhat different view of the scope of section 115 as well as to a large number of English decisions commencing with *Johnson* v. *Pye* (2) and covering more than a century and a half. We are not, however, prepared to dissent from the decision of this High Court in *Ganesh Lala* v. *Bapu* (1). We are not prepared so to contract the meaning of 'a person' in section 115 as to exclude from its connotation all persons declared under the Indian Contract Act incompetent to contract. It is upon this ground and this ground alone, as far as we can see, that the Calcutta High Court was able to get over the difficulty occasioned by section 115. The long current of authorities we have considered appears to us to reveal a constant confusion of thought between what is true estoppel and what may be the effect of fraudulent misrepresentation by a minor. We are not, however, concerned with any considerations proper to the latter point. Estoppel is a law of allegation and proof, and if we are right in our interpretation of section 115, then the defendant No. 2, being 'a person' within the contemplation of that section and having by direct declaration intentionally caused the plaintiff to believe that he was a major, is precluded absolutely from denying the truth of that assertion, that is to say, he might not plead - much less prove—that at the time the conveyance was executed, he was in fact a minor. The point is not, as seems too often to be assumed, what would be the effect upon such a transaction of minority as a fact, but it is this that if the law of estoppel be correctly and strictly enforced, the Court is not to know that the defendant No. 2 was in fact a minor at all. The whole trial must proceed upon

(1) 21 B. 198; 11 Ind. Dec. (N. S.) 133.
(2) (1665) 1 Sid. 258; 82 E. R. 1091.

the footing of that being true which he represented and caused the plaintiff to believe to be true, *viz.*, that he was a major. Fraudulent misrepresentation is upon a totally different footing. In the large majority of cases of fraudulent misrepresentation it is the party who has suffered by it who desires the truth to be known and to obtain relief on that basis. That, of course, is a doctrine wholly outside the law of estoppel proper and should never be confused with it. In our opinion the learned Judge of first appeal has correctly appreciated the law, and we think that no sufficient grounds have been shown us for dissenting from the judgment of the Division Bench in *Ganesh Lala* v. *Bapu* (1) where that law was clearly laid down and so disturbing the decree of the lower Appellate Court.

We think that this appeal should be dismissed with costs.

HEATON, J.—I concur in the conclusions arrived at. Section 115 of the Indian Evidence Act must, in my opinion, apply unless the word 'person' occurring in that section is construed in some limited way so as to exclude minors. There is nothing in the section itself which suggests that there should be any limitation put upon the meaning of the word 'person' and when we turn to section 118 a little further on, we find there the word 'person' is used in its ordinary comprehensive sense. So it is again in section 122. We have, therefore, clear indications that in general the word 'person' when used in this Evidence Act is used in its ordinary sense, and I think that it is used in that ordinary sense in the particular case of section 115 also.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 75 OF 1916.

June 25, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Greaves.

BRAJA NATH PAL CHOWDHURY—DEFENDANT No. 1—APPELLANT

versus

SURENDRA KRISHNA ROY AND OTHERS—PLAINTIFFS, AND KRISHNAPADA CHOWDHURY AND OTHERS—REMAINING DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. V, r.* 17, *O. IX, r.* 13—*Summons, service of, place of—Mortgage suit*—Ex parte *decree—Application to set aside decree by some defendants—Decree, entire, whether to be set aside.*

On the refusal of a defendant to accept summons, attempted to be served upon him at a place where he does not ordinarily reside, the summons must be served in the house in which he ordinarily lives. [p. 182, col. 2.]

Where, on the application of some of the defendants for setting aside a mortgage decree passed *ex parte* against them, the decree is set aside, it should be set aside in its entirety. [p. 183, col. 1.]

Appeal against the order of the second Subordinate Judge, Hooghly, dated the 18th December 1915.

FACTS of the case appear from the judgment.

Mr. *B. Chuckerbutty* (with him Babu *Manmatha Nath Ganguly*), for the Appellant:—The suit was decided in the absence of the appellant and without any notice to him and his case is that as the summonses were suppressed, the suit should be re-heard in his presence. The appellant has been living for the last fifteen or sixteen years in his house at Cawnpore and the notice is said to have been served by hanging the same at his *katchery* at Bantra where the mortgaged property is situate. The peon who is said to have served the notice says that at the time when the summons was served, the defendant was lying ill on the verandah of the second floor of his house at Bantra; but does not say how he came to know of his illness. Practically there was no service of summons, and even if there was any, it was illegal as not having been made in accordance with the provisions of the Civil Procedure Code. So the *ex parte* decree should be set aside and the case should be re-heard.

Babu *Akshoy Kumar Banerji*, for the Respondents:—The summons in this case was

properly served. Where the defendant or his agent refuses to sign the acknowledgment the serving officer shall affix a copy of the summons on some conspicuous place of the house in which the defendant resides or carries on business or personally works for gain. See Order V, rule 17, Civil Procedure Code. In this case both the defendant and his agent refused to sign the acknowledgment and hence the peon, in affixing the copy of the notice on the outer door of the defendant's *katchery*, acted according to law. As the defendant has not been able to show any sufficient cause for his absence, the decision of the lower Court should not be interfered with. At Bantra the defendant carries on his *zemindari* business and hence the service at Bantra was a good service.

[MOOKERJEE, J.—*Zemindari* is not such a business as is contemplated by Order V, rule 17.]

But the agent of the defendant who was there got notice of this suit, and presumably he must have informed the defendant of this suit. The defendant should not be allowed to put forward any excuse if he had actual notice of the suit.

JUDGMENT.—This is an appeal against an order refusing to set aside an *ex parte* decree. The decree was made in a mortgage suit on the 21st January 1913. The application to set aside the decree was made on the 17th April 1915. The Subordinate Judge has dismissed the application on the ground that the summons was duly served upon the applicant. In our opinion the evidence does not support that conclusion. The summons is said to have been served on the 1st December 1912 at a place called Bantra in the District of Howrah. The case for the petitioner is that he resides ordinarily in his house at Cawnpore in the same District and that he has done so for many years past. He further asserts that on the day the summons is said to have been served, he was not in Bantra, but in his house at Cawnpore. These statements were made on oath and make out a *prima facie* case. To rebut this, the decree-holders bring forward the peon who served the summons. The indentifier is not produced because he is dead, and the witnesses to the service have not been called because apparently they cannot be found. The oral testimony of the peon is extremely unsatisfactory and his statements in the return of service are equally unsatisfactory. The statements come to this, that he went to serve the summons to Bantra and that the first defendant (the appellant before us) was in "the verandah upstairs in a state of illness." So he sent the summons through Chandra Kanta Sil, agent of the defendants, and asked for its receipt. As the receipt was not granted, the summons was affixed in the usual manner at the outer door of the house. The recital in the return does not state that the peon went upstairs and met the first defendant. It is extremely unlikely that he should have done so. He does not state how he learnt that the first defendant was lying in a state of illness upstairs. His evidence given in the present proceedings does not clear up the matter. Apparently it was hearsay. But even if the first defendant was in the house at Bantra at the time, the question arises, whether the service effected at the place was good service upon him under Order V, rule 17, Code of Civil Procedure. If we assume that the first defendant refused to accept the summons sent to him, the summons would have to be served in the house in which he ordinarily lived. According to the appellant he lives ordinarily in his house at Cawnpore and has done so for many years past. That statement stands practically uncontradicted Consequently we cannot hold that service was effected upon the first defendant in accordance with law.

We may point out that within two days of the alleged service, one of the defendants Kunjo Bihary Pal Chowdhury appeared before the Subordinate Judge and stated that the summons had been left in the house at Bantra, although some of the defendants had not resided there, and stated specifically that the defendant Braja Nath Pal Chowdhury who is the appellant before us lived at his own house in village Cawnpore. It is extremely unlikely that this statement is untrue and should have been made in view of a possible application by Braja Nath Pal Chowdhury for setting aside the *ex parte* decree which might be made against him.

It has finally been argued that the application is barred by limitation. Under Article 164 of the First Schedule to the Indian Limitation Act, the application has to be presented within thirty days of the date of the decree or of the date on which the petitioner becomes aware of the decree. The petitioner states on oath that the application was made within

two days of the date when he first became aware of the decree. It is suggested, however, that he must have been aware of the decree many months earlier, because summons was served upon him from this Court of a Rule obtained by the respondent to amend the decree which had been made in the suit. The Subordinate Judge has not accepted this evidence and in our opinion very properly. The respondent has not produced the primary evidence of the service of the Rule. He might have easily done so by applying for copies of the papers from the record of this Court. We are, therefore, of opinion that the application was made in time.

The result is that this appeal is allowed, the decree of the Court below set aside and the suit revived. The Subordinate Judge will take up the case for disposal as early as possible. As the decree was made in a mortgage suit and as the usual accounts must be taken in the presence of all the defendants, the entire decree is set aside, the whole case will be under the consideration of the Subordinate Judge. The costs of the trial up to the present stage will be costs in the cause. The appellant is entitled to his costs of this appeal from the plaintiffs-respondents. We assess the hearing fee in this Court at two gold *mohurs*.

Let the record be sent down as early as possible.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1363 OF 1915.

February 23, 19.7.

Present—Justice Sir John Woodroffe, KT., and Justice Sir Asutosh Mookerjee, KT.

KAILASH CHANDRA SOMADDAR—DEFENDANT—APPELLANT

versus

REVATI MOHAN ROY CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Letters Patent (Cal.) s. 15—Review of Division Bench judgment—Application refused by Single Judge of High Court—Appeal.

An application for review of a judgment of a Division Bench of the High Court was refused by one of the Judges constituting the Bench, the other Judge having ceased to be a Judge of the Court at the time:

Held, that no appeal under section 15 of the Letters Patent lay from the order of the Single Judge refusing the application for review. [p. 184, col. 1.]

Appeal against the order of Mr. Justice Teunon, dated the 28th November 1916.

FACTS appear from the judgment.

On the appeal being called on, the Vakil for the appellant was asked by Mr. Justice Mookerjee to show how an appeal lay from the order in question.

Babu *Jyotish Chandra Hazra* (with him Babu *Mohesh Chandra Banerji*) submitted that the order appealed against was a 'judgment' within the meaning of clause 15 of the Letters Patent. The word 'judgment' has not been defined in the Letters Patent. Therefore, we must look to the definition of the word as given in the Civil Procedure Code. The word 'judgment' as given in the Code means the statement given by the Judge of the grounds of a decree or order. In the present case the order of Mr. Justice Teunon dismissing the application for review is a judgment; it is to begin with an order—no one can dispute that—then the order also gives reasons, the reasons why the application for review should not be granted. I would refer to a case, *Mathura Sundari Dassi* v. *Haran Chandra Shaha* (1), where his Lordship Mr. Justice Mookerjee observed that an order rejecting an application is a judgment and his Lordship further remarked that if such a case comes before his Lordship, he will not hesitate to refer the case to a Full Bench. Here is a case of that description and I would invite your Lordships either to admit the appeal or to refer the case to a Full Bench.

[WOODROFFE, J.—But that is a different case altogether.]

Quite true but the observations of Mookerjee, J., are clearly in my favour.

[WOODROFFE, J.—Are not the reported cases against you?]

Yes, my Lord.

JUDGMENT.

WOODROFFE, J.—Appeal from Appellate Decree No. 1363 of 1915 was dismissed by Mr. Justice Teunon and Mr. Justice Smither on the 4th of August 1916. An application for review of the judgment passed in the appeal was presented before Mr. Justice Teunon on the 28th of November 19.6, when Mr. Justice Smither had ceased to be a Judge

(1) 34 Ind. Cas. 634; 23 C. L. J. 413 at p. 482; 20 C. W. N. 594; 43 C. 857.

of this Court. The application was rejected by Mr. Justice Teunon, sitting alone. Against the order rejecting the application for review this appeal is sought to be preferred under section 15 of the Letters Patent. The papers have been put before us for our orders upon the question as to whether the present appeal should be registered. It is suggested to us that we might direct the appeal to be registered subject to objection at the hearing. But in the present case no useful end would be served by such a course, seeing that we are prepared to deal with the matter at once.

It has not been contested before us that Mr. Justice Teunon had jurisdiction to pass the order which he did and that Mr. Justice Smither, having ceased to be a Judge, Mr. Justice Teunon was in fact the only Judge who could deal with the application which was presented to him. If the application had been made to both Judges, that is, if Mr. Justice Smither had remained a member of the Court at the time the application was made, the order could not have come before us. There can be no appeal merely because Mr. Justice Teunon, who was the only Judge who, under the circumstances, could hear the case, disposed of the application as a Single Judge. The intention of the Legislature was that an application for review should be entertained by the Judges or Judge who heard the case and no one else. If we were to give effect to the argument before us the result would be this: It is admitted by the learned Vakil who appeared before us that we should be invited to say that Mr. Justice Teunon erred in not granting the application for review, and that he ought to have granted the application and should have made the Rule absolute. In other words, we should have to consider not merely the judgment of one Judge of this Court, but the judgment of two Judges of this Court of which review was sought by the application before Mr. Justice Teunon.

It is admitted by the learned Vakil who appears before us that there is no authority which directly supports his argument. On the contrary, there are three decisions which are directly adverse to it, namely, those reported as *Musammat Rughoo Bibee* v. *Noor Jehan Begum* (2), *Aubhoy Churn Mohunt* v. *Shamont Lochun Mohunt* (3) and *Mulji Virji* v. *Bangabashi Saha* (4). The decision in *Mathura Sundari Dassi* v. *Haran Chandra Shaha* (1) is distinguishable, in that there it was held that the application was not an application for review of judgment. Whether that decision on this point was correct or not, we need not here consider; but it has obviously no bearing upon the matter now before us, which is a question whether an appeal does or does not lie from the order of a Single Judge refusing an application for what is admittedly a review.

In these circumstances we must direct that the memorandum of appeal be rejected on the ground that no appeal lies to us from the order of Mr. Justice Teunon of the 28th of November 1916.

Appeal rejected.

(2) 12 W. R. 459; 4 B. L. R. A. C. J. 10.

(3) 16 C. 788; 8 Ind. Dec. (N. S.) 523.

(4) 9 C. W. N. 502.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 175 OF 1915.

February 23, 1917.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

HUSSAIN SAHIB AND OTHERS—DEFENDANTS NOS. 9, 10, 12 AND 13—APPELLANTS

versus

HASSAN SAIB AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 TO 5, 7, 8, 15, 16, 18 TO 22, 24 TO 51—RESPONDENTS.

Custom—Hindu Law—Muhammadans, adoption by, of Hindu manners and customs—Nawayats *of South Canara—Joint family trade - Presumption—Evidence—Law applicable—Estoppel—Action and conduct of parties.*

Where a Muhammadan trading family so far conformed to Hindu customs that they lived as members of a joint family, purchased properties indiscriminately in the names of the members and showed themselves averse to division and conducted themselves as a Hindu family for many years:

Held, that a suit for partition would lie and the shares would be allocated according to the principles of Hindu Law. [p. 188, col. 1; p. 189, col. 2.]

Held, further, that the fact that the parties belonged to the class of *Nawayats* who, many years ago, married Konkani women and largely conformed to Hindu manners and usages, may be taken into account with the rest of the evidence for the purpose of explaining the footing on which they lived and traded for so many years [p. 188, col. 1.]

HUSSAIN SAHIB v. HASSAN SAIB.

Actions and conduct of parties might give rise to estoppel, when such actions and conduct have produced alteration of circumstances so great that without great loss and inconvenience the parties cannot be put back in their original position. [p. 188, col. 1.]

Mahomed Musa v. *Aghore Kumar Ganguli*, 28 Ind. Cas. 930; 42 C. 801; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; 21 C. L. J. 231; 28 M. L. J. 548; 17 Bom. L. R. 420; (1915) M. W. N. 621; 42 I. A. 1 (P. C.), followed.

Appeal under clause 15 of the Letters Patent, against the judgments of Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji, reported as 31 Ind. Cas. 927, in Appeal Suit No. 90 of 1911, preferred to the High Court against the decree of the District Court of South Canara, in Original Suit No. 6 of 1910.

Mr. *B. Sitarama Rao*, for the Appellants.

Messrs. *J. L. Rosario* and *H. Balakrishna Row*, for the Respondents.

JUDGMNNT.

WALLIS, C. J.—This is an appeal from the prevailing judgment of Mr. Justice Sadasiva Aiyar affirming the judgment of the District Judge of South Canara, Mr. Justice Tyabji dissenting.

The parties are Muhammadans and the suit was brought by the plaintiff for partition of the suit properties which, he alleged, belonged to the joint family of the plaintiff and the defendants. The parties are descendants of one Abdul Razak, whose four sons executed a partition deed in 1818. Their family residence was at Manki in North Canara, but the third brother Hussain Sahib with the assistance of the 4th brother Hammed Sahib started business at Souda in South Canara. That business has been carried on down to the present time by the two brothers and their descendants. Various properties had been acquired in the name of one or other of the senior members of the family and all the members of the family have been maintained out of the income of properties and the profits of the business. The accounts which have been preserved show that during the lifetime of Hassan, who died in 1870, accounts were kept in his name, and that since that time, they have been kept in the name of representatives of the senior and junior branches. In the course of years the descendants of the younger brother Hammed became more numerous than the descendants of the elder brother Hassan and the family have now four residences at Manki, three of which are occupied by descendants of the junior brother. If this were all the evidence in the case, the conclusion would naturally follow that the two brothers of the family were living and trading together on equal terms. It is quite common for the descendants of a Muhammadan trader to live and trade together for more than one generation and to acquire property in the names of one or other male members of the family, and in such a case the property is understood to be held for the several members of the family in the shares to which they are entitled under Muhammadan Law in succession to the common ancestor. Such a case recently came before this Court in a suit for the partition of properties of one of the leading Muhammadan firms in Madras. The present case, however, is not so simple. The contesting defendants rely on the partition of 1818 and on a document Exhibit XVI which is said to have been executed by Hassan, the senior brother, in 1845 before starting on a pilgrimage to the holy places and purports to be in the handwriting of the younger brother Hammed and to be written with his full consent. The evidence of the aged witnesses who were called to speak to its execution is practically worthless, as was pointed out by the District Judge. But other witnesses speak to the handwriting of some of the attesting witnesses and one of the plaintiff's witnesses speaks to a recognition of the document by some of the junior branch. It is also admitted by some members of the junior branch in their written statement in this case. Exhibit XVI has been accepted by the District Judge and the two learned Judges who heard the appeal and we are not prepared to differ from them. It recites that Hassan had carried on business and had acquired property of the value therein mentioned, and states that deducting Rs. 500 which he took on starting for Mecca the balance had been distributed into eight shares, of which his younger brother Hammed Sahib, who had been with him till then doing such acts as he was directed to do and who was to remain when he started for Mecca, was to have one; another share was to go to his wife and the remainder to his son Moiddin Sahib, who was to pay his two sisters Rs. 1,000.

It has been found by the District Judge and by the two learned Judges who heard the appeal that this document was never acted upon. Hassan Sahib returned from the pilgrimage and the business was carried on without any division. Mr. Justice Tyabji was further of opinion that in the events which happened no effect could be given to it. He, however, relied strongly on the recitals which it contained, that the business and properties therein referred to belonged to Hassan, the senior brother, as was admitted by the junior brother, and in these circumstances he was inclined to think that the business continued to belong to Hassan until his death in 1870. This was also the position taken up by the appellants in their 23rd ground of appeal, where they say that "The lower Court ought to have held that members of Hammed's branch were only servants, assistants and managers and payments made to them were either by way of wages or as charity." On the hearing of the appeal it was realised that this was too extreme a position, and Mr. K. Srinivasa Iyengar who appeared for the appellants conceded that they should be entitled to a one-eighth share, and acting on this concession Mr. Justice Tyabji in his judgment awarded them a $\frac{1}{8}$th share down to death of Hassan in 1870. As to the subsequent period he considered that an agreement between the two branches to share equally in the future profits of the business might be inferred from the fact that the subsequent accounts stood in the names of members of both branches.

On the other hand, Mr. Justice Sadasiva Aiyar was of opinion that the conduct of the two brothers and the members of the family after Hassan's return from the pilgrimage about 1848 was such as might be expected from brothers who considered themselves equal partners in the business and equal co-owners of all their properties, and he accordingly agreed with the District Judge that the two branches were entitled to partition in equal shares. On the whole, I have come to the conclusion that this is the right conclusion to be derived from the evidence as a whole. I fully appreciate, if I may say so, the force of Tyabji, J.'s observations as to the danger of attaching too much importance to the fact that in a trading family like this a son or junior brother has been allowed to take part in the management and been maintained out of the profits. I have often had to try cases in which claims to a partnership or a share arising out of facts like this have been made and failed. Every case, however, must stand on its own circumstances. In this case the plaint was presented in January 1909 and we have to draw inferences from the course of conduct pursued for over sixty years by both branches. Assuming that properties of the value mentioned in Exhibit XVI belonged to Hassan in 1845, it is not shown that the younger brother who got a share on the partition in 1818 had no other property of his own. Exhibits XVIII, XX and XIX show that three items of the suit properties were acquired in his name in the years 1844, 1846 and 1849. Exhibits XXVI, XXVII and XCV show properties acquired in Hassan's name in 1836, 1848 and 1854. Hammed, admittedly, managed the business during his brother's absence on pilgrimage. There is nothing in the evidence to suggest that after his return they agreed to go on trading on the basis that Hammed and his family should be entitled only to a one-eighth share on the basis of Exhibit XVI. There is no direct evidence of any specific agreement as to the terms on which they were to carry on the business and all that we can do is to draw the appropriate inference from their subsequent conduct. It is not suggested that during Hasean's lifetime or subsequently, the members of the junior branch were treated in any way less favourably than the senior branch. On the contrary, owing to their larger numbers, much larger expenditure was incurred on them. When the junior brother Hammed died in 1866, the properties, Exhibits XVIII, XIX and XX which stood in his name and which the contesting defendants suggest were held by him *benami* for the elder brother Hassan, were transferred not to Hassan's name but to the name of his eldest son Dodda Moidin. But this may be explained on the ground that he was then looking after the properties at Manki. The transfer, as Exhibit A shows, was made with the consent of his son Abdul Razak. Hassan died in 1870 and his eldest son Moidin died in 1889. Exhibit B is the genealogy prepared by the village officers on that occasion and shows the family as consisting

of the two sons of Abdul Razak, namely, Hassan and Hammed and their descendants. And Exhibit C is the application for the transfer of registry of the properties standing in his name. It describes the descendants of Hassan as near heir, and the descendants of Hammed as distant heirs and is signed by both branches. The person described as near heirs were the persons entitled to succeed under the Muhammadan Law and the mention of the others shows that they were regarded as having an interest in the properties. These properties, referred to in Exhibit C, were the properties in North Canara. The properties in South Canara were transferred to the name of Abdul Razak of the junior branch who was managing the business at Souda. On his death the properties standing in his name were registered in the name of his half-brother Sanna Hassan. In 1897 both Dodda and Sanna died within a day of each other. Exhibit D is a genealogy prepared on that occasion. It is signed by the members of both branches and states that "all the heirs mentioned herein (that is to say, all the surviving members of both branches) belong to an undivided family. Besides these there is no other near heir". The question was settled by a compromise. Some of the properties were registered in the name of the 9th defendant of the senior branch and the rest in the name of Mahomed Siddiq of the junior branch, Exhibits F1 and F 2. Exhibit E1 is the statement taken from the contesting 9th defendant in this suit. He says: "The deceased and I are elder and younger brothers and there are heirs of the second branch and being members of an undivided family, not only the management of the lands but all remaining affairs are conducted as a whole by our household." This is a very significant statement. He goes on to say that, as senior member of the senior branch, he alone was the *hukdar* or manager and that it would not be convenient that the property should be registered in the name of the widow. And in another statement, Exhibit E 2, he says: "Now I being the chief heir of the deceased and moreover I being the heir according to law and Muhammadan *Shastras*, I state that the *kudtala* may be entered in my name. In the undivided family of the two branches and in our household my father looked after the management until his death and all the members of the family are supplied with necessaries from our household. The *kudtala* should be transferred to my name as stated by me." Exhibit E 3 by the 22nd defendant stated that they were the members of an undivided family but that the registry should be in the name of the wife of the deceased. Exhibit E4, a statement from the plaintiff's father, stated that "the members of this family as well as the members of the family of Moidin Sahib were undivided up till now. We are living together as members of an undivded family," but that he had no objection to the *kudtala* being transferred to the widow's name. Exhibit E5 is the widow's statement. She also stated that "the deceased, my husband and his brothers and all the heirs shown in the annexed genealogy are members of an undivided family. No division has been made up to this time." This is clearly a statement that they were all interested in the properties. Exhibit E7 is a statement of Alli Sahib, a member of the junior branch, which objected to some of the properties being transferred to the name of Hammed Sahib son of the deceased on the ground that he remained in Manki village, whereas the *kudtala* of the properties in Souda had, therefore, been transferred to the names of persons who remained there to look after the management of the properties.

These statements, made by members of both branches in Exhibit E series that both branches were members of an undivided family and interested, as heirs, in the properties to be registered, are, I think, very important evidence of the terms on which the two branches lived and carried on business for sixty years before the institution of this suit. It seems to me to amount to an admission on the part of the senior branch that the junior branch were interested in all the properties as well as in the business; and when with this we consider the facts that the business was carried on since 1870 in the names of members of the senior and junior branches and that the junior branch, admittedly, were dealt with on

terms of perfect equality with the senior branch and owing to their numbers had three establishments maintained for them at Manki as against one for the senior branch, the proper inference, I think, is that for a very long series of years the two branches lived and traded together on the footing that they were entitled to equal shares in all the properties as well as in the business; in other words, that they acted as if the business had been carried on from the first by the two brothers Hassan and Hammed without any division between them. Something is said in the judgments of the learned Judges about the fact that the parties belong to the class of '*Navayats*' or new comers, who many years ago, married Konkani women and as found in *Khatija* v. *Ismail* (1) conformed to Hindu customs and manners to a very great extent and were not over fond of division.

It is not the plaintiff's case here that the family is in any way bound by the rules of Hindu Law. But I think that the fact that they belong to this class of *Navayats* may be taken into account with the rest of the evidence, for the purpose of explaining the footing on which they lived and traded for so many years.

Lastly, I think there is great force in the observation of Sadasiva, Aiyar, J., as to the application to this case of the recent ruling of their Lordships of the Judicial Committee in *Mahomed Musa* v. *Aghore Kumar Ganguli* (2) that "Actings and conduct of parties might give rise to estoppel, where such actings and conduct have produced alterations of circumstances so great that without great loss and inconvenience the parties cannot be put back in their original position".

For these reasons, I agree with the judgment of Sadasiva Aiyar, J., and would dismiss the appeal with costs.

OLDFIELD, J.—I agree and have nothing to add.

SESHAGIRI AIYAR, J.—I agree. I confess that it is only the absence of reliable evidence as to what took place between 1845 and 1870 and the failure of the parties to concentrate their attention upon the nature, the extent and the object of the drawing from the partnership accounts that have led me to hold with Sadasiva Aiyar, J., and the District Judge that the two branches of the family of Hassan and Ahmed should divide the properties equally. Mr. Rosario has drawn our attention to all the weak points in connection with Exhibit XVI. It is true that there is no satisfactory evidence as to the custody of this document. It is also true that this document has never been referred to in any of the subsequent documents. At the same time it must be remembered that the parties did not seriously question its genuineness in the lower Court. There is evidence in support of its execution. The District Judge has acted on that evidence and the two learned Judges who heard the appeal have come to the conclusion that the document is genuine. Under these circumstances, I agree in thinking that we must start with the conclusion that Exhibit XVI was executed by Hassan in 1845 prior to his departure for Mecca, that it is in the handwriting of Hammed and that the statement that the document has his consent was written by him. This undoubtedly is a weighty circumstances in favour of the contention advanced by Mr. Sitarama Rao that the assets of the partnership in the year 1845 belonged wholly to Hassan. As against this we have the fact that in the year 1844 Hammed did acquire property which after his death in 1866 was transferred to Dodda Moideen, the son of Hassan. We have the further fact that from 1845 to 1848 the business was solely managed by Hammed It is clear that Hassan contemplated the possibility of his not returning to India at the end of the pilgrimage. But as a matter of fact, he did come back in 1848. There is nothing to show what was the position of affairs in that year. No doubt, the business continued to stand in the sole name of Hassan until 1870. There is nothing to indicate the exact position occupied by Hammed during this period. From 1870 onwards the accounts of the firm stood in the names of two people, one from each

(1) 12 M. 380; 4 Ind. Dec. (N. S.) 614.

(2) 28 Ind. Cas. 930; 42 C. 801; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; 21 C. L. J. 231; 28 M. L. J. 548; 17 Bom. L. R. 420; (1915) M. W. N. 621, 42 I. A. 1 (P. C.).

branch of the family. In the *kudtala* transfer proceedings, we find statements to the effect that both the branches lived as a joint family (*vide* Exhibit E series). In Exhibits C and D there is a column in which the members of both the branches are mentioned as heirs. It is true that the members of the senior branch are there styled as near heirs, and those of the junior branch as distant heirs. That is because the form of the document contained these two columns. Under Muhammadan Law there can be no question of a distant heir. What the recording authorities meant was that the members of Hassan's branch were heirs under the Muhammadan Law, and that those who were called distant heirs were persons who being the heirs of the co owner were entitled to the property which stood in the name of Hassan. As was pointed out long ago in this Court in *Khatija* v. *Ismail* (1), *Nawayats* while regulating their succession according to Muhammadan Law follow the Hindu Law as regards their mode of living and of dealing with each other. They originally belonged to the Hindu community and were living among Hindus, whose business habits they apparently found convenient to adopt in their trade concerns. It is clear that except for business purposes the members of this family did not regard themselves as in any way coming under the Hindu Law. Therefore the fact that in the proceedings relating to the transfer of registry, both branches of the family were mentioned as heirs is a strong indication of co-ownership. There is the further fact that the junior branch possesses a larger number of dwelling-houses than the senior branch. They seem to have drawn more money from the partnership than the senior branch. Such a state of affairs is inconsistent with the suggestion that the junior branch acted either as servants, agents or managers of the business and had no proprietary interest in the concern. These facts also are inconsistent with the theory that all the members of the junior branch were entitled to was only an eighth share in the business. It is clear that Exhibit XVI was never acted upon. Hassan might have intended that it should be given effect to in case he did not return. On his return apparently, the document was ignored altogether. In the subsequent accounts kept by the partnership, there is nothing to indicate that the junior branch was to have only an eighth share in the business.

The position of affairs, therefore, is this The senior of the two brothers had some exclusive property which he brought into the business early in 1818. Soon after he was joined by his younger brother. In 1845 he estimated the amount due to him to about Rs. 25,000 and was willing that under certain circumstances, an eighth part of this amount should go to his younger brother. From 1845 to 1848 the business was solely managed by the younger brother. From 1848 to 1870 the business was managed by both the brothers, although the business stood in the name of the elder brother alone. From 1870 to the date of the suit, the accounts stood in the joint names of two members of the family, one from the senior and another from the junior branch. Moneys were drawn out indiscriminately by both the branches, a larger amount being drawn by the junior branch than by the senior branch. Each branch had large establishments; all their common expenses were met from the partnership funds. The members of each of the branches recognized the other as being co-heirs with them in the proceedings relating to the transfer of registry. There was at no time any settlement of accounts or ascertainment of profits. Properties were purchased indiscriminately in the names of the members of both the branches of the family. The members stated before responsible officers of Government that they lived together as members of a joint family. In my opinion, the true inference to be drawn from these facts is that both the branches regarded themselves as equally entitled to the profits of the business, and to the properties purchased from the business, and that consequently, the conclusion come to by the District Judge that it should be divided half and half is right. This appeal should be dismissed with costs.

Appeal dismissed.

V.R.P.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 167 OF 1915.
April 18, 1917.
Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.
LAKHPAT RAI—PLAINTIFF—APPELLANT
versus
FAKHR-UD DIN—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 91 (f)—Mortgage—Redemption—Purchaser in execution, right of.

A purchaser of mortgaged property in execution of a money-decree, who is not made a party to a subsequent suit on the mortgage in which the mortgaged property is sold, is entitled to redeem the property under section 91 (*f*) of the Transfer of Property Act as against the purchaser in execution of the mortgage decree. [p. 190, col. 2.]

First appeal from a decree of the Subordinate Judge, Pilibhit.

Sir *Sundar Lal* and the Hon'ble Mr. *Motilal Nehru*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Priya Nath Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed possession of certain property and that if he was not entitled to possession, pure and simple, he might get possession after redeeming a certain mortgage. The plaintiff's title is as follows:—Nand Kishore obtained a simple money-decree against Ram Mohan Lal on the 25th of May 1889. Before judgment he had caused the property to be attached. The property was subsequently put up to sale and purchased by Lakhpat Rai on the 28th of September 1902. The sale was confirmed on the 26th of November 1902. The defendant on the other hand sets up the following title. The property in dispute had been mortgaged by Ram Mohan Lal on the 4th of April 1889 in favour of Ram Ratan and Ram Gopal. On the 15th of June 1897 a suit was instituted by the mortgagees for sale upon the mortgage. They obtained a decree on the 25th of September 1897 and caused the property to be sold on the 20th of June 1899, when the defendant's father purchased the same. He was put in possession on the 25th of April 1900. It is an admitted fact that Nand Kishore was not made a party to the mortgagee's suit and it is further admitted that he had obtained his decree before the suit was instituted. The defendant accordingly contends that the suit is barred by limitation so far as it claims possession and that any right which Nand Kishore, or others claiming under him, had to redeem the property is long since extinguished. The Court below has held that the suit is barred by time, and on this preliminary point has dismissed the plaintiff's claim, without going further into the merits. In the course of the argument in this Court it was strongly contended that Nand Kishore had no interest in the property itself or even in the equity of redemption such as would entitle the plaintiff to claim redemption now. Numerous authorities have been cited on both sides as to the effect of an attachment by an execution-creditor. The remarks of their Lordships of the Privy Council in the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) are quoted. Their Lordships' remarks in the case of *Moti Lal* v. *Karrabuldin* (2), have also been referred to. We think that it is unnecessary in the present case for us to express any opinion as to whether or not an attachment by a judgment-creditor has the effect of conferring an estate. Section 91 of the Transfer of Property Act specifies the persons, other than the mortgagor, who have the right to redeem mortgaged property. Clause (*f*) is as follows:—"The judgment-creditor of the mortgagor when he has obtained execution by attachment of the mortgagor's interest in the property;" the right to redeem which is conferred on the persons mentioned in this section seems to be the same right to redeem in all cases. It is the very same right which the mortgagor himself has. A mortgagor in this country can redeem within sixty years, unless his right to redeem has been concluded by proper legal proceedings. It seems to us,

(1) 5 C. 148 at p. 174; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(2) 25 C. 179 at p. 185; 24 I. A. 170; 1 C. W. N. 639; 7 Sar. P. C. J. 222; 13 Ind. Dec. (N. S.) 121 (P. C.).

therefore, that Nand Kishore and the plaintiff as claiming under him are entitled to redeem, it being an admitted fact that neither Nand Kishore nor Lakhpat Rai were made parties to the mortgages. We need hardly say that, in our opinion, the Court below was quite right in holding that the suit, so far as it is a suit for possession other than by redemption, is clearly barred by time. We also think that the plaintiff's only right is to redeem and he cannot question the genuineness of the mortgage. We allow the appeal, set aside the decree of the Court below, and remand the case with directions to re-admit the case under its original number and proceed to hear and determine the same on the merits. Costs here and heretofore will be costs in the cause.

Appeal allowed; Cause remanded.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 136 AND 265 OF 1916.

March 29, 1917.

Present:—Mr. Justice Chapman and Mr. Justice Jwala Prasad.

SUNDAR ROY AND OTHERS —PLAINTIFFS— APPELLANTS

versus

HEMA MAHTO AND OTHERS—DEFENDANTS —RESPONDENTS

AND

SUNDAR ROY AND OTHERS—PLAINTIFFS — APPELLANTS

versus

UGAR SINGH AND OTHERS—DEFENDANTS— RESPONDENTS.

Chota Nagpur Tenancy Act (*VI B. C. of* 1908), *ss.* 51, 177—*Rent, suit for recovery of—Payment to third person, plea of—Procedure.*

In a suit for recovery of rent under the Chota Nagpur Tenancy Act where the plaintiff has made out a complete title to receive rent and the tenants set up the plea of no knowledge of the plaintiff's title and of payment of rent to a third person, such person should, under section 177 of the Act, be made a party to the suit and the question of the actual payment of rent to such third person in good faith should be enquired into and the suit decided according to the result of such enquiry. [p. 192, col. 1.]

In rent suits it is desirable, where the plaintiff has received delivery of possession from the Civil Court and has had his possession recognized in the survey proceedings, that he should be permitted to realise his rent, leaving it to any third person, who disputes the plaintiff's title, to bring a civil suit. [p. 192, col. 2.]

Second appeals from a decision of the Judicial Commissioner, Chota Nagpur, dated the 12th September 1915, reversing that of the Deputy Collector, Hazaribagh, dated the 3rd March 1915.

Messrs. *Ganesh Dutt Singh* and *Jamini Mohan Mukerji*, for the Appellants.

Mr. *Sailendra Nath Palit*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—On the 25th of June 1906, the plaintiffs had obtained a decree absolute for the sale of a mortgaged property, the amount of the decree with costs being nearly Rs. 60,000. They applied for execution on the 11th of February 1908. The sale took place in November 1911. Plaintiffs thereupon instituted a suit for the rent of some of the land, *viz.*, 3 *kalams* out of the 18 which the plaintiffs had purchased. That suit failed upon the ground that the plaintiffs had not had their names registered. The plaintiffs registered their names and instituted the present suit for rent. They made out a complete title under their purchase in execution of their mortgage-decree. They were also able to rely upon the fact of registration of their names and upon the entry of their names in the Survey *khewat* and upon the issue of a notice under section 51 of the Tenancy Act directing the tenants to pay rent accordingly.

The tenants' case was that the *mukarrari* and *milkiat* rights under which the landlord sued in the present case formerly belonged to one Thakur Lakhpat Nath Singh; that upon his death he was succeeded by his widow and thereafter by his posthumous son Sidh Nath Singh; that the defendants had no knowledge of the sale at which the plantiffs had purchased and that they had been paying rent to the widow and the son of Lakhpat Nath Singh. This case being made, the son of Lakhpat Nath Singh, Sidh Nath Singh, was made an intervener under section 177 of the Chota Nagpur Tenancy Act. Sidh Nath in his written statement claimed to have succeeded his father. He alleged that he had had no knowledge of the plaintiffs' purchase and delivery of possession and said that they could not be binding upon him.

The first Court decreed the plaintiffs' suit

for rent. The learned Judicial Commissioner in appeal has found that rents were not paid by the tenants to the widow or the son of Lakhpat Nath Singh as alleged and that if payment was made, it was *mala fide*. He proceeded, however, to hold that the sale at which the plaintiffs had purchased was a nullity inasmuch as one month before the sale took place the intervener, the son of Lakhpat Nath, had been born and he was not made a party; and also on the ground that the widow who was not a party to the present case had not been made a party in the execution proceeding in which the mortgage sale took place. It appears that in that proceeding, after a decree absolute for sale had been obtained during the lifetime of Lakhpat against him, Lakhpat's brother Bartonath was made a party in the execution proceeding. It appears to me that the learned Judicial Commissioner fell into an error in disposing of the suits in this manner. The plaintiffs had made out a complete title to recover rent in these suits. By saying that they had made out a complete title I do not mean to say that that title could not have been displaced by any kind of evidence whatever. What I mean is that in the absence of displacing evidence the title was complete. The tenants set up the plea of no knowledge of the plaintiffs' title and of payment of rent to a third person. The procedure in such a case is prescribed by section 177 of the Chota Nagpur Tenancy Act. That section says that "such third person shall be made a party to the suit and the question of the actual payment of the rent to such third person in good faith shall be enquired into and the suit shall be decided according to the result of such enquiry." The finding of the Judicial Commissioner is that rent was not paid to the third person, and, if paid, it was not in good faith. Section 177 requires that the suit shall be decided according to that decision, that is to say, that the intervener will not be permitted to defeat the suit for rent.

This view of the case is in accordance with the requirements of justice, for if it were otherwise, it would be necessary for us, sitting in appeal in this Court, to express an opinion as to the nullity or otherwise of the sale at which the plaintiffs purchased, in a case in which there has been a very perfunctory enquiry into the point, which was not indeed very clearly raised even in the pleading. In rent suits it is desirable, where the plaintiff has received delivery of possession from the Civil Court and has had his possession recognized in the survey proceedings, that he should be permitted to realise his rent, leaving it to any third person who disputes the plaintiff's title to bring a civil suit. The result is that the appeals are allowed, the decision of the learned Judicial Commissioner is set aside and that of the Munsif restored. Plaintiffs are entitled to costs in all Courts.

JWALA PRASAD, J.—I concur.

Appeals allowed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 25 OF 1914.

June 4, 1917.

Present:—Mr. Shah Din, Chief Judge, and Mr. Justice LeRossignol.

Musammat JASWANTI—PLAINTIFF—APPELLANT

versus

TEJ NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Debts—Son's duty to pay just debts of his father—Immoral purposes—Burden of proof.

A Hindu son is bound to discharge the debts contracted by his father, unless it is shown that they were contracted for illegal or immoral purposes; and where it is alleged by the son that a particular debt was contracted for such purpose, the burden lies on him to prove his allegation [p. 196, col. 1.]

The burden is not discharged by showing that the father lived an extravagant or immoral life, there must be a direct connection between the debt and the father's alleged immorality. [p. 196, col. 1.]

Where in a suit for possession by a mortgagee it appeared that the deceased mortgagor lived a licentious life far beyond his means, indulging in drink, rioting and prostitution, and the plaintiff mortgagee lived in a portion of the same house which was occupied by the mortgagor and had full knowledge of the latter's mode of life and of the manner in which he was wasting his substance:

Held, that the mortgagor's son was under no obligation to discharge the debts incurred by the mortgagor for such purposes. [p. 195, col. 2.]

First appeal from the decree of the District Judge, Gurgaon, dated the 28th October 1913, dismissing the claim.

Mr. *Manohar Lal* and Mr. *Kanwar Narain*, for Mr. *D. C. Ralli*, for the Appellant.

JASWANTI *v.* TEJ NARAIN.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Rai Sahib Lala *Moti Sagar*, for the Respondents.

JUDGMENT.—(*May* 29, 1917).—In pursuance of the order of this Court, dated the 24th January 1917, Mr. Manohar Lal has produced before us the Will, dated 19th October 1916, which is said to have been executed by Janki Parshad, deceased, in favour of his widowed daughter-in-law, *Musammat* Jaswanti, who has already been brought on the record as his legal representative. Notices were issued to the four grandsons of Janki Parshad, three of whom Kishan Parshad, Basheshar Nath and Dowarka Parshad, are brothers of the whole blood and the 4th, Kashi Parshad is a brother of the half blood; the three first named have been served with notices but service has not been effected on the fourth; and no application has been made by any one of them under Order XXII, rule 3, Civil Procedure Code. The non-service of notice on Kashi Parshad is immaterial, for the period of limitation within which an application under rule 3, sub-rule (2), of Order XXII could be made by him has expired, and he cannot now be brought on the record as the legal representative of his grandfather, Janki Parshad, even if he were to establish as against his step-mother *Musammat* Jaswanti, who claims under the alleged Will of Janki Parshad, that he was one of Janki Parshad's heirs and legal representatives. Under rule 5 of Order XXII we decide that for the purposes of this appeal, *Musammat* Jaswanti is the legal representative of Janki Parshad deceased. We now proceed to hear the appeal on the merits.

FINAL JUDGMENT.—The following pedigree will assist in understanding the fact of the case:—

Rai Bahadur Pandit Prem Narain, died 1879 = *Musammat* Premwanti.

Janki Parshad, plaintiff (died during the pendency of appeal in this Court) = *Musammat* Jeo Ji.

Pandit Maharaj Narain, (adopted by *Musammat* Premwanti about 1885), defendant, (died during the pendency of suit in the lower Court)

Tej Narain, defendant-respondent.

The facts of the case are briefly these. On the 14th April 1909 Maharaj Narain executed a registered deed of mortgage (Exhibit P-3) in favour of Bhagwan Das and Rattan Lal for Rs. 5,000. By this deed he mortgaged without possession to the said mortgagees 20 *biswas* of *Mauza* Gopalpura, in Tahsil Rewari, District Gurgaon, together with three houses in Delhi: and it was stated in the mortgage-deed that the mortgage-money had been received for paying off the debts due by the mortgagor and for defraying his household expenses. Of the mortgage-money entered in the deed, Rs. 3,740 was received by the mortgagor before the Sub-Registrar (pages 6—8 of the paper book). On the 2nd June 1911 Maharaj Narain executed another registered mortgage-deed (Exhibit P-4) in favour of Lala Hardeo Das and four others for Rs. 3,879, whereby he mortgaged with possession the income of *Mauza* Gopalpura and of a shop in Delhi. No part of the mortgage-money was received by the mortgagor in cash before the Sub-Registrar, as it appears from the details thereof as given at the end of the mortgage-deed that the entire mortgage-money was due to the mortgagees on certain promissory notes and *hundis* which the mortgagor had already executed in their favour. On the 30th October 1911 a third mortgage-deed (Exhibit P-2) was executed by Maharaj Narain in favour of Janki Parshad for a consideration of Rs. 12,000. By this deed he mortgaged with possession to Janki Parshad the whole 20 *biswas* of *Mauza* Gopalpura; and it was recited in the deed that the mortgage-money Rs. 12,000 was raised for payment of the mortgage-debts of Rs. 5,000 and Rs. 3,879 due, respectively, to the mortgagees in whose favour the mortgage-deeds, dated the 14th April 1909 and 2nd June 1911, had been executed by the mortgagor, and also for the performance of the sacred thread investiture ceremony of the mortgagor's son Pandit Tej Narain. The detail of the mortgage-money as given in the mortgage-deed is as follows:—

		Rs.
1.	Received under receipt, dated 2nd October 1911	500
2.	Deposited with the mortgagee for payment to the prior mortgagees...	10,000
3.	To be received in cash at the time of registration ...	1,500

JASWANTI v. TEJ NARAIN.

It appears from the Sub-Registrar's endorsement on the back of the deed that Rs. 1,180 was paid before him by cheque to the mortgagor, that Rs. 10,000 was left with the mortgagee for payment to the prior mortgagees and that the mortgagor admitted having received at home Rs. 820. The sum of Rs. 10,000 just referred to is said to have been paid by the mortgagee Janki Parshad to the prior mortgagees as follows:—

1. A sum of Rs. 3,879 was paid to Lala Hardeo Das and others, who were mortgagees under the deed of mortgage dated the 2nd June 1911, on the 7th February 1912.

2. A sum of Rs. 6,100 was paid to Bhagwan Das, who held a mortgage dated the 14th April 1909, on the 8th February 1912.

3. The balance of Rs. 21 was paid to the mortgagor Maharaj Narain on the 9th February 19 2. [See the endorsement, dated the 7th February 1912, on the back of the mortgage-deed dated the 2nd June 1911, page 13; the endorsement, dated the 8th February 1912, on the back of the mortgage-deed dated the 14th April 1909, page 8; and the receipt, dated 9th February 1912 (Exhibit P-5 – page 19)].

Although the mortgage in favour of Janki Parshad was one with possession, the mortgagor Maharaj Narain did not, as a matter of fact, deliver possession of the mortgaged property to the mortgagee immediately after the execution of the mortgage-deed. On 17th November 1911, Maharaj Narain leased the village of Gopalpura to third parties (who were originally impleaded as defendants Nos. 2—8 in the suit out of which this appeal has arisen but with whom we are not now concerned) for a period of 5 years. It may also be noted here that although the mortgage-deed in favour of Janki Parshad purports to have been executed on the 30th October 1911 it was not presented for registration and registered until the 5th February 1912. Even after the registration of the deed, Maharaj Narain did not deliver possession of *Mauza* Gopalpura to Janki Parshad; and as he refused to deliver possession according to the terms of the deed of mortgage, on the 27th March 1912 Janki Parshad brought a suit in the Court of the District Judge of Gurgaon for possession as mortgagee of the said village of Gopalpura under the mortgage-deed dated the 30th October 1911. He impleaded Maharaj Narain as defendant No. 1, and the lessees in whose favour Maharaj Narain had executed a lease of the village on the 17th November 1911 as defendants Nos. 2—8. Maharaj Narain filed his written statement on the 3rd June 1912, and Janki Parshad plaintiff filed his replication on the 4th June. The plaintiff's Pleader made an oral statement in Court on the 4th June; and Maharaj Narain made a similar statement on the 11th July. On the pleadings of the parties ten issues were framed by the District Judge on the 11th July, and the case was fixed for evidence for the 10th August 1912. On that date several witnesses were examined for the plaintiff; and the hearing was adjourned to the 24th August. On the latter date Maharaj Narain defendant was examined as a witness for the plaintiff and the plaintiff closed his case, reserving his rebutting evidence.

Maharaj Narain died on the 10th October 1912, and his minor son Tej Narain was brought on the record as his legal representative on the 12th October 1912. On the 3rd December 1912 Tej Narain, through his mother *Musammat* Maharaj Rani as his guardian *ad litem*, filed a written statement in answer to the plaintiff's claim (page 58 of the paper book), in which he pleaded *inter alia* that Maharaj Narain was a man of bad character and dissolute habits; that the mortgage on the strength of which the plaintiff had brought his suit for possession of *Mauza* Gopalpura had been made without consideration and valid necessity; that Maharaj Narain had a large income from his property and had no need for mortgaging any portion of it to the plaintiff or to the prior mortgagees who were alleged to have been paid off by the plaintiff; that since the mortgage-debts in question had been raised for immoral purposes the defendant was not bound to pay them, nor was the ancestral property in Maharaj Narain's hands liable for their payment; and that the plaintiff, who was a very near relation of Maharaj Narain, had full knowledge of the latter's licentious habits and loose morals, and if he had ad-

vanced any debts to Maharaj Narain, such debts could not form a valid charge on the property in the hands of the defendant. To Tej Narain's written statement the plaintiff filed a replication on the 20th January 1913; and on the same date the Court framed four additional issues (page 61). Thereafter both parties adduced evidence in support of their respective positions, and on the 23rd August 1913 the District Judge heard arguments. On going through the record he found that it was essential to draw an issue as to whether, in the event of the property in suit being found ancestral in the hands of Maharaj Narain, the mortgage in question had been made for legal necessity or not: and he accordingly altered issue No. 14 slightly (page 104); and allowed the plaintiff to produce additional evidence. The plaintiff produced his additional evidence, and the case was closed by the parties on the 10th October 1913. After hearing arguments the Court dismissed the suit on the 28th October 1913, and the present appeal was preferred to this Court on the 22nd December 1913.

We have heard the appeal argued at great length by the learned Counsel on both sides; but in the view that we take of the case, it is unnecessary to consider and decide some of the questions of fact and law which have been discussed by them with great ability. The four additional issues framed by the lower Court after Tej Narain, minor son of Maharaj Narain, had been brought on the record as his legal representative are as follows:—

(11) Is the property in suit ancestral?

(12) If so, is not Tej Narain entitled to object to the alienation in question?

(13) Was the mortgage money spent in misbehaviour and licentiousness?

(14) If issue No. 13 is decided in defendant's favour, was the alienation made for valid necessity?

As has been noted above, the last issue was altered by the District Judge on the 23rd August 1913, by substituting the figure 11 for figure 13; and accordingly the amended issue ran as follows:—

If issue No. 11 is decided in defendant's favour, was the alienation made for valid necessity?

On these issues the District Judge has held:—

(1) That the property in suit was ancestral in the hands of Maharaj Narain;

(2) that his son Tej Narain was entitled to object to the alienation in dispute;

(3) that it has not been satisfactorily established that at the time when the mortgage in dispute or the prior mortgages of the 14th April 1909 and 2nd June 1911 were made by Maharaj Narain, he was living a licentious life beyond his means and was without any business or occupation upon which the mortgage moneys might legitimately have been spent; and

(4) that it has not been proved that there was any legal necessity for the mortgage or that the mortgagee made any enquiry before advancing the mortgage-money or that the loan had been contracted for illegal or immoral purposes. On the ground that neither full consideration for the mortgage in dispute has passed nor legal necessity for it has been established, the District Judge has dismissed the plaintiff's suit for possession of the mortgaged property.

There was considerable argument before us as to whether or not the mortgage-debts raised by Maharaj Narain by the mortgage-deeds, dated the 14th April 1909 and 2nd June 1911 and which were paid off by the present mortgagee Janki Parshad, constituted "antecedent debts" as understood in Hindu Law; and in this connection Counsel on both sides referred to a large number of decisions both of the High Courts and of the Privy Council, the latest of which is the one reported as the case of *Sahu Ram Chandra* v. *Bhup Singh* (1). For the purposes of this appeal, however, it is not necessary to decide the point, for assuming that the mortgage-debts raised under the mortgage-deeds of the 14th of April 1909 and 2nd June 1911 amount to "antecedent debts" with reference to the mortgage now in dispute, within the meaning of the Hindu Law, we have come to the conclusion that the said debts were tainted with immorality and, therefore, Tej Narain, son of Maharaj Narain, is under no legal obligation to discharge them, nor is the mortgaged pro-

(1) 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22 (P. C.).

perty in his hands liable for their payment. The principle of Hindu Law applicable to a case like the present is undisputed, *viz.* that a Hindu son is bound to discharge the debts contracted by his father unless it is shown that they were contracted for illegal or immoral purposes; and where it is alleged by the son that a particular debt was contracted by the father for such purpose, the burden lies on him to prove his allegation. The burden is not discharged by showing that the father lived an extravagant or immoral life; there must be a direct connection between the debt and the father's alleged immorality. The burden of proof being upon the son, it is to be decided in each particular case with reference to its own facts whether he has discharged that burden or not. In *Ram Nath* v. *Bulaqi Ram* (2) it was laid down that under Hindu Law the presumption is that a loan has been raised for an immoral purpose, "if it is proved that the borrower at the time of raising the loan was living a licentious life beyond his means, indulging in drink, riot, prostitution and debauchery, and that, at the same time, he was without any business or occupation upon which the money might legitimately have been spent. It is not necessary to show on which particular act of immorality the money was spent; if it is proved clearly that at the time the borrower was notoriously wasting his substance on riotous living and spending large sums beyond his income and above his station in life, a loan contracted in the midst of such living and spent upon it would be a loan contracted for immoral purposes." In *Shib Nath* v. *Alliance Bank of Simla, Ltd., Lahore* (3)the same principle was followed. At page 22* of the report the learned Judges referring to the profligate life led by Diwan Lachhman Das say:

"When expelled from Kashmir he seems to have plunged into a vortex of insensate debauchery and riotous living; and, though no doubt he spent much in litigation and had to pay up some Rs. 55,000 to defendant No. 5 as the result of litigation, he got a full *quid pro quo* for that sum in valuable estate; and we think it is impossible to avoid the conclusion that the debts incurred up to 31st May 1899 were, on the whole, incurred for immoral purposes and by way of wanton extravagance and waste. We do not think that in circumstances such as these it is reasonable to call upon defendant No. 4 to prove that this and that item of debt was incurred for use on this or that piece of immorality or extravagance."

Again, in *Kishen Singh* v. *Bhagwan Das* (4) the principle laid down in *Ram Nath* v. *Bulaqi Ram* (2) was substantially approved. The latest decision of our Court on the subject is *Indar Narain* v. *Nanak Chand* (5), the judgment of the Division Bench in this case being more fully reported in XXXII Indian Cases, page 454. In the course of that judgment the learned Judges say:—"The general rule no doubt is that some clear connection between the debt and the immorality must be established, but it does not follow that every debt of an immoral individual is an immoral debt. The inference of immorality cannot be drawn in cases in which, as a fact, all proper debts had been defrayed from other moneys than those in respect of which the suit was brought, but it is to be drawn only when the debtor had no debts or business on which the loan might have been expended with propriety". In another part of the judgment the learned Judges state their conclusion in these terms:—

"Our conclusion is that Jai Narain led an irregular life and spent extravagantly on wine and women; on the other hand he expended large sums in litigation, and encountered heavy losses in business; his debts, immoral and moral, are inextricably entangled, and it is impossible for us to determine how much was moral and how much immoral."

To a similar effect are the decisions in *Maharaj Singh* v. *Balwant Singh* (6), *Sri Narain* v. *Raghubans Rai* (7).

The question foed crision in the present case is whether, with reference to the principles laid down in the above-mentioned decisions, the mortgage debts raised by Mabaraj Narain by deeds dated the 14th April 1909

(2) 17 Ind. Cas. 735; 50 P. R. 1913; 69 P. L. R. 1913; 15 P. W. R. 1913.

(3) 25 Ind. Cas. 480; 3 P. R. 1915; 120 P. W. R. 1914; 215 P. L. R. 1914.

(4) 31 Ind. Cas. 476; 89 P. R. 1915.

(5) 32 Ind. Cas. 454; 58 P. R. 1916; 74 P. W. R. 1916, 58 P. R. 1917.

(6) 28 A. 508 at pp. 513; 521 525; 3 A. L. J. 274; A. W. N. (1906) 117.

(7) 17 Ind. Cas. 729; 17 C. W. N. 124; 25 M. L. J. 27; (1913) M. W. N. 768 (P. C.).

*Page of P. R. 1915.—*Ed.*

and 2nd June 1911 and by the mortgage-deed now in dispute were immoral debts which his son Tej Narain is under no obligation to discharge. On this point the evidence on the record is, in our opinion, overwhelmingly in favour of the respondent Tej Narain. In discussing issues Nos. 13 and 14 the District Judge has referred to the evidence of the witnesses produced by both parties to prove the amount of the income derived by Maharaj Narain from the estate in his possession and his legitimate expenses; and the learned Judge has come to the conclusion that Maharaj Narain's income far exceeded his proper expenses. In this conclusion we agree without hesitation. From the evidence of P. W. No. 10, Jawahir Nath (page 69), D. W. No. 1, Lachhmi Narain (page 71), D. W. No. 16, Manmohan Lal (page 76), D. W. No. 17, Tej Kishan (page 77), *Patwari* (pages 78 and 81), P. W. No. 16 Joti Parshad (page 92) and D. W. No. 25, Pirthi Nath (page 95), it is satisfactorily proved that Maharaj Narain's annual income from his landed and house property was at least Rs. 4,000 up to September 1908, when *Mauza* Bias or Bapas was redeemed from Maharaj Narain by the owner. It is also clear from the evidence of P. W. No. 11, Kashi Nath (page 70), D. W. No 8, Murli Dhar (page 73), D. W. No. 17, Tej Kishan (page 77), D. W. No. 25, Pirthi Nath (page 95), and *Musammat* Maharaj Rani, widow of Maharaj Narain, (pages 99 and 101), that his ordinary current expenses were not more than about Rs. 1,500 a year. He could thus save and apply towards defraying his extraordinary expenses of a proper character about Rs. 2,500 annually. But it has been argued by the appellant's learned Counsel that Maharaj Narain was forced to carry on most expensive litigation against different parties and in different Courts from about the year 1902 up to the date of his death, and that on this litigation he must have expended very large amounts aggregating at least Rs. 10,000. The evidence relating to the various suits in which Maharaj Narain was involved consists of certain documents, being mainly copies of judgments and decrees passed in those suits, which are printed at pages 3, 4, 5 and 20 and 21. There is also the oral evidence of certain witnesses produced by the appellant, *viz.*, P. W. No. 6, Bhagwan Das (page 62), P. W. No. 8, Narinjan Nath (page 65), P. W. No. 2, Hardeo Das (page 66), P. W. No. 9, Bansi Dhar (page 67), P. W. No. 10, Jawahir Nath (page 69), P. W. No. 11, Kashi Nath (page 69), D. W. No. 1, Lachhmi Narain (page 71), D. W. No. 15, Ambika Parshad (page 76), D. W. No. 16. Manmohan Lal (page 77), Onkar Nath (page 90), P. W. No. 13, Chandar Bhan (page 91), and *Musammat* Maharaj Rani (pages 99, 100 and 101). The plaintiff's learned Counsel also contended that Maharaj Narain had to spend large sums of money in connection with certain domestic ceremonies which, as a respectable member of the community of Kashmiri Pandits, he had to perform. In this connection, he referred to certain recitals in Exhibits P. 3 and P. 2 (pages 6 and 15) and to the oral evidence of the following witnesses:—P. W. No. 6 (page 62), P. W. No. 2 (page 66), D. W. No. 1 (page 71), pages 91 and 92, P. W. No. 18 (page 104), P. W. No. 19 (page 104), P. W. 20 (page 105).

Taking up the question of litigation expenses first, we observe that from the documents on the record the total amount of the expenditure incurred by Maharaj Narain falls far short of the sum of Rs. 10,000 which the appellant's Counsel says Maharaj Narain must have incurred in this connection; but we shall assume for the sake of argument that the total expenditure under this head came to Rs. 10,000. So far as the alleged expenditure in connection with domestic ceremonies is concerned, *e.g.*, the *mundan* and the sacred thread investiture ceremonies of Tej Narain, it was admitted that the sacred thread investiture ceremony, as a matter of fact, never took place; and the evidence on the record shows that the *mundan* ceremony could not have cost more than Rs. 500 at most. It would thus appear that Maharaj Narain's total expenditure on litigation and on the performance of domestic ceremonies should not have exceeded, to put it at the highest Rs. 11,000.

Now coming to the income derived by Maharaj Narain from his estate, we have already seen that he could easily have saved about Rs. 2,500 per annum, which means that during the ten or twelve years that he was engaged in litigation, he could have met all the expenses incidental to it from his own private income. For the sake of argument, however, this source of income may, for the

present, be ignored. It is in evidence that in September 1908 the village of Bias or Bapas, which was in mortgage with Maharaj Narain, was redeemed by the owners on payment to him of Rs. 21,000 (P. W. No. 10, Jawahir Nath, page 69; P. W. No. 20, Rattan Nath, page 105; *Patwari*, page 78). Four years earlier, in April 1904 another plot of land which was in mortgage with Maharaj Narain was redeemed on payment of Rs. 7,000; and in November 1905 another piece of land was redeemed from him on payment of Rs. 1,000 (pages 33—35). This shows that between the years 1904 and 1908 Maharaj Narain came into possession of Rs. 29,000 in hard cash; and even if we assume, for the sake of argument, that he had no surplus private income to spend on the litigation in which he was involved between 1902 and 1912 and that he met the expense of such litigation out of the redemption money, the surplus in his hands would be about Rs. 20,000. And yet we find that in April 1909 he raised a sum of Rs. 5,000 by a mortgage of *Mauza* Gopalpura from Bhagwan Das and two years later raised another sum of Rs. 3,879 by a mortgage of the income of *Mauza* Gopalpura and a shop in Delhi in order to pay off certain promissory notes and *hundis* which he had executed in favour of the mortgagees Hardeo Das and four others. Now, how did he spend the Rs. 20,000 of redemption money and the additional Rs. 9,000 (in round numbers) which he raised by the mortgages of 14th April 1909 and 2nd June 1911? There is overwhelming evidence on the record to show that he spent the whole of this money in the course of a few years in living a life of unbridled licentiousness, profligacy and dissipation. In this connection it is only necessary to refer to the statement of Maharaj Narain's widow, *Musammat* Maharaj Rani (pages 96-102), which has a ring of truth about it and which contains a graphic story of the vicious life which Maharaj Narain began to live after he came into possession of his adoptive father's estate, and more especially after he redeemed the village of Bapas in 1904. He entered upon a career of extravagance and reckless waste and was surrounded day and night by women of ill-fame and indulged in drink and debauchery to his heart's content. The evidence of Maharaj Rani is amply corroborated by the testimony of a large number of independent witnesses, *viz.*, D. W. No. 1 Lachhmi Narain, a Brahman of Delhi; D. W. No. 2 Brij Kishore, another Brahman of Delhi; D. W. No. 3 Dharam Chand, cook; D. W. No. 4 Moti Lal, Goods clerk, E. I. R., Delhi; D. W. No. 5 Banarsi Das, banker; D. W. No. 6 Abdul Razaq, barber; D. W. No. 7 Rahim Ali, tailor; D. W. No. 8 Murli Dhar, Record Keeper, Simla; D. W. No. 9 Ram Chandra, lace seller, Delhi; D. W. No. 10 Ahmad Said, ice vendor; D. W. No. 11 Ram Sarup, house broker; D. W. No. 12 Rahim Khan, house broker; D. W. 13 Ganesha, Doli bearer; D. W. No. 14 Bulaki Ram, *Vaid*; D. W. No. 15 Ambika Parshad, Kashmiri Brahman, Delhi; D. W. No. 16 Manmohan Lal, Inspector, City Post Offices, Delhi; D. W. No. 17 Tej Kishen, Clerk; D. W. No. 18 Kishen Guru, cook; Kalyan Singh *Patwari* (page 81); Rai Bahadur Pandit Paran Nath, retired Postmaster of Delhi (page 84); Pandit Onkar Nath, retired Subordinate Judge (pages 88 and 89), D. W. No. 19 *Musammat* Buniadi, prostitute; D. W. No. 20 Parma Nand Biswas, dealer in musical instruments; D. W. No. 21 Ismail, watch maker; D. W. No. 22 Shama, barber; D. W. No. 23 Makna, water bearer; D. W. No. 24 Dr. Ishar Das; and D. W. No. 25 Pandit Prithi Nath. Of these witnesses Pandit Bulaki Ram, *Vaid*, Pandit Ambika Parshad, Pandit Manmohan Lal, Rai Bahadur Pandit Paran Nath, Pandit Onkar Nath, *Musammat* Buniadi and Dr. Ishar Das give very important evidence in support of the respondent's case, namely, that Maharaj Narain had given himself up to a life of luxury and licentiousness, that he wasted very large sums of money in entertaining prostitutes and in riotous living, and that as a result of his intemperate habits his health broke down and he died of consumption. It is also in evidence that the plaintiff Janki Parshad, who was the husband of *Musammat* Jeo Ji, sister of Maharaj Narain, lived in a portion of the same house which was occupied by Maharaj Narain, and that he had full knowledge of the latter's mode of life and of the manner in which he was wasting his substance. We have no doubt whatever that the debts contracted by Maharaj Narain from 1909 to 1911 by mortgaging the village of Gopalpura and his property in Delhi to Bhagwan Das, Hardeo Das and others were raised for immoral

purposes, for it is clear from the evidence on the record that no portion of these debts was intended to be spent, or was as a matter of fact expended, on litigation or in meeting the legitimate expenses of any domestic ceremonies. Tej Narain respondent is, therefore, under no obligation to discharge the said debts of his father Maharaj Narain; and it follows that the mortgage in dispute, which was made by Maharaj Narain in favour of Janki Parshad on the 30th October 1911, is not binding on Tej Narain.

For the foregoing reasons we maintain the judgment and decree of the lower Court, and dismiss this appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 779 OF 1916.

May 16, 1917

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

Moulvi ALA-UD-DIN—APPELLANT

versus

Bibi ZAIFAN-NISSA AND OTHERS—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 120—*Record of Rights, entry in—Declaration, suit for—Limitation.*

A plaintiff can bring a suit for a declaration that an entry in the Record of Rights is wrong within six months from the date on which his title is effectively challenged, though more than six years have elapsed since the publication of the record, provided the plaintiff's enjoyment of the property has not been affected. [p. 199, col. 2.]

Defendant got himself wrongly entered in a Record of Rights prepared under the Bengal Tenancy Act as being jointly entitled to a certain land with the plaintiff who was in reality exclusively entitled to it, but did not actually disturb plaintiff's possession. More than six years after the publication of the record defendant sued plaintiff in the Small Cause Court claiming to participate in the profits of the land. On notice of the suit being served upon the plaintiff, he instituted a suit within six months for a declaration that the entry in the Record of Rights was wrong:

Held, that the suit was not barred by limitation. [p. 199, col. 2.]

Appeal against a decision of the District Judge, Monghyr, dated the 12st February 1916, reversing a decision of the Munsif, Begusarai, dated the 30th April 1915.

Messrs. *Muhammad Ishfaque* and *Muhammad Hasan Jan*, for the Appellant.

Mr. *Khurshaid Hasnain*, for the Respondents.

JUDGMENT.—In this case the facts briefly are that the plaintiff was the sole owner of certain plots of land, having received them as dower from her husband who in his turn had received them by partition from his brother.

More than six years before the institution of the suit the husband's brother had the lands recorded as being held in joint tenancy of himself and the plaintiff's husband. No suit was brought upon this challenge to the plaintiff's title. On the other hand no attempt was made by the defendant, who is the brother of the plaintiff's husband, to derive material benefit from the erroneous entry in the Record of Rights.

Within six years (? six months) of the institution of the suit the defendant brought a claim in the Small Cause Court to participate in the profits of the land and upon a cause of action arising out of the receipt of summons from the Small Cause Court the plaintiff instituted a suit for a declaration that the Record of Rights is erroneous.

The question is whether the suit is barred by limitation. In a case recently decided by a Divisional Bench of this Court *Ramji Ram* v. *Lal Sadhu Saran Lal*, Appeal from Appellate Decree No. 9220 of 1916, it was held that no suit lies upon a challenge contained in the Record of Rights unless such suit is brought within six years of the publication, but it was also held that notwithstanding the lapse of more than six years from the date of the publication of the Record of Rights a suit might be brought within six months of a fresh challenge to the plaintiff's title if that fresh challenge affected his peaceful enjoyment of the property. I have no hesitation in saying that the attempt on the part of the defendant to obtain a share in the products of the land in the possession of the real owner was a serious challenge to the right of that owner and that the suit was maintainable on a cause of action arising from the receipt of summons from the Small Cause Court,

The suit was, therefore within time and was rightly decreed. The appeal fails and is dismissed with costs.

The cross-objection which is solely on a question of fact is not seriously pressed and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 51 OF 1912.

February 27, 1917.

Present:—Justice Sir George Woodroffe, KT., and Justice Sir Ashutosh Mookerjee, KT.

SATI NATH *alias* SITANATH SIKDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

RATANMANI NASKAR - PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution—Purchaser from decree-holder, position of—Sale subsequently set aside with notice to decree-holder—Refund of price.

The purchaser of a property from a decree-holder, which the latter purchased at a sale in execution of his decree, cannot treat as a nullity subsequent proceedings of the execution Court in which the execution sale is set aside with notice to the decree-holder but in the absence of and without notice to the purchaser, as such proceedings, being good proceedings against the decree-holder, are good also as regards the purchaser who claims through the decree-holder. [p. 202, col. 1.]

But such purchaser is entitled to a refund of the price paid by him with interest from his vendor. [p. 202, col. 1]

Appeal under section 15 of the Letters Patent against the judgment of Mr. Justice Richardson, dated the 26th April 1912, in Appeal from Appellate Decree No. 3686 of 1910.

FACTS appear from the following judgment of Mr. Justice Richardson :—

"The controversy in this case is as to the effect of an order which was made in the year 1906 setting aside an execution sale on the ground of fraud and inadequacy of price. It appears that the property was sold in execution of a mortgage-decree on the 19th November 1894 and that it was purchased by the decree holder Aditya. On the 2nd *Asar* 1312 or 16th June 1905, the plaintiff purchased the property from Aditya by a private sale. The plaintiff's purchase was prior in point of time to the proceedings by which the sale was set aside. He was not a party to these proceedings and it is not suggested that he was a party to or had any notice of the fraud affecting the sale. He brought the present suit for recovery of possession of the property from the defendants Nos. 1 to 8, the judgment-debtors under the decree in execution of which the property was sold, some of whom are the appellants before me. The plaintiff in his plaint based his right to relief on several grounds, alleging *inter alia* that the order of the year 1906 setting aside the sale was obtained by fraud. That question has not been entered into by the Courts below, which have concurred in granting the plaintiff a decree on the simple ground that the order referred to was obtained in proceedings to which he was not a party and, therefore, could not and did not affect the title which he had already acquired by his purchase from the auction-purchaser, the decree-holder. The view as taken by the Courts below has been challenged on behalf of the appellants. It is contended that the plaintiff, although he was a *bona fide* purchaser for value without notice, was deprived of the fruits of his purchase by the order setting aside the execution sale, notwithstanding that order was made in proceedings to which he was not a party. The learned Vakil for the appellant has attempted to support this position not by reference to any authority which is expressly or even indirectly in his favour, but by distinguishing the present case from authorities which appear to be in principle entirely against him. The cases which he seeks to distinguish are those of *Sheik Ismail Rowther* v. *Rajab Rowther* (1) and *Jatindra Mohan Poddar* v. *Srinath Roy* (2) In the former case it was held that where a property sold in execution of a decree was purchased by the decree-holder and by him sold for value to a third party who had no notice of any defect in the decree, the equitable right to set aside the decree could not prevail against the rights of the subsequent purchaser for value without notice. It is said that there it was the decree which had been set aside and not the execution sale. But it is difficult to see what difference that makes in point of principle. The right to set aside a sale on the ground of fraud and consequential damage may be a statutory right, but the sale is not

(1) 30 M 295; 17 M. L J. 165; 2 M. L. T. 186.

(2) 3 C. W. N. 261; 26 C. 267; 13 Ind. Dec. (N. S.) 775.

void but merely voidable. Why should the subsequent purchaser for value from the auction-purchaser decree-holder be in a worse position in the case of the sale being set aside than in the case of the decree itself being set aside? If he has a secure title in the latter case, it would seem that *a fortiori* his title is secure in the former case also. In the particular case before me, however, it is not necessary to go so far. It is not necessary to decide that the sale could not have been set aside as against the plaintiff if he had been made a party to the proceedings. All that I need decide and I do so decide is that the plaintiff is not bound by the proceedings here in question to which he was not a party. In the case of *Jatindra Mohan Poddar* v. *Srinath Roy* (2) it was held that an auction-purchaser was not a necessary party to an application under section 108 of the Code of 1882 to have an *ex parte* decree set aside, and the reason which was assigned for so holding was this that as the sale in execution had been confirmed, the rights of the auction-purchaser, whatever they might be, could not be affected in any way by the result of the proceedings under section 108 to which they were not parties and which had been instituted with the object of setting aside the *ex parte* decree and not of setting aside the sale held in execution of it. In other words, they were not necessary parties because their interests were not affected. It certainly does not follow that in the present case the plaintiff was not a necessary party to the proceedings to set aside the sale, if it was intended that those proceedings should be binding upon him. The concluding portion of the passage in the judgment of the learned Judges to which I have first referred implies the contrary.

The result is that the only contention put forward on behalf of the appellants fails. The appeal must be dismissed with costs."

Babu *Manmatha Nath Mookerjee*, for the Appellants.—The order setting aside the execution sale is not a nullity. Aditya, the decree holder, had notice of the proceedings in the execution Court, and inasmuch as the plaintiff claims through Aditya, the said proceedings are also valid against the plaintiff who purchased the property from Aditya. Refers to *Krishna Chandra* v. *Jogendra Narain* (3), *Satis Chandra Ghose* v. *Rameswari Dasi* (4) and *Abdul Rahman* v. *Sarafat Ali* (5). But *Krishna Chandra* v. *Jogendra Narain* (3) does not strictly bear upon the present point in question. The proper remedy of the plaintiff was to apply to have the order set aside. He should have gone to the execution, Court. The fact that the plaintiff was not present would not invalidate the proceedings, as the person through whom he claims had notice of the proceedings.

Babu *Soshi Sekhar Bose*, for the Respondents.—Though I am not in the position of a stranger auction-purchaser, I ought to have had notice of an application to set aside the sale.

[MOOKERJEE, J.—Can you treat the order as a nullity?]

I was entitled to a notice. In the cases which the other side has cited the purchaser from the decree holder was a party to the proceedings, so those cases are clearly distinguishable. The appellants knew that I was in possession of the property, still they did not make me a party.

As Aditya had no subsisting interest, the notice to him cannot amount to a notice to me. Under the provisions of Order XXI, rule 92, sub-rule 2, a notice of the application has got to be served upon me. But this has not been done. In any case I ought to have a refund of consideration money.

Babu *Manmatha Nath Mookerjee* replied.

JUDGMENT.

WOODROFFE, J.—The plaintiff seeks in the first place to recover possession of a property purchased from one Aditya Chakravarti. He was a decree-holder who purchased the property at a sale held under his decree. After his sale to the plaintiff, the Court sale was set aside on notice to Aditya but in the absence of and without notice to the plaintiff.

It is conceded that the plaintiff is not in the position of a stranger who has purchased at a Court sale and who is pleading a *bona fide* purchase without notice;

(3) 27 Ind. Cas. 139; 20 C. L. J. 469; 19 C. W. N. 537.

(4) 31 Ind. Cas. 894; 22 C. L. J. 409; 20 C. W. N. 685.

(5) 31 Ind. Cas. 896; 22 C. L. J. 412; 20 C. W. N. 667.

and, it is conceded, he is, therefore, a person taking through the decree-holder purchaser at the sale and standing in the same position as the decree-holder. The question, therefore, before us is whether or not we should treat the order setting aside the execution sale as a nullity or as a mere irregularity. If it was a nullity, then of course the plaintiff's title is made out; if, however, it was an irregularity then the plaintiff's remedy was in the execution Court to set aside the proceedings which were held in his absence. I think, however, that it has not been made out that it was a nullity and that this is so is shown by the fact that there is no doubt that the proceedings were held on notice to Aditya. Therefore, they were good proceedings as regards him, and the plaintiff claims through him. Possibly if the plaintiff had gone to the execution Court and had represented to that Court that Aditya having disposed of his interest was no longer concerned in the matter and that he should be made a party to these proceedings, the Court might have acceded to his request. But the fact that the proceedings were held in the absence of the plaintiff would not make them a nullity, seeing that they were held in the presence of a person through whom he claims, namely, Aditya. Therefore, on this ground the suit, so far as it is a suit for possession as against defendants Nos. 1 to 8, fails and must be dismissed with costs in all Courts.

There is, however, an alternative relief sought by the prayer (*ghu*) of the plaint. The plaintiff says: If the plaintiff be not held by the Court to be entitled to recover *khas* possession, then in that case he prays that he may have a decree directing refund of the consideration money by the *pro forma* defendants Nos. 9 to 12, and payment of the sum of Rs. 10 as compensation on account of cultivation expenses. As regards the latter part of this claim we know nothing, and there is no mention of it in the judgment. But as regards the consideration money which amounts to Rs. 95, the plaintiff is entitled to a decree for that sum against the defendants Nos. 9 to 12 with interest thereon at six per cent. per annum from the date of the suit to the date of realization. It does not appear that these defendants have taken any part in the suit in any of its stages, and, therefore, though the suit is decreed as against those defendants, the decree will not carry any costs.

The appeal is allowed in these terms.

MOOKERJEE, J.—I agree.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 291 OF 1916.

April 16, 1917.

Present:—Mr. Justice Chapman and Mr. Justice Jwala Prasad.

Mahant RACHU GIR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Mahant RAGHUNATH GIR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O. XLI, r.* 23 *—Decision on preliminary point, what is—Execution of document—Fraud—Undue influence—Burden of proof.*

A suit is disposed of on a preliminary point within the meaning of Order XLI, rule 23, Civil Procedure Code, where by reason of the decision on one or more of the issues recorded in the case there has been no necessity for the consideration of the other issues, and such a preliminary decision is a decision of a preliminary point, whether the decision involves questions of law or questions of fact. [p. 203, col. 1.]

Mata Din v *Jamna Das*, 27 A. 691; 2 A. L. J. 685; A. W. N. (1905) 159, relied upon.

Where the execution of a document is admitted, the burden of proving that it was executed under fraud or undue influence is on the party setting up such plea. [p. 263, col. 2.]

Appeal from a decision of the District Judge, Muzafferpore, dated the 23rd August 1916.

Mr. *Sharoshi Charan Mitra*, for the Appellants.

Messrs. *Lakshmi Narayan Singh* and *Amir Hasan*, for the Respondent.

JUDGMENT.

CHAPMAN, J.—One Rachu Gir gave a lease to an Indigo Factory. The period of the lease was to expire in 1320 *Fasli*, corresponding roughly to the year 1913. Two years prior to the expiry of the lease Rachu Gir gave a lease to the plaintiff Raghunath Gir; Raghunath Gir, hearing that inspite of the lease having been made in his favour the Factory was about to obtain a renewal of their lease, gave notice to the Factory of the existence of his lease and on the expiry of the Factory's lease

Raghunath Gir endeavoured to obtain possession but was unable to do so. He found that the Factory had obtained a lease from Rachu Gir in 1913; thereupon he brought the present suit for recovery of possession.

The first defence was that Raghunath Gir obtained a lease from Rachu Gir by deception, Rachu Gir being given to understand that he was executing a document of an entirely different character. The next defence was that Raghunath Gir's lease was obtained by undue influence. The third defence was that the Factory had no notice of the prior lease of Raghunath until the renewal of their lease.

The first Court held that Raghunath Gir's lease had been obtained by undue influence and, therefore, declined to go into the question whether the plaintiff's lease prevailed against the lease in favour of the defendant Factory.

In appeal the learned District Judge upset the finding of undue influence and held that there was no undue influence and that Rachu Gir had failed to show that he had been deceived into signing a document of a character which he did not intend to sign. The District Judge, therefore, remanded the case for trial of that issue.

It has been contended in appeal before us that the order of remand was not authorised by the Code of Civil Procedure and that the disposal of the issue of undue influence by the Subordinate Judge was not disposal of a preliminary point within the meaning of Order XLI, rule 23. I am in agreement with the opinion of Mr. Justice Best, cited in the case of *Mata Din* v. *Jamna Das* (1), that a suit is disposed of on a preliminary point within the meaning of section 562 when by reason of the decision on one or more of the issues recorded in the case there has been no necessity for the consideration of the other issues, and that such a preliminary decision is a decision of preliminary point within the meaning of Order XLI, rule 23, whether the decision involves questions of law or questions of fact. The decision of the issue of undue influence in the present case made it unnecessary to consider the other issues in the case. It was in my opinion a disposal on a preliminary point. The order of remand was in accordance with Order XLI, rule 23.

It has next been contended that the findings on the questions of undue influence and deceit involve errors of law. It has been suggested that some mistake in regard to the burden of proof has been made but on the finding that the only relationship between Raghunath Gir and Rachu Gir was a connection by marriage and that there was no other relationship of any other capacity between them, it is not possible to say that the burden of proof was wrongly placed. With regard to the other question whether execution of the bond was obtained by deceit, the burden of proof is clearly upon Rachu Gir to prove that the bond was read over and purported to be something different to what it actually was. In my opinion the appeal fails and must be dismissed with costs.

JWALA PRASAD, J.—I concur.

Appeal dismissed.

(1) 27 A. 691 at p. 694; 2 A. L. J. 685: A. W. N. (1905) 159.

CALCUTTA HIGH COURT.

RULES *Nisi* NOS. 895 TO 899 OF 1917.

March 22, 1917.

Present:—Justice Sir Asutosh Mookerjee, Kt and Mr. Justice Beachcroft.

PADU MOHAMMAD AND OTHERS—PETITIONERS

versus

CHUTRA NATH CHAUDHURY AND OTHERS—OPPOSITE PARTIES.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Civil Procedure Code (Act V of 1908), O. VII, r. 10 - Jurisdiction of Small Cause Court Judge to dismiss suit on merits after holding it to be non-cognizable.

A Judge of a Small Cause Court cannot proceed to try and dismiss a suit on the merits, which he, on the objection of the defendant, holds not to be cognizable by a Small Cause Court, for under Order VII, rule 10, Civil Procedure Code, it is incumbent upon him to return the plaint at any stage of the suit for presentation to the proper Court. [p. 205, col. 2.]

A suit which was in essence a suit for rescission of a contract and consequential relief was brought in a Small Cause Court. The defendant objected to the jurisdiction of the Court and also objected to the claim on the merits. The Judge found that the suit was not cognizable by the Court but nevertheless proceeded to try the case on the merits and ultimately dismissed it,

PADU MOHAMMAD *v.* CHUTRA NATH.

On the application of the plaintiff for setting aside the judgment, the High Court set it aside and directed the plaint to be returned to the plaintiff in order that he might present it to the proper Court for trial of his claim. [p. 205, col. 2; p. 206, col. 1.]

Rule against the order of the Munsif, Thakergaon, exercising the powers of a Court of Small Causes in Suits Nos. 261, 262 and 268 to 270 of 1916.

FACTS material will appear from the judgment of the Small Cause Court which was as follows:--

"This suit is heard together with suits Nos. 262, 268, 269 and 270 of 1916 (Small Cause Court). In them the defendants have raised three preliminary objections, *viz*, (1) that these suits are not cognizable by a Small Cause Court, (2) that these suits are barred under the special limitation provided in section 75 of the Bengal Tenancy Act, and (3) that the suits are barred by *res judicata*. As regards the first objection, I find that the plaintiffs have prayed in these suits for a declaration that a certain contract between the parties is void, and for recovery of certain amount of money alleged to have been illegally exacted by the defendants as rent. The first prayer is practically one for rescission of a contract, and as such, it comes under Article 15 of the Second Schedule of the Provincial Small Cause Courts Act (IX of 1887) and is not cognizable by a Small Cause Court. Moreover, the suits are of a declaratory nature with prayer for consequential relief, and cannot, therefore, be taken cognizance of by a Small Cause Court [*vide* Article 19 of the same schedule and the cases cited as *Akbar Ali* v. *Jezuddin* (1), *Rameshur Kulwar* v. *Beecree Seth* (2), *Kola Aheer* v. *Musammat Sajna Ahimur* (3).] Moreover, a suit to recover an illegal exaction of rent will not lie in the Small Cause Court [*vide Surbo Chunder Doss* v. *Woomanund Roy* (4)]. Had it been a case of over-payment of money by mistake, a Court of Small Causes could have taken cognizance of it [*vide Badr-un-nisa* v. *Muhammad Jan* (5)], but the nature of the present suit is quite different; even if the rent is voluntarily paid to a wrong person, a suit for its refund cannot lie in the Small Cause Court [*vide Ram Chand Dutt* v. *Mosai Santal* (6)]. For these reasons the first objection of the defendants is allowed, and I hold that these suits are not cognizable by Court of Small Causes.

Let me now come to the second objection of the defendants, admitting for argument's sake that the suits are cognizable by this Court As regards this objection I find that the wording of section 75 of the Bengal Tenancy Act is quite clear on this point. That section provides that a tenant may, within six months from the date of the execution, institute a suit to recover from the landlord, in addition to the amount of what is exacted, such sum by way of penalty as the Court thinks fit, etc. In the present suit the plaintiffs have prayed for recovery from the defendants (the defendants Nos. 1 and 2 are admittedly the landlords of the plaintiffs), in addition to the amount exacted, certain sums of money as either interest or damages. In my opinion these excess amounts, claimed either as interest or as damages, fall under the denomination of penalty as contemplated by section 75 of the Bengal Tenancy Act, inasmuch as there is no provision in that Act for awarding such interest or damages to the tenants. The damages contemplated in section 68 (2) of that Act are awarded in suits of an altogether different type, and have no concern with circumstances of the present suits. In the face of the special provision of limitation no other general law of limitation can apply. No cases, cited as authorities on this point, have been brought to my notice. But a Madras case reported as *Pamu Sanyasi* v. *Zamindar of Jayapur* (7), though not exactly to the point, has some resemblance to the present one in facts and circumstances. There the suit was held to be barred under a special law of limitation provided by the Madras Rent Recovery Act, and the general law of limitation was not allowed to apply. So it appears to me that the limitation in the present suits is governed by the special provision of section 75 of the Bengal Tenancy Act. As the plaintiffs have not come within six months from the date of execution, I hold that these suits are barred by limitation.

Let me now come to the defendants' last objection on the point of res

(1) 8 C. 399; 6 Ind. Jur. 530; 4 Ind. Dec. (N. S.) 255.
(2) 3 N. W. P. H. C. R. 208.
(3) 3 N. W. P. H. C. R. 105.
(4) 11 W. R. 412.
(5) 2 A. 671; 1 Ind. Dec. (N. S.) 1010.
(6) 11 C. 738; 5 Ind. Dec. (N. S.) 1251.
(7) 25 M. 240.

judicata. The judgment, Exhibit A, and the plaint, Exhibit B, show that suits were instituted by these plaintiffs for recovery of these amounts with damages on the same causes of action formerly, and that these suits were dismissed after a contested trial. Most of the objections now made by the defendants were made by them in these suits, and in them several issues were framed. One of the issues was decided against the plaintiffs, and the suits were accordingly dismissed. It is admitted by the learned Pleaders on both sides that the judgment in these suits has not yet been set aside. There is no prayer in the present suits to have the decree of these suits set aside. I am, therefore, of opinion that the present suits are barred by *res judicata* under provisions of section 11 of the Civil Procedure Code, and on reference to the explanation IV of that section, so long as the judgment of the aforesaid suits is binding upon the parties the third objection of the defendants must, therefore, also prevail and I hold that the present suits are barred by the law of *res judicata*.

In the face of the aforesaid findings, the question now arises for me to determine, whether in the present cases the plaint should be returned under section 23 of the Provincial Small Cause Courts Act, or the suits should stand dismissed. That section provides that when the right of the plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immoveable property or other title which such Court cannot finally determine, the Court may return the plaint. In the present suit no question of title to immoveable property or any other title arises, and so the provisions of that section do not, in my opinion, apply to the present suits and the plaint in the present cases cannot, therefore, be returned. Under these circumstances these suits cannot but be dismissed. It is also not necessary to record any further evidence in these cases, and to enter into the other questions that have been raised in these suits. It is, therefore, ordered that these five suits be dismissed with costs to the contesting defendants. This judgment will also govern Suits Nos. 262, 268, 269 and 270 of 1916 (Small Cause Court)."

Babu *Sarat Chandra Roy Chowdhury* and *Lal Mohan Ghose*, for the Petitioners.

Babu *D. N. Bagchi*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside a decree of dismissal made by a Court of Small Causes. The suit was in essence for rescission of a contract, and in the alternative, for declaration that the contract was either void or voidable and for consequential reliefs. Objection was taken by the defendants that the suit was excluded from the cognizance of a Court of Small Causes under clauses 16 and 19 of the Second Schedule to the Provincial Small Cause Courts Act. The defendants also objected to the claim on the merits. The Small Cause Court Judge found that the suit was not cognizable in his Court under clauses 16 and 19; but, notwithstanding this conclusion, he proceeded to try the case on the merits and ultimately dismissed it. The plaintiffs now contend that the only course open to the Judge was to direct that the plaint be returned to the plaintiffs for presentation to the proper Court. This view has been controverted by the defendants. In our opinion the order made by the Small Cause Court Judge is obviously wrong.

Order VII, rule 10 of the Code of 1908, which applies to Provincial Small Cause Courts, as is clear from Order L, provides that the plaint shall, at any stage of the suit, be returned to the plaintiff for presentation to the Court in which the suit should have been instituted. The words "at any stage of the suit" were introduced in the Code of 1908, and did not appear in the corresponding provision of the Code of 1882, namely, section 57. These words really amount to a legislative approval of the decision of a Full Bench of the Bombay High Court in the case of *Prabhakarbhat* v. *Vishwambhar Pandit* (8). Consequently, it was incumbent on the Small Cause Court Judge to return the plaint to the plaintiff for a presentation to the proper Court. [*Ladhaji Nathaji* v. *Hari* (9)]. The Rule is accordingly made absolute, and the order of the Small Cause Court Judge set aside. The plaint will be returned to the plaintiff in

(8) 8 B. 313; 4 Ind. Dec. (N. S.) 583.

(9) 1 Bom. L. R. 176; 23 B. 679; 12 Ind. Dec. (N. S.) 454.

order that he may present it to the proper Court for trial of his claim. As the Rule has been opposed, we make it absolute with costs which we assess at one gold *mohur*. We are of opinion that the Rule should not have been opposed, and if it had not been opposed, we should not have been disposed to allow costs to the petitioner.

It is conceded that this judgment will govern the analogous Rules (Nos. 896 to 899 of 1916). These Rules also are made absolute with costs—one gold *mohur* in each case.

Rules made absolute.

PATNA HIGH COURT.
APPEALS FROM ORIGINAL DECREES No. 450, 451 AND 452 OF 1915.
June 26, 1917.
Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.
HON'BLE *Maharajah Sir* RAMESHWAR SINGH *Bahadur*—OPPOSITE PARTY—APPELLANT
versus
Babu JOTINDRA CHANDRA SINHA AND OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *s.* 151—*Transfer of Property Act* (*IV of* 1882) *s.* 90, *decree under—Amendment of decree not in accordance with judgment—Inherent power of Court.*

If on the face of it a decree made under section 90 of the Transfer of Property Act is not in accordance with the previous judgment, then the Court will be justified under the inherent powers given to it by section 151 of the Civil Procedure Code in making the decree in accordance with the judgment. [p. 206, col. 2.]

Appeal from a decision of the Subordinate Judge, Darbhanga, dated the 3rd July 1915.

Messrs. *Ramcharan Mitra*, *Jogendra Nath Mukerji*, *Purendra Narain Sinha* and *Murari Prasad*, for the Appellant.

Mr. *Mritunjoy Lal*, for the Respondents.

JUDGMENT.—The facts of this case are that in three mortgage suits instituted in 1892, 1895 and 1897, the Maharajah of Darbhanga obtained decrees for very large sums of money against the present respondents. The properties were brought to sale from time to time. In 1907 applications under section 90 of Act IV of 1882 were made by the Maharajah, on which a Rule was issued upon the opposite party to show cause why proceedings should not be taken to recover the balance due from the other properties. The opposite party put in an appearance, but were not in earnest in opposing the applications which were finally granted *ex parte*. Three decrees were prepared, signed and sealed under section 90 on the 3rd of January 1908.

In 1914 the Maharajah took steps to put these decrees into execution. It was then for the first time that the judgment-debtors examined the decrees and took objection; *firstly*, to the arithmetic wherein serious mistakes had been made; *secondly*, to the grant of interest after six months from the date of the original decree. The learned Subordinate Judge thereupon passed orders amending the decrees with a view to bring them into conformity with the original judgments of 1892, 1895 and 1897. Against this decision the decree-holder appeals.

It is contended that there is no provision in the Code for any appeal against an order amending a decree. There is on the other hand no provision in the Code for any amendment of a decree except that provided by section 152 of the Code. The amendment therein contemplated is the correction of a clerical or arithmetical mistake. The records of the case having been called for on the petition of appeals the case is before us. We, therefore, deal with it under section 115. If upon the face of it the decree made under section 90 was not in accordance with the previous judgment, then the Court will be justified under the inherent powers given to it by section 151 in making the decree in accordance with the judgment. We propose, therefore, to consider the judgments of 1892, 1895 and 1897 and satisfy ourselves as to the obvious meaning thereof. If the obvious meaning of them is not expressed in the final decrees made under section 90, then we are prepared to give instructions to the learned Subordinate Judge to amend the decrees so as to bring them into conformity with the judgments. But if the question is merely a matter of doubt, then it must be taken that inasmuch as the decrees were made after contest on the 3rd of January 1908 and no appeal has been filed against those decrees, that they were accepted by the parties and cannot now be challenged on the ground that their correctness is doubtful. Before proceeding to amend the decrees made by his predecessor the Judge must see that

there is an obvious clerical or arithmetical mistake in them or that they are not in accordance with the real intention of the Judge who made himself responsible for the correctness of the decrees by attaching his signature thereto. The actual order of the Court in each of these cases dated the 21st December 1907 runs in the following words:—

"That the decree-holder be permitted to take steps under section 90 of the Transfer of Property Act for the realisation of the balance of the decretal money from the other properties of the judgment-debtors."

And on the 3rd January 1908 a decree under section 90 was made by merely copying out the petition for a decree under section 90.

It is manifest in one case at least, No. 452, that there was a glaring clerical error in the petition for a decree under section 90. This glaring error was reproduced in the decree itself. The decree, therefore, in that case was obviously wrong and before attempting to execute it the learned Subordinate Judge was right in going into the merits of the case and ascertaining for himself what sums were actually due.

In Case No. 450 it was admitted before the learned Judge that an arithmetical mistake had resulted in a loss to the judgment debtor of Rs. 1,000. Here again the learned Subordinate Judge was justified in going through the whole of the decree and preparing a fresh decree.

In the third case there was no clerical or arithmetical mistake alleged. It was urged only that as the judgment in the cases of 1892, 1895 and 1897 said nothing about future interest, therefore, the decree-holder had no right to claim future interest. The decree in each of these cases clearly gives future interest and it should have been presumed, until the contrary was proved, that the Court in each instance intended to give the relief which it embodied above its signature in its own decree. There was no contest whatever in regard to any of the reliefs claimed in the plaint, and to the ordinary person it would seem obvious that in the absence of contest the intention of the Court would be to give the plaintiff all the reliefs asked for. In the plaint it was specifically demanded that a decree should be made for interest and compound interest up to the date of sale with interest and future costs from the date of sale to that of realisation, and a direction that the defendant should pay to the plaintiff the amount claimed within the time allowed by the Court, and that in case of non-payment of the same the Court may be pleased to realise the decree for money due to the plaintiff by sale of the mortgaged property as per specification given in the plaint and that in the event of the sale proceeds not being sufficient for the realisation of the whole of the decretal money, the Court may be pleased to pass a decree making the mortgagees personally liable for the mortgage money.

Both the decrees for sale of the mortgaged property and the decrees under section 90 were made *ex parte*. There is no reason to suppose in either case that the learned Subordinate Judge had any intention of giving the plaintiff less than what he asked. It is distinctly stated that the claim was for interest up to the date of realisation and we find it set forth in the decrees themselves made in the original suits that the defendants do pay to the plaintiff within six months from this date the sum of Rs. 17,751, the amount claimed, with Rs. 265-7-0, interest thereon, at the rate of 6 per cent. per annum from the date of institution of the suit to this date, in all Rs. 18,016-7-0, and Rs. 987 on account of costs of the suit with interest at the rate mentioned above on the entire decretal amount and costs aforesaid from this date till the date of realisation.

There is in this decree a clear order that simple interest shall run from the date of the decree to the date of realisation and we can see no reason for the amendment of the decree ordered by the learned Subordinate Judge in this respect.

We, therefore, direct the learned Subordinate Judge to restore these decrees to their original condition; he will then consider whether there is any other clerical or arithmetical mistake, which can be cured under section 152 of the Code and on satisfying himself that there has been a clerical or arithmetical mistake will make such amendments as may be necessary. The appeals are dismissed without order as to costs. Under section 115 the learned Subordinate Judge is directed to take action as indicated in each case in this judgment.

Appeals dismissed.

MADRAS HIGH COURT.

APPEALS NOS. 173 AND 182 OF 1910, 256 OF 1913 AND 48 AND 311 OF 1914.

October 11, 1916.

Present:—Mr. Justice Sadasiva Aiyar and and Mr. Justice Napier.

IN NO. 173 OF 1910.

Raja Kumara VENKATA PERUMAL RAJU BAHADUR VARU, MINOR, BY THE ESTATE GUARDIAN MR. W. A. VARADACHARIAR—DEFENDANT NO. 1—APPELLANT

versus

UDDAGIRI PAPA NAIDU AND OTHERS—PLAINTIEFS AND 3RD DEFENDANT AND 1ST PLAINTIFF'S LEGAL REPRESENTATIVES—RESPONDENTS.

Hindu Law—Impartible zemindari—*Inalienability and succession by single heir, whether family custom or incident of tenure—"Tanaka", meaning of—Civil Procedure Code (Act XIV of 1882), s. 257 A—Consideration paid towards forbearance to execute decree, effect of—Mortgage—Settled account forming part of consideration—Non-receipt of consideration, whether can be proved.*

In cases of grants of land under *zemindari* tenure under the Permanent Settlement, the conditions of the tenure prior to cession cannot be presumed to have continued and it rests on the claimant to show that the manner in which the estate has been treated by the British Government indicated that Government intended to preserve the prior incidents. [p. 218, col. 1.]

Impartibility leads logically to the existence of a power of alienability and not to a rule of inalienability. The custom of impartibility and of succession by a single owner are incidents attached not to the property of a family but to the law governing that particular family. [p. 210, col. 1.]

(*Udayarpalayam case*) *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar*, 28 M. 508; 8 Sar. P. C. J. 855; 2 C. L. J. 231; 10 C. W. N. 95; 15 M. L. J. 312; 2 A. L. J. 845; 7 Bom. L. R. 907; 1 M. L. T. 12; 32 I. A. 261 (P. C.); *Mahammad Afzal Khan* v. *Ghulam Kasim Khan*, 30 C. 843 at p. 862; 67 P. R. 1903; 112 P. L. R. 1903; 8 C. W. N. 81; 5 Bom. L. R. 486; 30 I. A. 190; 8 Sar. P. C. J. 455 (P. C.); *Durgadut Singh* v. *Maharaja Sir Rameshwar Singh Bahadur*, 4 Ind. Cas. 2; 36 C. 943; 13 C. W. N. 1013; 11 Bom. L. R. 901; 6 M. L. T. 68; 10 C. L. J. 233; 6 A. L. J. 847; 19 M. L. J. 567; 36 I. A. 176; *Bhau Nanaji Utpat* v. *Sundrabai*, 11 B. H. C. R. 249; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M I. A. 523; 12 W. R. (P. C.) 21; 3 B. L. R (P. C.) 13; 2 Sar. P. C. J. 523; 2 Suth. P. C. J. 243; 20 E. R. 436; *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar*, 1 C. 186; 19 W. R. 8; 3 Sar. P. C J. 174; 8 M. L. J. 151; 2 Suth. P. C. J. 744; 1 Ind. Dec. (N. S.) 119 (P. C.), followed.

In cases of military tenures, as regards the question of inalienability without the Sovereign's sanction, the reason for the restricted ownership ceasing as soon as the military service is dispensed with, the ordinary law governing impartible estates involving the right of the holder of that estate to alienate at his pleasure becomes at once applicable, except where a custom of inalienability is proved to exist. [p 211, col 2.]

Rama Krishna Rao v. *Court of Wards*, 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 417; 26 I. A. 83; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276; *Raja Row Vencata Niladry Row* v. *Vutchavoy Vencataputty Raz*, (1834) 3 Knapp. 23; 12 E. R. 554, followed.

Where a supposed custom has followed the ordinary law as laid down by the Courts, though wrongly assumed to be the ordinary law, such custom, as it did not modify the law as generally understood and had not independently the force of law, cannot be recognised as a valid custom having the force of law. An erroneous view of law, though held for a considerable time, cannot form the basis of an independent custom when the error is discovered and set right. [p. 212, col. 1.]

The use of the word "tanaka" in a document clearly creates security and not merely an assignment of revenue. [p. 212, cols. 1 & 2.]

Dakkata Thotapalli v. *Sasanapuri Dali Sethi*, 22 Ind. Cas. 524; 1 L. W. 96 at p. 97; (1914) M. W. N. 270, *Patte Muhamad* v. *Davood*, 30 Ind. Cas. 569; 18 M. L. T. 209; 29 M. L. J. 525; (1915) M. W. N. 852; 39 M. 1010, followed.

A sum of money paid to a decree-holder for giving time to the judgment-debtor, under an arrangement not sanctioned by the Court under section 257A of the Civil Procedure Code, 1882, must be deducted from the amount of the decree. [p. 213, col 1.]

Venkata Subramania Ayyar v. *Koran Kannan Ahmod*, 26 M. 19; 12 M. L. J. 113, followed.

Where a person who takes a mortgage stands in a fiduciary relation to the mortgagor, it is competent to the mortgagor to prove failure of consideration, by proving circumstances which would entitle him to go behind the settled account comprised in the mortgage and showing that the amount was not really due. [p. 215, col 2; p. 216, col. 1.]

Tirumal Raju v. *Pandla Muthial Naidu*, 9 Ind. Cas. 289; 35 M. 114; (1911) 1 M. W. N. 113; 9 M. L. T. 286; 21 M. L. J. 169, followed.

It is open to a mortgagor to shew that there has been an actual failure of consideration in respect of a part and that the mortgage is only good for the balance. [p. 216, col. 1.]

Chinnayya Rawutan v. *Chidambaram Chetti*, 2 M. 212; 5 Ind. Jur. 356; 1 Ind. Dec. (N S.) 419; *Tirumal Raju* v. *Pandla Muthial Naidu*, 9 Ind. Cas. 289; 35 M. 114; (1911) 1 M. W. N. 113; 9 M. L. T. 286, 21 M. L. J. 169, followed.

An attaching creditor can question the correctness of the whole account on which a mortgage of the attached property is founded. [p. 216, col. 1.]

Rajani Kumar Dass v. *Gaur Kishore Shaha*, 35 C. 1051; 7 C. L. J. 586; 12 C. W. N. 761, followed.

Where the transfer of interest in immoveable property is by way of security only, there is no principle which gives the consideration for the mortgage a position higher than that of an ordinary bond debt. Where an obligor can under certain circumstance go behind a settled account, he is equally entitled to plead that the consideration based on that account had never been received. [p. 216, col 1.]

VENKATA PERUMAL RAJU *v.* UDDAGIRI PAPA NAIDU.

IN APPEAL SUITS NOS. 173 AND 182 OF 1910.

Appeals against the decrees of the District Court, North Arcot, in Original Suit No. 34 of 1907 and No. 12 of 1908.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Messrs. *S. Gopalasami Aiyangar*, *C. V. Ananthakrishna Aiyar* and *N. Rajagopalachariar*, for the Respondents.

IN APPEALS NOS. 356 OF 1913 AND 48 AND 311 OF 19. 4.

Appeals against the decrees of the Court of the Subordinate Judge, North Arcot, in Original Suits Nos. 95, 18 and 86 of 1911.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

The Hon'ble Mr. *T. Rangachariar*, Messrs. *K.V.L. Narasimham*, *S. Gopalaswami Aiyangar*, *C. V. Ananthakrishna Aiyar*, *K. Bashyam Aiyangar*, *P. Venkotaramana Rao*, *T. Pattabhirama Aiyar*, *N. Chandrasekara Aiyar*, *A. Venkatarayaliah*, *Short Bewes & Co.*, *P. V. Parameswara Aiyar*, *C. P. Ramaswami Aiyar*, *A. Duraiswami Aiyar* and *K. C. Desikachariar*, for the Respondents.

Appeals Nos. 173 and 182 of 1910 coming on for hearing on the 7th March 1913, the Court (Miller and Sadasiva Aiyar, JJ.,) delivered the following

JUDGMENT.—So far we have had argued only the question whether the District Judge was wrong in refusing to decide the question raised in issue No. II. He has refused because on issue No. II (A) he held that the question could not be tried in the suit.

He invoked the authority of *Raja of Vizianagaram* v. *Dantivada Chelliah* (1) which does not support him, if only for the reason that the restraint (if any) on alienation which may exist in this case is not imposed for the benefit of, and, therefore, cannot be waived by, the person desirous of making the alienations.

Zamindar of Karvetnagar v. *Trustee of Tirumalai* (2), to which reference is also made, is not a decision that the custom alleged, if made out, is not sufficient to prevent the mortgagor's successor from questioning the validity, as against him, of the mortgage when it is sued on by the mortgagee.

(1) 28 M. 84; 14 M. L. J. 468.
(2) 2 Ind. Cas. 18; 32 M. 429; 19 M. L. J. 410.

The learned Judges expressly say that a separate suit, and not execution proceedings, should be resorted to for the decision of the question.

There is no reason why issue No. II should not be decided in this suit. We, therefore, direct the District Judge to return findings on the 2nd, 3rd and 4th issues.

In Appeal No. 173 of 1910, a finding is required only on the 2nd issue for the same reasons.

In both appeals fresh evidence may be taken on the issues on which findings are required.

The findings should be submitted within six months from this date and seven days will be allowed for filing objections.

Even if the District Judge's finding is against the custom alleged, he should nevertheless return findings on the other questions also on the assumption that the custom is proved.

In compliance with the order contained in the above judgment, the District Judge of North Arcot submitted a finding to the effect that the Karvetnagar Estate was not inalienable either by reason of its tenure or the custom pleaded by the first defendant.

These appeals coming on for hearing after the return of the findings of the lower Court on the issues referred to it for trial, in Appeals Suits Nos. 173 and 182 of 1910, in pursuance of the order of this Court, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The question common to all these appeals is, whether the Karvetnagar Estate is inalienable by virtue of its tenure or by a custom under which the *zemindar* for the time being is prohibited from alienating any portion of the estate, except for purposes for which the manager of a joint Hindu family (not the father) is entitled as such manager to make valid alienations of the joint family property. On this question, I might at once say that I agree with the judgment to be pronounced by my learned brother. As it was, however

argued with great strenuousness and persistence by Mr. Govindaraghava Aiyar for the appellant, I deem it appropriate to express my views on this point in my own words. As regards inalienability by virtue of the tenure, as soon as the military tenure under which the properties were held was put an end to, about 120 years ago, that is, when the British Government granted the lands to the *zemindar* under a quite different tenure with express powers of alienation and after imposing a liability on the lands to be attached and sold in exection of decrees passed against the grantee, the restraint on alienation without the permission of the overlord came to an absolute end. The analogy of the incident of impartibility attaching to some estates is absolutely misleading. Impartibility, according to the Privy Council decision in *Sartaj Kuari* v. *Deoraj Kuari* (3), leads logically to the existence of a power of alienability, and not to a rule of inalienability.

Further, the custom of impartibility and of succession by a single owner are incidents attached not so much to the property held by a family as to the law governing that particular family (see Lord Macnaghten in the (*Udayarpalayam's* case) *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (4). At page 516 in that case, the following passages occur:— "On the cession of the Carnatic, the British Government assured the Poligars, of whom the Poligar of Udayar was one, that they would enjoy every just and ascertained civil right, *with a free exercise of the religious institutions and domestic usages of their ancestor.*" One of the domestic usages, namely, succession according to rules of primogeniture was upheld in that case. In the case of *zemindaris* where succession by primogeniture prevails, though that domestic usage might have begun in the times when the head of the family was a military ruler and though that position had ceased at the time of the Permanent Settlement, the *family law* of succession by primogeniture was presumed to continue even afterwards. In short, it is a question of the family law of succession, and such law was held applicable even in the case of families of certain Mussalman zemindars. [See *Mahammad Afzal Khan* v. *Ghulam Kasim Khan* (5).] It is not really a question of succession to a particular property. It can never be argued that where portions of an impartible estate are alienated by a Zemindar governed by his family law of primogeniture to Hindus governed by the ordinary Hindu Law, succession to the portions so alienated is also governed by the law of primogeniture. If the proprietor of the Karvetnagar Estate was incapable by the custom of his family from alienating or binding by his debts any part thereof beyond his own lifetime, except under circumstances which would entitle the managing member of a joint family to do so, the enactment of section 4 (1) of the Impartible Estates Act was superfluous so far as this estate was concerned. That the law of impartibility depends on the family custom of succession and not on the nature of the estate is also clear from the case of *Durgadut Singh* v. *Maharaja Sir Rameshwar Singh Bahadur* (6), which related to certain properties given to junior members of a Zemindari family for their maintenance. It was held in that case that it was proved that the family custom of primogenture and impartibility governed the succession to those properties also. (See pages 952 to 954*.) As remarked by that eminent Judge (West, J.) [see pages 272-273 of *Bhau Nanaji Utpat* v. *Sundrabai* (7)], "In a good many cases, the question of family custom has been mixed up with that of the supposed impartible character of a *raj* or principality, and this has perhaps led to some little confusion in particular instances, but a careful examination of the cases will show that the special law of descent has usually been put by the Privy Council, as in the case of *Neelkisto*

(3) 10 A. 272; 15 I. A. 51; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213; 6 Ind. Dec. (N. S.) 182 (P. C.).

(4) 28 M. 508; 8 Sar. P. C. J. 855; 2 C. L. J. 231; 10 C. W. N. 95; 15 M. L. J. 312; 2 A. L. J. 845; 7 Bom. L. R. 907; 1 M. L. T. 12; 32 I. A. 261 (P. C.)

(5) 30 C. 843 at p. 862; 67 P. R. 1903; 112 P. L. R. 1903; 8 C. W. N. 81; 5 Bom. L. R. 486; 30 I. A. 190; 3 Sar. P. C. J. 455 (P. C.).

(6) 4 Ind. Cas. 2; 36 C. 943; 13 C. W. N. 1013; 11 Bom. L. R. 901; 6 M. L. T. 68; 10 C. L. J. 233; 6 A. L. J. 847; 19 M. L. J. 567; 36 I. A. 176.

(7) 11 B. H. C. R. 249.

*Pages of 36 C.--*Ed.*

Deb Burmono v. *Beerchunder Thakoor*(8), *on the ground of ancient family custom whether the property was a* raj *or not.* There are other cases like that of *Ghirdharee Sing* v. *Koolahul Sing* (9), in which the fact that the estate was a *raj* was held not to involve the consequence that it was indivisible under a special law of inheritance applicable to that species of property; and generally it may be said that it is the family custom of descent, which, for juridical purposes, gives the property the character of a *raj*, and not anything in the estate itself, which determines the rights of pretenders to it. In a case in 7 Bengal Sudder Dewani Adaulat Reports, page 195, it was ruled that on a property which had descended in one family, according to a rule of primogeniture, undivided, passing to another family in which no special rule prevailed, it became partible according to the ordinary law. Thus viewed, all the numerous cases of property, regarded as impartible because 'partaking of the nature of a *raj*', are instances of the effect which the highest Court has given to family customs diverging from and, therefore, in a sense 'repugnant or antagonistic to the general law.' 'The prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place, of the property of people of that class or race, stands on the footing of usage or custom of the family.' *Soorendronath Roy* v. *Musammat Heeramonee Burmoneah* (10)." In *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (11) the following observations occur at page 191: "In the present case the estate was held directly from the Government, there being no intermediate lord. And it appears to their Lordships that, upon this settlement, any incidents of the old tenure, as a military *jagir*, requiring the render of services, if any such ever existed, were, as conditions of tenure, impliedly at an end; and that the Zemindari, so far as relates to tenure, was thenceforth held under the Government as an ordinary Zemindari free from any such conditions. The settlement would not, however, of itself, have operated to destroy a *family usage regulating the manner of descent*.....It would not, of itself, affect *an existing family custom*". At page 195, their Lordships say that even the custom of impartibility could, without any violation of law, be put an end to by the conduct of the members of the family after the Permanent Settlement. They say: "Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails". These passages show that even as regards the family usage of succession by primogeniture, the family could revert to the ordinary law after the Permanent Settlement. As regards the question of inalienability without the Sovereign's sanction in case of military tenures, the reason for the restricted ownership ceasing as soon as the military service is dispensed with, the ordinary law governing impartible estates, involving the right of the holder of that estate to alienate at his pleasure (which follows from there being no co-parcenary rights vested in the other members of the family) becomes at once applicable. In the *Pittapuram* case in *Rama Krishna Rao* v. *Court of Wards* (12), Mr. Mayne tried his best to argue that in the Madras Presidency, there was a special custom governing the impartible estates which were once held by military rulers, which custom attached the incident of inalienability to those estates (except for purposes for which the Mitakshara family manager is entitled to alienate). Their Lordships, however, without even calling upon the

(8) 12 M. I. A. 523; 12 W. R. (P. C.) 21; 3 B. L. R. (P. C.) 13; 2 Sar. P. C. J. 523; 2 Suth. P. C. J. 243; 20 E. R. 436.

(9) 2 M. I. A. 344; 6 W. R. (P. C.) 1; 1 Sar. P. C. J. 200; 1 Suth. P. C. J. 98; 18 E. R. 330.

(10) 12 M. I. A. 81 at p. 91; 10 W. R. 35 (P. C.); 1 B. L. R. (P. C.) 26; 2 Suth. P. C. J. 147; 2 Sar. P. C. J. 372; 20 E. R. 271.

(11) 1 C. 186; 19 W. R. 8; 3 Sar. P. C. J. 174; 8 M. L. J. 151; 2 Suth. P. C. J. 744; 1 Ind. Dec. (N. S.) 119 (P. C.).

(12) 22 M. 383 at p. 396; 1 Bom. L. R. 277; 3 C. W. N. 415; 26 I. A. 83; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276.

respondent's Counsel went through all the cases in Madras from the earliest case in *Raja Row Vencata Niladry Row* v. *Vutchavoy Vencataputty Raz* (13) and decided against the custom. It was very soon after this decision that the first temporary Act that preceded the Madras Impartible Estates Act was enacted. The evidence in this case, in my opinion, does not establish any custom of inalienability but indicates, on the other hand, that the ordinary law which vests the power of alienation in the Zemindar for the time being was followed by each successive Zemindar, though the son or the brother of a Zemindar sometimes claimed that the ordinary Mitakshara Law applied to the estate. He never suggested that any custom which was against the ordinary law as understood by him applied to the Zemindars. Their Lordships of the Privy Council say at page 396 that where a supposed custom has followed the ordinary law, *as laid down by the Courts*. though it was wrongly assumed to be the ordinary law, that supposed custom, which did not modify the understood general law and which had, therefore, not independently the force of law, cannot be recognised by Courts as a custom having the force of law, even after it is established that the supposed ordinary law which it was alleged to have followed was not the ordinary law. I, therefore, agree with the lower Court and with my learned brother that there was no proof of any family usage having been consciously followed, which was considered to be a special custom at variance with the ordinary Hindu Law.

As regards the argument based on Exhibit VII series in which the word 'Tanaka' is used, Ayling, J., says in *Dakkata Thotap lli* v. *Susanapuri Dali Seth* (14) that "Exhibit A was intended by the parties to create a simple mortgage, I feel no doubt whatever. The word 'Tanaka' which is twice used in the operative portion of the document is to my mind conclusive. The learned District Judge says: The word 'Tanaka' is always used to denote a mortgage". "In Brown's Telugu Dictionary the only meanings given to the word 'Tanaka' are (1) a mortgage, (2) an assignment of land revenue, the latter meaning being obviously inapplicable in the present case." In *Patte Muhamad* v. *Davood* (15) Spencer and Kumaraswami Sastri, JJ., interpret the word 'Tanaka' occurring in the document in that case as mortgage. The interpretation sought to be put upon that word by Mr. Govindaraghava Aiyar, when it occurs in Exhibit VII series, namely, that it meant only an assignment of revenue and not a mortgage cannot, therefore, be sustained. Far from these documents supporting the learned Vakil's argument that the Zemindar was disinclined to execute deeds of alienation intended to last beyond his lifetime, they support the conclusion that he treated the lands in his estate as his absolute property to be alienated according to his pleasure.

The learned Vakil next relied strongly on the decision in the *Ammayanayakanur* case [*Sivasubramania Naicker* v. *Krishnammal* (16)]. Even if certain observations of that decision have not got to be re considered in the light of the Privy Council decision in *Rama Krishna Rao* v. *Court of Wards* (12), the rule of succession applicable to that Zemindari was a quite exceptional one, namely, Dayathipattam, and the evidence let in in that case to show the nature of the estate held by each succeeding Zemindar was also of a very special character. The conclusion of fact arrived at in that case, in which the succession was not a succession governed by the ordinary rule of primogeniture and where the evidence showed that each succeeding Zemindar expressly admitted that his Dayadees were co-parceners with him, cannot govern the consideration of the evidence in this case. Having thus dealt with the point common to all these cases, I shall now deal with the other particular questions arising in the appeals.

APPEAL No. 173 OF 1910.

In the suit out of which this appeal has arisen, the 1st defendant contends that the

(13) (1834) 3 Knapp. 23; 12 E. R. 554.
(14) 22 Ind. Cas 524; 1 L. W. 96 at p. 97; (1914) M. W. N. 270.
(15) 30 Ind. Cas. 569; 18 M. L. T. 209; 29 M. L. J. 525; (1915) M. W. N. 852; 39 M. 1010.
(16) 18 M. 287; 5 M. L. J. 168; 6 Ind. Dec. (N. S.) 549.

mortgage-deed sued on has not been supported by consideration in respect of five of the items of consideration mentioned therein. The first of these items is a sum of Rs. 6,617-6-5 due to the lst and 2nd plaintiffs' father under a decree in Original Suit No. 1 of 1885 on the file of the District Court of North Arcot which was passed against the Zemindar. The amount of the decree-debt was Rs. 6,581-0-10 on the date of the decree (25th February 1885), the decree providing for subsequent interest. About seven months before the date of the mortgage sued on (14th November 1890) the receipt, Exhibit VI, (19th February 1890) for Rs. 2,500 was filed in Court by the decree-holder. This sum of Rs. 2,500 covered a sum of Rs. 2,000 agreed to be paid to the decree-holder for the forbearance shown by him in not proceeding with the execution of the decree on a former occasion, that agreement not having had the Court's sanction. Section 257 (A) of the old Civil Procedure Code was as follows:—Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree and such Court deems the consideration to be under the circumstances reasonable". "Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment-debt". I think these are imperative provisions and Rs. 2,000, which has been admittedly paid under an agreement as consideration for grant of time (see Exhibits V and VI), ought to be treated as paid towards the decree. Out of the sum of Rs. 6,617-6-5, therefore, mentioned in Exhibit A, the sum of Rs. 2,000 and interest thereon at six per cent. per annum from date of Exhibit VI (19th February 1890) till date of suit bond (14th November 1890) should be deducted in defendants' favour. See also *Venkata Subramania Ayyar* v. *Koran Kannan Ahmad* (17). The mortgage document is, however, good security for the balance of the decree amount [see *Tirumal Raju* v. *Pandla Muthial Naidu* (18)]. The objections as to the other four items were not seriously argued and I agree with the District Judge that those objections cannot be sustained. It was next objected to the decree as drawn up in the lower Court that even simple interest at 12 per cent. per annum from the date of default mentioned in Exhibit A is a penal rate, the original rate being six per cent. The provision in Exhibit A for *compound* interest at 12 per cent. from the date of default is no doubt of a penal character, but I think the lower Court was justified in giving 12 per cent. *simple* interest from the date of default as a reasonable compensation for the breach of the contract to pay on the due date. Lastly, it was contended that the decree drawn up by the lower Court was wrong in form and might be construed as making the 1st defendant liable personally at once for the decree amount, as it begins by saying that "the Court doth order and decree that the defendants do pay plaintiffs", etc. I think the decree ought to have followed the Form No. 4, Appendix D, of the Code of Civil Procedure. The decree will be modified accordingly.

I must here state that the 11th and 12th grounds in the memorandum of appeal, namely, that the District Judge ought not to have excluded the time during which the estate was under the Court of Wards in calculating the period of limitation (as regards the right to a decree for sale) and that the mortgage document has not been proved were not argued before us and very properly, seeing that there is nothing in those contentions. In the result, the appeal is partially allowed, the amount due to the plaintiffs being calculated after deducting Rs. 2,000 and interest thereon at six per cent. for about nine months from the sum mentioned as principal in Exhibit A. As this is only a slight modification of the lower Court's decree and as the mortgagee cannot be said to be guilty of dishonesty in claiming the whole sum mentioned in Exhibit A, I would order the appellant who failed on the principal contention as to "inalienability" to pay the respondents' costs in this appeal which can also be added to the mortgage amount. The consideration of the question whether the plaintiffs would be entitled to remedy against other properties if, under clause (3) of Form No. 4, an application is made on the sale of mortgag-

(17) 26 M. 19; 12 M. L. J. 113.

(18) 9 Ind. Cas. 289; 35 M. 114; (1911) 1 M W. N. 113; 9 M. L. T. 286; 21 M. L. J. 169.

ed properties, is premature and we express no opinion on it.

APPEAL No. 182 OF 1910.

The only question argued, when this appeal came up before this Court after submission of findings, is that the decree is not in proper form and might be construed as making the 1st defendant personally liable in the first instance. Let the decree be drawn up in proper form as directed in the connected Appeal No. 173 of 1910. The appellant will pay the plaintiffs' costs of the appeal.

APPEAL No. 311 OF 1914.

The suit out of which this appeal has arisen was brought (by the sons of the usufructuary mortgagee who obtained the mortgage document Exhibit U from the then Zemindar of Karvetnagar) to establish the plaintiffs' right to enjoy the villages mentioned in item 1 of the plaint schedule (including the forests and jungles in those villages) as part of the property usufructuarily mortgaged under Exhibit N and for a permanent injunction against the defendants, of whom the principal defendant is the 5th defendant (the minor Zemindar of Karvetnagar), from interfering with the plaintiffs' enjoyment of the forests and jungles and of the produce therefrom and for other minor reliefs. The special defence raised in this case is that the *poramboke*, waste and the forests attached to the villages of Pillaiyarkuppam and Kannikapuram were excluded from the usufructuary mortgage, that the forests and *porambokes* were not put in possession of the mortgagee (the plaintiffs' father) and that they have been all along in the enjoyment of the Zemindar. Exhibit U mortgages about one hundred villages, and it begins by saying that for the sum of Rs. 25,000 odd, the said one hundred villages with the hamlets, tanks, *kasams*, channels, fruit trees, gardens, forests, forest *poramboke*, road-cess, etc., income, mountain and mountain leases are secured. Then it says that ninety-two villages of the one hundred villages are secured without possession, while the remaining eight villages (including the two villages in dispute) are mortgaged usufructuarily. In the latter half of the document (which, I might say, has not been translated or printed for our use) the names of the villages are mentioned but the additions found in the first part, namely forests produce, etc., are not repeated. It was, therefore, argued that the forests and forest produce were intended to be excluded from the usufruct to be taken by the mortgages. I find myself unable to accept this argument, especially as it is expressly stated in the document that the mortgagee was to enjoy *all the incomes* realisable from the above eight villages, which include the two villages in dispute. I also agree with the lower Court that the evidence in the case establishes that though the Zemindar tried to let to others the produce of the forests in these two villages himself (the income from the said villages being comparatively trifling), the mortgagee was able to secure his possession of the produce by himself letting it to his own licensees. The lower Court's decree declaring the plaintiffs' right and securing future possession by injunction and granting the small amount of damages claimed was, therefore, right and this appeal is dismissed with costs.

APPEAL No. 356 OF 1913.

The 1st defendant (the minor Zemindar) is the appellant in this case. The only ground argued in this case was the 14th ground besides, of course, the common ground of inalienability. That 14th ground is as follows:

"Admittedly there being no personal liability for the payment of the amount found due, the decree directing that the defendants do pay the plaintiffs the amount decreed is not sustainable in law". For reasons given in Appeals Nos. 173 and 182 of 1910, I would order the decree to be drawn up in the correct form, and it being admitted in this case that the personal liability is barred, the 3rd clause of form No. 4, Appendix D, need not be produced in the decree in this case.

APPEAL No. 48 OF 1914.

The suit out of which this appeal has arisen was brought on a mortgage document marked as Exhibit FF on remand and is dated 8th June 1894 and was executed by the then Zemindar in favour of G. Gurusawamayya and E. Saravana Pillai, who were employed under him as *zemindari* servants and agents (Manager and Deputy

Manager of the *zemindar*). In order to protect himself from his creditors, the *zemindar* had executed a nominal lease of about 106 villages in favour of these two mortgagees in January 1890 under Exhibit XXIV. The lease was a purely *benami* transaction and the nominal lessees were (as I said) his servants and chief officers who had, as such, to make collections from the tenants cultivating the lands in the villages, to pay the *peishcush* of Rs. 12,000 to Government and to account to the *zemindar* for the balance. In order to keep up the appearance of a real lease, these agents had sometimes to pay the *peishcush* of Rs. 12,000 due to Government even before collections to that extent had been made and to recoup themselves out of the collections afterwards made. The mortgage document sued on (Exhibit FF) was executed for Rs. 54,763-12-11. Out of this amount, I find from the account statement Exhibit XXV that Rs. 16,544-15-1 was connected with this nominal *ijara* transaction. Out of that sum Rs. 16,544-15 1 again, Rs. 13,478-5-9 appears to be the principal amount alleged to be due on the accouuts as between the *zemindar* and his agents in respect of the management of the 106 villages (see page 202 of the printed paper), the remaining Rs. 3,065-9 4 being charged as interest The *zemindar* (2nd defendant in this suit) contended in his written statement, paragraph 7, as follows:—"The said Gurusawmiah and Saravana Pillai occupied fiduciary position towards the late Raja Bommaraja Bahadur in respect of the said lease of 106 villages and the amounts realized thereunder. This defendant submits that the suit mortgage-deed was executed on the basis of the accounts outstanding between the said Raja Bommaraja Bahadur Varu and the said Gurusawmiah and Saravana Pillai. If only the true state of accounts had been disclosed to the said Raja Bommaraja Bahadur inclusive of those relating to the said lease as it was their duty to have done, the amount payable, if any at all, would have been considerably less than the amount for which the mortgage-deed was executed and to the extent of this difference, as shown in the schedule hereto, the mortgage-deed had no consideration." On this plea, the question was raised generally whether the suit mortgage-deed was not supported by consideration. The *zemindar's* contention was that far from Rs. 13,000 principal plus Rs. 3,000 odd (interest), total Rs. 16,000 odd, having been due on the date of Exhibit FF to the two mortgagees, on a calculation of receipts and expenditure relating to the 106 villages, Rs. 38,641-9-0 would be found to have been then due by the said agents to the Rajah in the matter of the receipts from the above *ijara* villages, which the agents failed to account to the *zemindar*, and that there was, therefore, want of consideration for the plaint mortgage-deed to the extent of the Rs. 16,00) and odd entered in the statement Exhibit XXV, which was the basis of Exhibit FF. Though in the written statement it is contended that the whole of the difference of Rs. 50,00C and odd between the statement of accounts in Exhibit XXV and the statement of accounts attached to the written statement should be deducted from the consideration of Exhibit FF, it is quite clear that the 2nd defendant could attack the consideration for the mortgage-deed only in respect of the Rs. 16,000 and odd mentioned in it as part of its consideration. The learned Subordinate Judge refused to go into this question of partial failure of consideration, on the ground that if complete and true accounts had not been rendered by the mortgagees on the date of Exhibit FF in the matter of the *ijara* transaction, that was a separate transaction that a separate suit for account should be brought by the 2nd defendant and that he could not be allowed to raise it as a defence to the suit on the mortgage bond Exhibit FF. I am unable to accept as sound the above reasoning of the learned Subordinate Judge. Here were two confidential agents obtaining a mortgage-deed from their principal not only for amounts due to them on other loan transactions but also on account of a debt of Rs. 16,000 and odd alleged to be due to them for principal and interest in the matter of their management of 106 villages nominally leased to them. They were in a fiduciary position with regard to all sums of money received by them from the estate and were bound to render accounts. If they falsely represented that on the balance of the account the sum of Rs. 16,000 was due to them, then the Zemindar would be entitled to have the account

re-opened in a suit against them. Does the fact that the amount has become the consideration for a mortgage prevent the raising of this defence in a suit by the mortgagees? There is no doubt that it is open to a mortgagor to show that there has been an actual failure of consideration in respect of part of the consideration and that the mortgage is good for the balance [*Chinnayya Rawutan* v. *Chidambaram Chetti* (19) and *Tirumal Raju* v. *Pandla Muthial Naidu* (18)]; it is also clear that an attaching creditor can question the correctness of the whole account on which a mortgage of the attached property is founded [*vide*, *Rajani Kumar Dass* v. *Gaur Kishore Shaha* (20)]. There seems to be, therefore, no principle which gives the consideration for a mortgage a position any higher than that of an ordinary bond debt, the transfer of interest being by way of security only. It follows, therefore, that if circumstances are proved which would entitle an obligor to go behind a settled account, he is equally entitled to plead that the consideration based on that account has never been received.

The lower Court ought, therefore, to have allowed evidence to be adduced on the question of failure of consideration for Exhibit FF in respect of this Rs. 16,000 odd, and is now directed to take evidence adduced on both sides on this question and submit its findings within four months from the receipt of records. Ten days will be allowed for filing objections.

NAPIER, J.—These are appeals in Original Suits Nos. 34 of 1907 and 12 of 1908 in the District Court of North Arcot and Original Suit No. 18 of 1911, Original Suit No. 86 of 1911 and Original Suit No. 95 of 1911 in the Court of the Subordinate Judge of North Arcot. Appeals Nos. 173 and 182 of 1910 come before us on return of the finding; the other three are heard now for the first time. The issue on which the finding was called for is the same as one of the issues framed in the other three suits and it is with that issue that I propose to deal. The issue is as follows:—Whether the Karvetnagar Estate is inalienable by virtue of its tenure or the custom pleaded. The custom pleaded is as follows:—"Inalienability except for purposes for which the manager of a joint Hindu family can, as such manager, alienate joint family property." With regard to the tenure there is no dispute. The *zemindar* was originally a semi-independent Poligar holding an impartible *raj* on the terms of paying an annual tribute to the Nawab of Arcot and supplying a military force. There is no doubt that the Poligar was originally a petty chieftain who gradually improved his position, so his origin is different to that of other classes of *zemindars* who were in many cases mere tax-collectors for the ruling power. In the year 1792 the East India Company took over the control of the dominions of the Poligars of Venkatagiri, Kalahasti and Bommarajapalayam (the earlier name of Karvetnagar) from the Nawab under treaty with him, and by a later treaty of 1801 these semi-independent kingdoms became merged in British territory, losing their quality of *raj*. A year later in 1802 the Poligars became *zemindars* and *sanads* were issued to them. The history of these proceedings and the nature of the settlement made at that time has been fully explained in Appeal No. 62 of 1913 reported as *Secretary of State* v. *Rajah of Venkatagiri* (21). It is sufficient to say that the settlement was based on the commutation of service and military tribute and not on the revenue of the *raj* and that the *sanad* shows material divergence from the ordinary *sanad* in consequence.

Mr. Govindaraghava Aiyar who represents the present *zemindar* in all these suits admits that there was, during the peroid when the Poligar was semi-independent under the Nawab, a condition arising out of the tenure which forbade alienation either of the whole or any part of the *raj* without the sanction of the Nawab, the overlord. But he contends that there was in addition a custom of inalienability as pleaded and that that custom remained in existence after the treaty of 1801 and after the Permanent Settlement of 1802 and has continued to the present time.

(19) 2 M. 212; 5 Ind. Jur. 356; 1 Ind. Dec. (N. S.) 419.

(20) 35 C. 1051; 7 C. L. J. 586; 12 C. W. N. 761.

(21) 25 Ind. Cas. 266; 31 M. L. J. 97; (1916) 2 M. W. N. 96; 4 L. W. 133; 20 M. L. T. 284.

He seeks to fortify his argument as to the possibility of the existence of the custom concurrent with the inalienability owing to tenure by the analogy of the custom on which impartibility is based. And he has invited our attention to a long series of cases which, he contends, support the proposition that impartibility of either a *raj* or an estate is linked with the tenure and enures after the alteration of the tenure. He has accordingly examined the decisions in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (22), *Katama Natchiar* v. *Rajah of Shivagunga* (23), *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (24), *Collector of Trichinopoly* v. *Lukkamani* (25), *Mutta Vaduganadha Tevar* v. *Dora Singha Tevar* (26), *Mallik rjana* v. *Durga* (27), (the *Udayarpalayam* case) *Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalyana Rangappa Kalakka Thola Udayar* (28), the *Ramnad* case (29), (the *Udayarpalayam* case) *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (4), *Ram Nundun Singh* v *Janki Koer* (30), *Mahammad Afzal Khan* v. *Ghulam Kasim Khan* (5) quoting the passages which he relies on for his contentions. On the other side, it is contended by Mr. Rangachary that impartibility arises out of a family custom as to succession, not out of tenure, and that, therefore, the custom of impartibility may well continue after the change of tenure, but that the prohibition against alienation without the sanction of the overlord arises solely out of the tenure, that no family custom could have existed side by side with that prohibition and that when the prohibition was removed, the ordinary right of alienation came into existence.

I do not think it necessary to examine the accuracy of these alternate contentions because undoubtedly Mr. Govindaraghava Aiyar has been unable to prove the existence of any such custom prior to the cession by any evidence whatsoever. We must begin to seek this custom in the history of the dealings with this estate by the *zemindars* after the date of the Permanent Settlement. Now it is perfectly obvious why the claim of custom is put forward in the form of which Mr. Govindaraghava Aiyar contends for. It is well known that prior to the decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari* (3), the view was taken in the Courts of this Presidency that after the Permanent Settlement these impartible estates were inalienable except for certain purposes. The basis of this doctrine has shifted during the history of decisions, a fact which was pointed out and relied on by the Privy Council in the Pittapur case, *Rama Krishna Rao* v. *Court of Wards* (12), when the Board finally negatived the contention. Undoubtedly, the decision in *Sartaj Kuari* v. *Deoraj Kuari* (3) was unwelcome to the Courts of this Presidency and an attempt was made, in *Court of Wards* v. *Venkata Surya Mahipati Ramakrishna Rao* (31) before the High Court and in *Rama Krishna Rao* v. *Court of Wards* (12) before the Privy Council, to differentiate the impartible estates in this Presidency from those governed by the decision in *Sartaj Kuari* v. *Deoraj Kuari* (3) on the ground of a territorial custom. That plea failed and in consequence the Legislature intervened with the Impartible Estates Act, II of 1904. Now the attempt is renewed on the basis of the family custom pleaded here based on the language used by their Lordships in *Sartaj Kuari* v. *Deoraj Kuari* (3): "The inalienability of the estate depends upon custom, which must be proved, or, it may be in some cases, upon the nature of the tenure". Mr. Govindaraghava

(22) 9 M. I. A. 66; 1 W. R. (P. C.) 30; 1 Suth. P. C. J. 460; 1 Sar. P. C. J 826; 19 E. R 666.
(23) 9 M. I. A. 539; 2 W. R. (P. C.) 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843.
(24) 12 M. I. A. 1; 9 W. R. (P. C.) 15; 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241.
(25) 1 I. A. 282 at p. 293; 21 W. R 358; 14 B. L. R. 115; 5 M. H. C. R. 303; 7 Mad. Jur. 190; 3 Sar. P. C. J. 318 (P. C.).
(26) 8 I. A. 99; 3 M. 290; 4 Sar. P. C. J. 239; 5 Ind. Jur. 438; 1 Ind. Dec. (N. S.) 757 (P. C.).
(27) 13 M. 406; 17 I. A. 134; 5 Sar. P. C. J. 547; 4 Ind. Dec. (N. S.) 995.
(28) 24 M. 562; 11 M. L. J. 191.
(29) 24 M. 613*note*.
(30) 29 C. 828; 29 I. A. 178; 7 C. W. N. 57; 178 P. R. 1902; 4 Bom. L. R. 664; 8 Sar. P. C. J. 351 (P. C.).
(31) 20 M. 167 at p. 181; 6 M. L. J. 218; 7 Ind. Dec. (N. S.) 118.

Aiyar has argued that the Permanent Settlement was not intended to alter the tenure or the custom, as Government were not seeking revenue but only seeking to disarm the Poligars, and he relies on the decisions in *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (24), (the *Udayarpalayam* case) *Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalyana Rangoppa Kalakka Thola Udayar* (28) and (the *Udayarpalayam* case) *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (4), for the proposition that although it was undoubtedly open to the British Government to make any alteration it chose in the nature of the tenure, it must be shown affirmatively that they intended to do so at the time. It may be doubted whether this proposition is an accurate statement of the law since the decision of the Privy Council in *Secretary of State* v. *Bai Rajbai* (32). It is there held that the conditions of the tenure prior to cession cannot be presumed to have continued and that it rested on the claimant to show that the manner in which the estate has been treated by the British Government indicated that Government intended to preserve the prior incidents [*vide Seshachala Chetty* v. *Para Chinnasami* (33)]. But even if this proposition is sound, it is difficult to see how it could help the mortgagor. We are referred to the *sanad* Exhibit II (*a*), and it is argued that Article 7 only relieved the Zemindar of a disability but did not otherwise alter the tenure. The tenure was, however, in fact altered, the military service, the foundation of the tenure, being dispensed with; and as there is no evidence of a custom of inalienability other than that arising out of the tenure, there is no material on which a Court could decide that the alleged custom continued. It is contended by Mr. Rangachary that the *sanad* shows clearly that the condition of inalienability was removed and intentionally removed, because its *ratianale* had ceased with the abolition of the service. As put by my learned brother in the course of the argument, "The *raj* was inalienable without the sanction of the ruling power: By the *sanad* the sanction was given." The *sanad* recites the removal of the military service, the obligation to furnish troops and maintain forts and garrisons, and the commutation of that duty for an equivalent to be paid in money. Article 7 reads as follows:—"You shall be at full liberty to transfer without the previous consent of Government, or of any other authority, to whomsoever you may think proper either by sale, gift, or otherwise, your proprietary right in the whole or any part of your *zemindari* and such transfers shall be valid, provided that they be not repugnant to the Muhammadan or Hindu Laws or to the Regulations of the British Government."

Article 8: "Your *zemindari* will be liable to be sold either wholly or in part in satisfaction of a decree of Court."

Article 10: "Although you will have free right and liberty to transfer, by sale, gift or otherwise, any part of your *zemindari* not repugnant to the Regulations of Government, yet it shall not be competent for you to form any part of your land into a separate estate unless the public assessment amounts to the annual sum of 500 star pagodas."

Mr. Rangachary contends that these articles indicate the removal of the necessity for sanction. Mr. Govindaraghava Aiyar argues, *contra* that the words in Articles 7, being only a reproduction of paragraph 8 of the Regulation and being inserted in *sanads* to all Zemindars, cannot have special reference to the sanction, and he calls in aid the language of Article 2 where it is stated that the military service is commuted for an equivalent to be paid in money "by you and your posterity" With regard to Mr. Govindaraghava Aiyar's first contention it may be that in other *zemindaris* dealt with in identical language there had not been a prohibition against alienation without sanction, but, in my opinion, that cannot limit the effect of the words. Bearing in mind that this was the creation of an 'estate in land' in substitution for an existing *raj* and applying the principle that it is entirely within the province of Government to create conditions on which the estate is to be held, it is to my mind impossible to contend suc-

(32) 30 Ind. Cas. 303; 42 I. A. 229; 19 C. W. N. 1087; 13 A. L. J. 953; (1915) M. W. N. 563; 29 M. L. J. 242; 18 M. L. T. 179; 2 L. W. 731; 17 Bom. L. R. 730; 39 B. 625; 23 C. L. J. 1 (P. C.).

(33) 40 Ind. Cas. 909; 32 M. L. J. Sup. 1; 40 M. 410.

cessfully that these words did not create a new estate with the incidence of alienability for the benefit of the Zemindar. It is true that the Sudder Adaulat Court had at different times construed the *sanad* as creating an estate analogous to an estate-tail or as a settlement on the *zemindar* for life with remainder to his heirs and successors in perpetuity [*vide* the history of these decisions set out in the judgment of the Board in *Rama Krishna Rao* v. *Court of Wards* (12)]. But those views were subsequently abandoned and have been declared by the Privy Council to be unsound. As to his contention on Article 2 it is sufficient to point out that those words did not create an 'estate' and that they must be read with Article 15, under which the Zemindar is "authorised and empowered to hold in perpetuity and his heirs, successors and assigns at the permanent assessment herein named the *zemindari* of Bommarajapalayam". Mr. Govindaraghava Aiyar further argued that the rights of the Poligars had been recognised in the treaty and could not be cut down by the language of the *sanad*. With regard to this, the answer is that the short period of a few months between those two events is not sufficient to create new rights and that the Regulation passed in 1802 prior to the *sanad* contains the same words. There still remain the words "provided that such transfers shall not be repugnant to the Hindu Laws." No argument has been addressed to us by either side on these words, but it is to be noted that since the decision in *Rama Krishna Rao* v. *Court of Wards* (12), it must be held that an absolute power of alienation is in accordance with the Hindu Laws. There is indeed no reservation of custom in the *sanad* or in paragraph 8 of the Regulation and for this reason, I should be strongly inclined to doubt whether the Court could take into consideration any custom prior to the cession. But as I have held no such custom was proved, there is no necessity to decide this point.

Coming now to the history of the *zemindari* after the settlement, we have to see whether the alleged custom is made out. The first difficulty in the way of the appellant is this. Up till the decision in *Sartaj Kuari* v. *Deoraj Kuari* (3), it was held by the Courts of this Presidency that an impartible *zemindari* was inalienable except for special reasons. The proposition is stated in *Pareyasami* v. *Saluckai Tevar* (34) as follows at page 177, speaking of the Palayaput of Padamathur, an ancient impartible *zemindari*: "We think that the *zemindar* should be regarded as possessing only the qualified powers of disposition of a member of a joint family with such further powers, or it may be with such restrictions, as spring from the peculiar character of his ownership and that these powers fall short of a right of absolute alienation of the estate". The language used in *Bhavanamma Garu* v. *Ramasami Garu* (35), the date of which is 1881, is as follows:— "Assuming, therefore, that the *zemindari* of Devarakota is an impartible estate belonging to a joint Hindu family, descending to a single heir at a time to the exclusion of the rest of the family, that the Zemindar for the time being is not competent to bind his successors by a permanent grant of property forming part of his estate, and that an alienation made by him in circumstances which would not ordinarily render it binding on a joint Hindu family could not enure beyond the grantor's life, the question for decision is whether the grant now in dispute ceased to be in force on the death of the late *zemindar*." On these decisions, the law, as understood then, was practically what is contended for now as arising by custom. Is it possible for a custom to exist which is in accordance with the law as then understood? It has been held by a Bench of this Court in *Sivasubramania Naicker* v. *Krishnammal* (16) that such a custom can be proved. But I doubt whether this view is good law in the face of the language used by the Privy Council in *Rama Krishna Rao* v. *Court of Wards* (12). There Mr. Mayne was contending for a territorial custom and their Lordships use the following language: "The supposed custom followed the law.....The custom now relied upon did not modify the law. It had no force independently of the law." It is difficult to see how a practice in accordance with law can be relied on as a custom, for the essence of a custom is in its being some special usage modifying the law. If this argument is sound, the whole of Mr. Govindaraghava Aiyar's case on custom

(34) 8 M. H. C. R. 157.
(35) 4 M. 193; 1 Ind. Dec. (N. S.) 969.

must go, for it was only in 1899 that the right of free alienation was definitely laid down by the Privy Council and the old law declared to be bad.

I will, however, deal with the evidence that has been put before us to establish this custom. The references to the Exhibits are taken from the printed papers in Appeal No. 48. The question is whether there has been established a custom of non-alienation except for purposes binding on the family. Before dealing with the evidence, it is well to note that Mr. Rangachary for the defendants, in answer to a question put to him from the Bench, stated his contention as to the effect of the evidence to be this: That each Zemindar in succession ignored the law as then undoubtedly supposed and treated the Zemindari as alienable by him to whatever extent he chose. Mr. Govindaraghava Aiyar has invited our attention to various documents such as resumptions of *inam*, correspondence between the Zemindar and the Collector, protests by the members of the Zemindar's family, statements by the Zemindar himself, etc., as supporting the supposed custom and we have carefully examined all these documents. Exhibit VII series are relied on to show that where he assigned the revenues, he did not mortgage the estates themselves and only assigned the revenues for his own life. Exhibit VII is translated as follows:—"The two villages of Samantavada and Aravasi are mortgaged for the payment;" but it is contended that the word used is "Tanaka" and that it does not mean mortgage. We are informed by the Bench clerk and a reference to the dictionaries supports the view, that the word "Tanaka" does convey the idea of security on the property, and it is certainly to be noted that there is nothing in any of these documents to suggest that the security was only to enure for the lifetime of the grantor. The fact that there was no power of sale inserted in the document is no argument, because powers of sale are not usually inserted into mortgages. He next relies on a series of letters. The first is Exhibit XII*a*, from the Zemindar to the Collector in 1842. It has reference to an *inam* granted by the Zemindar's predecessor which the Zemindar has resumed. It refers to the *inam* as being contrary to custom. On examination of the letter, it appears that the Zamindar was complaining of the grant of a thriving and populous village on a permanent lease for very small *beriz*, which, he says, is contrary to the custom, or more accurately, contrary to the usual regulations. This complaint appears in three places in the letter. There is no suggestion that according to the custom of the family, there is no power to grant any *inam* except for necessary purposes. The next is also a letter to the Collector of the same year with reference to a *kattubadi amara inam*, which the Zemindar claims to have the right to resume. There is no plea of the alleged custom and it is admitted that *inams* of this class can be resumed at will. The next is in 1848 and has reference to a choultry *inam*. Here the Zemindar puts forward the claim: "Even if our predecessors had the right to give it out of the income, it can hold good only for their lifetime, but we, the reversioners, are not bound by such grants." The letter, though signed by the Zemindar, is obviously drafted by a lawyer and on a careful analysis it is clear that he relies on his right to redeem after the Zemindar's death, not on any family custom, but on the language of the *sanads*, the decrees of the Courts and the acts of the Legislature. A part of the letter is taken up with the contention that the right of resumption is vested in the Zemindar and not in Government, a position that has quite lately been upheld by this Court in *Secretary of State* v. *Rajah of Venkatagiri* (21). The next is Exhibit IX. There the Zemindar does object to the grants of the *inams* which are "contrary to the Hindu Law and the Laws and adverse to reversionary heirs." He does not say "contrary to the family custom", and he complains that the grants were made without considering the difficulties that would ensue. The letter ends by the claim to resume as the Brahmins have "behaved meanly". It is difficult to see how this can be put forward as evidence of the custom, for if he thought the alienation to be contrary to the Hindu Law, he was only expressing the view then taken by the Courts. Exhibit VI, which is in the year 1869, is a protest sent to the Zemindar, Venkata Perumal Raju, by his younger brother and the gist of the whole complaint is that the estate

is ancestral and not the self-acquired property of the Zemindar, that he is a coparcener entitled to a share and that the Zemindar has no right to alienate the estate for his debts. Here, again, there is no word about custom. He makes an extravagant claim of a right to partition and bases his objection to the alienations on that. The next is Exhibit XV of 1881 written by the son to the then Zemindar complaining of the debts and alienations. It is a long, rambling document and nowhere contains any reference to the supposed custom. The next series of documents are orders on petitions connected with the *inams*. They assert the power of resumption but nowhere deny the right of the Zemindar's predecessors to grant. Much reliance is placed on Exhibit XIV as being a recognition of the sons' right. It is an agreement entered into in 1879 between Venkata Perumal Raju, the then Zemindar, and his son Bommaraju, under which he binds himself not to contract new debts except such as are contracted for lawful purposes and are necessary in the interests of the Samasthanam. He also agrees to discharge the debts of the son to the extent of Rs. 17,000, the son undertaking not to borrow anything more, and the son agrees to join with him in a bond for the purpose of borrowing a lakh of rupees for paying *peishcush*. Mr. Govindaraghava Aiyar strongly relies on this as evidence of the custom. But apart from the initial difficulty that it gives effect to what was supposed then to be the law, there is this answer, namely, that at that time, the estate was largely involved and the creditors, knowing the law as then understood, were very naturally insisting on the son of the Zemindar joining in future alienations. The fact that the e tate was heavily involved is shown by Exhibit XIII*a*, a letter written by the son after his father's death, in which he states that there was a debt of sixty lakhs and he there complains that the creditors were compelling his father that he (the son) too should sign the bonds and states that out of respect he had to do so. So far from proving that the father and the son recognised the existence of the family custom, it shows that for the purpose of getting his own debts paid, he had been compelled to join his father in executing mortgages for further advances because the creditors insisted on it. Evidence that such mortgages were executed by both jointly is afforded by Exhibits D, F, VIII, etc. We then come down to the year 1894, Exhibit XXIII, the plaint in a suit against the then Zemindar by his son claiming that the father had no right of alienation beyond his lifetime. Here, it seems to me, we get for the first time the allegation that by custom and by nature of the tenure, the said Zemindari is inalienable. Now giving all due weight to all the above documents and even assuming that from time to time the brother or son of the then Zemindar set up a custom, it cannot, in my opinion, assist the appellant in the slightest degree, and for this reason, namely, that each Zemindar on inheritance from his father continued his father's practices and never recognised any limit to his own power of alienation. A protest by a son carried into practice when he came into the possession of the estate might be some evidence of custom, but a contention to which the Zemindar paid no attention and which the person making the protest never adopted himself can be of no value whatsoever. It appears that during the whole period covered by the evidence, 200 out of 800 villages were granted in *inam* for various purposes; a large number of the grants were certainly made on festivals and for religious duties and Mr. Govindaraghava Aiyar seeks to explain away this class of alienations on the ground that pious purposes are part of the doctrine of necessity and that, therefore, the fact that these alienations were made proved the recognition by the *zemindar* of the limitation suggested. He relies on a case reported as *Vasudev Bhat* v. *Venkatesh Sanbhav* (36). Mr. Rangachari has referred to a case, *Muthusami Pillai* v. *Dorasami Pillai* (37), where it was held that the only forms of alienation for pious purposes which come within the doctrine of necessity are the grants for family worship; and this certainly appears to be the view taken in Madras. In my opinion all these *inams* for various purposes are explained by the

(36) 10 B. H. C. R. 139.
(37) 11 M. L. J. 310.

view taken by each *zemindar* that he had absolute, uncontrolled power of alienation once the restriction placed by the nature of his military tenure was removed. It is common knowledge that all Rajahs, whether absolutely independent or semi-independent, have been in the habit of making large grants of villages for military service, for revenue service and for personal service, and it is only necessary to refer to the work of the Inam Commission to establish this undoubted fact. This being so, the fact that one-fourth of the villages of the estate has been granted as *inam* is a sufficient answer to the claim put forward in these suits. On behalf of the respondents, our attention was invited to the evidence showing that there have been an enormous number of mortgages. By far the largest number of these are not produced and the respondents urged with some justice that this evidence is in the possession of the *zemindar* and that if there were any considerable number which purported to be for life only and to admit the custom alleged, they would have been produced by the appellant in support of this case; whereas in fact we only find the documents Exhibit VII series, of which the most that can be said is that they are ambiguous. We are referred to the evidence of the first defence witness at page 225. This witness was head clerk in the estate and had been there for the last twenty-five years. He states that the Narayanavanam *Taluk* of the estate has been under usufructuary mortgage since 1882 to his knowledge and had been under a Court Receiver before that, that the Tirutani *Taluq* has been under usufructuary mortgage since 1884 and that in the Pallipat *Taluq* various villages have been under mortgage since 1882, and he ends by admitting that there does not appear to be even a single village which is not under mortgage, either simple or usufructuary. He also admits that about ten villages in the estate have been granted to *bandhus*. One of these grants is exhibited and is before us as Exhibit B. It is made to the sister's son of the Rajah and it cannot be contended that a grant of that sort is one recognised by the Hindu Law. I do not think it necessary to examine the evidence let in by the respondents at all in detail. It admittedly lies upon the appellant to establish the custom and, in my opinion, he has absolutely failed to do so. So far from evidencing the custom alleged, the documents conclusively establish that each *zemindar*, however much he may have protested when he was a son, has exercised the right of alienating any portion of the estate he chose for any purpose which he thought fit—with the result, as stated above, that there is not a single village in the estate which has not either been granted in *inam* or mortgaged. On this first issue, therefore, common to all the appeals, the appellant must fail. My learned brother in his judgment has dealt with the other issues that arise in each case and I concur with him in his reasons and the result that he has arrived at.

Appeals on the main question dismissed.

V. R. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 536 OF 1914.

January 18, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

SALIG RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHAJJU AND OTHERS—DEFENDANTS—RESPONDENTS.

Regulation XVII of 1806—*Mortgage by way of conditional sale—Sale clause struck out by Deputy Commissioner—Foreclosure proceedings, validity of—Redemption—Punjab Alienation of Land Act* (*XIII of* 1900), *s.* 9 (2).

Defendant executed a mortgage by way of conditional sale in favour of plaintiff When the alienation was put up for mutation, the Revenue Officer, thinking that the clause relating to conditional sale was incapable of enforcement under the provisions of the Punjab Alienation of Land Act, enquired of the mortgagee whether he would agree to its erasure from the deed, and upon the latter giving his consent the Deputy Commissioner struck out the said clause. The mortgagor, however, was not a member of an agricultural tribe, and the Deputy Commissioner's action was, therefore, *ultra vires*. Subsequently, the plaintiff, ignoring the

NIMBA *v.* MOTIRAM.

e rasure of the clause, issued the usual notice of foreclosure, and upon the expiry of the year of grace sued for possession as vendee:

Held, that the sale clause having been struck out of the deed, the mortgagor was justified in ignoring the notice of foreclosure which he knew to be unwarranted by the deed as it existed, and that the mortgagee was, therefore, equitably estopped from relying upon the foreclosure proceedings.

Second appeal from the decree of the Divisional Judge, Ambala, dated the 10th February 1914.

Mr. *Gokal Chand Narang*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This was a suit for the possession of a plot of land on the strength of a mortgage by way of conditional sale executed on the 26th May 1900 by one Jamiat, a Kalal, in favour of Jowahara, the ancestor of the plaintiff. In 1904, when the alienation was put up for mutation, the Revenue Officer, thinking that the clause relating to conditional sale was incapable of enforcement under the provisions of the Punjab Alienation of Land Act, enquired of the mortgagee whether he would agree to its erasure from the deed, and upon the latter giving his consent the Deputy Commissioner struck out the said clause. It is beyond dispute that the mortgagor was not a member of an agricultural tribe, and that the clause in question did not come within the purview of section 9, sub-section 2 of the said Act, under which the Deputy Commissioner purported to act, and that the latter's action was *ultra vires*.

The fact, however, remains that the deed ceased to contain a stipulation providing for sale in the event of the mortgagor's failure to pay the money within the specified period. Plaintiffs, ignoring the erasure of the clause, issued in 1910 the usual notice of foreclosure, and upon the expiry of the year of grace brought the present action for possession as vendees.

The crucial question for determination is whether the mortgagor has lost his right of redemption. Now, the object of the Regulation dealing with foreclosure of mortgages (XVII of 1806) is to protect the equity of redemption and to give the debtor a year of grace within which to redeem the property. It is manifest that the mortgagor can avail himself of this right only if he is aware of the existence of a condition providing for sale in the event of his failure to pay the debt. The deed in this case has no such stipulation, and the mortgagee, having agreed to its cancellation, cannot very well say that the mortgagor should have known that the Deputy Commissioner's action was unauthorized, that the cancellation had no legal existence, and that the instrument always retained its original character. It seems to us that the mortgagor is perfectly entitled to urge that had the erasure been cancelled, he would have been aware of it and taken necessary steps to redeem the property and prevent the transaction becoming a sale by the expiry of the year of grace. He was justified in ignoring the notice of foreclosure, which he knew to be unwarranted by the deed as it existed, and in these circumstances the mortgagee is equitably estopped from relying upon the foreclosure proceedings.

We are accordingly unable to hold that the mortgage has been converted into a sale; but upon the admission of the learned Pleader for the respondents, we grant the plaintiffs a declaratory decree to the effect that the cancellation of the conditional sale clause was *ultra vires* and that the clause shall be deemed to be part of the mortgage transaction. The admission shall not preclude the defendants from contesting hereafter their liability to pay interest for the entire period. The question relating to interest is not before us, and we consequently refrain from expressing any opinion upon the merits thereof.

We accordingly dismiss the suit for possession, but modifying the decree of the lower Appellate Court we grant the plaintiffs a declaration in the terms stated above. The appeal is accepted *pro tanto*, and the parties are directed to pay their own costs in all the Courts.

Appeal partly accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 268 OF 1916.

March 15, 1917.

Present:—Mr. Justice Beaman and Mr. Justice Macleod.

NIMBA LOTU PATIL—PLAINTIFF—APPELLANT

versus

MOTIRAM UKA PATIL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 107—Contract for sale of goods—Buyer, default by—Re-sale.

MALAIPERUMAL CHETTIAR *v.* ARUNACHALLA CHETTIAR.

A contract for the sale of cotton was made on the 5th January and weighment was completed on the 9th. The contract was then ended by an express agreement that the payment of the price and delivery were to be postponed for two or three days, and that on payment of the price delivery was to be effected by substituting the defendant's board for the plaintiff's. A few days afterwards the defendant committed a breach of the contract, and the plaintiff, after sending the defendant a notice on the 2nd April, re-sold the goods on the 22nd, and then sued the defendant for the difference in the price:

Held, that the plaintiff was entitled to recover from the defendant the difference between the contract price and the price which he realised by the re-sale.

Second appeal from the decision of the Assistant Judge, Dhulia, in Appeal No. 645 of 1913, confirming the decree passed by the Subordinate Judge, Chalisgaon, in Civil Suit No. 570 of 1912.

Mr. *P. V. Nijsure*, for the Appellant.

Mr. *B. G. Modak*, for the Respondent.

JUDGMENT.—The plaintiff in this suit seeks to recover damages for the breach of a contract of sale of 122 maunds of cotton. The contract of sale was made on the 5th of January 1911 and the weighment was completed on the 9th of January 1911. The contract of sale was then ended by an express agreement that the payment of the price and delivery were to be postponed for two or three days, and that on payment of the price delivery was to be effected by substituting the defendant's board for the plaintiff's. It is thus clear that on the 9th of January 1911 the contract was completed and the property in the goods had passed to the defendant. Within a few days, however, the Courts below find that the defendant committed a breach of this contract to the plaintiff's knowledge. The rights of the parties in these circumstances are quite clear. The goods belonged to the defendant. The plaintiff had the choice of two remedies: either to bring a suit for the recovery of the price, the action being then simply in debt; or after giving due notice to the defendant to sell the goods at the defendant's risk and should they not realise the contract price, to recover from the defendant the difference. The plaintiff actually sent the defendant a notice on the 2nd of April 1911, and although the defendant refused to accept it, there can be little doubt that it reached him, and being written on a post card, that he read it. Now, a notice of this kind is made compulsory not in the interest of a plaintiff, situated as the plaintiff was here, but in the interest of the defendant; and the defendant certainly is not complaining that the plaintiff effected the sale too early but rather too late.

We are, therefore, very clearly of opinion that the plaintiff is entitled to recover from the defendant the difference between the contract price and the price which he realised for this cotton when it was sold at the defendant's risk on the 22nd of April after full and sufficient notice; and that is what he has claimed in this suit.

We must, therefore, reverse the decree of the Court below and award the plaintiff the full amount claimed less Rs. 86-4-0, to which the plaintiff is not entitled, with all costs throughout.

Decree reversed.

MADRAS HIGH COURT.

APPEAL SUITS NOS. 139 AND 275 OF 1916.

March 22, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Sadasiva Aiyar.

IN A. S. NO. 139 OF 1916

MALAIPERUMAL CHETTIAR, MINOR, AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ARUNACHALLA CHETTIAR, BY HIS AGENT SUBRAMANIA CHETTIAR—PLAINTIFF—RESPONDENT.

IN A. S. NO. 275 OF 1916

MEENATCHI SUNDARATHAMMAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

KHAN SAHIB VA. SINNA MARACAYAR—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family trade carried on by manager—Debts, liability for—Presumption—Minor co-parceners liability of—Guardian, right of, to con-

tinue caste trade, on death of manager—Principal and agent—Power-of-Attorney with reservations, effect of.

Where a Hindu family belongs to a caste whose caste calling is a particular kind of trade and the manager of the family carries on the trade as a family concern, it is competent for the next surviving eldest co-parcener on the manager's death to continue the trade on behalf of the family and minor co-parceners are bound by his acts and are liable for debts contracted by him as their guardian in the course of such trade. [p. 226, col. 1.]

Where the surviving members are all minors, it is competent for the mother to continue the trade on their behalf under the advice of her relations and to bind the minors for liabilities incurred by her in the course of the business. [p. 226, col. 1.]

The ordinary presumption in the case of a trading caste or family is that the entire family credit and all the joint family properties are embarked in the business, even as regards the minor members. The whole of the joint family properties, therefore, and not the trade assets alone are liable for the joint family trade debts which cannot, on principle, be distinguished from any other joint family debts. [p. 227, col. 1.]

Muthaya Pillai v. *Tinnevelly South India Bank Ltd.*, 37 Ind. Cas 230; 5 L. W. 341, followed.

Sanka Krishnamurthi v. *Bank of Burma Ltd.*, 11 Ind. Cas. 79; 14 Ind. Cas. 389; 35 M. 692; 21 M. L. J. 620; (1911) 1 M. W. N. 385; 11 M. L. T. 56, distinguished.

An agent cannot by his acts bind the principal to a larger extent than he is empowered to do under the power-of-attorney granted to him. If the power does not authorise the agent to carry on a business *except with limitations*, any act done by him in excess of such power will not bind the principal. [p. 226, col. 2.]

Appeals against the decrees of the Court of the Subordinate Judge, Negapatam, in Original Suits Nos. 23 of 1914 and 6 of 1916 respectively.

Messrs. *C. Madhavan Nair* and *K. C. Subramaniam*, for the Appellants in A. S. No. 139 of 1916.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (the Advocate-General) and Mr. *S. Desikachariar*, for the Respondent in A. S. No. 139 of 1916.

Mr. *K. C. Subramaniyam*, for the Appellants in A. S. No. 275 of 1916.

Mr. *N. M. Malim Sahib*, for the Respondent in A. S. No. 275 of 1916.

JUDGMENT.

SADASIVA AIYAR, J.—The two minor defendants in Appeal No. 139 of 1916 are the 2nd and 3rd defendants in the connected Appeal No. 275 of 1916. The 1st defendant in the suit (Original Suit No. 6 of 1916) out of which the latter Appeal No. 275 of 1916 has arisen, is the mother of the two principal defendants who are the sons of one Kannusami Chetti and the younger brothers of one Tirumudi Chetti. Tirumudi Chetti died on the 7th July 1911 having carried on trade in arecanuts for about two years before his death. The trade had been carried on on a pretty extensive scale and he owed moneys to numerous customers. But he also left stock in trade of the value of about five or six thousand rupees according to the evidence. The probabilities are that there were also outstandings due to him in the business when he died suddenly of cholera, but as the defendants have not produced their trade accounts, it is impossible to state what sums were then really due to the business In the power-of-attorney, Exhibit A, executed by the mother, she clearly admits that there were outstandings to be collected due to the business. On Tirumudi's death on 7th July 1911, the minors' mother thought it best in the interests of her sons to continue to carry on the business on their behalf and she executed in favour of her brother Muthiah Chetti (who had been assisting Tirumudi Chetti during the latter's lifetime in the management of the arecanut business) and also in favour of her sister's husband Subramania Chetti, empowering them to carry on the business. The business was so carried on till about the end of 1914.

The two suits before us have been filed by two of the creditors of the defendants' business to recover the amounts due to them from the joint family properties belonging to the minor defendants. In the second suit, Original Suit No. 6 of 1916, the defendant, the mother, is also sought to be made liable as she had personally undertaken to be liable for the balance that may be found due to the plaintiff in that suit. The Subordinate Judge decreed the suits against the minor defendants, in the first suit to the extent of the joint family assets and against them similarly as defendants Nos. 2 and 3 in the second suit, as also against their mother the 1st defendant in that suit personally. Hence these appeals.

The questions for consideration are, (1) whether Tirumudi Chetti carried on the arecanut business as manager of the joint Hindu family consisting of himself of his minor

brothers, whether he had power under the Hindu Law to so carry on the business to the benefit of his brothers also and whether they are bound by the liabilities incurred by him to the extent of their assets in all their joint family properties; (2) whether the mother was entitled to continue the business so as to bind the minors with liabilities; (3) whether the power-of-attorney, Exhibit A, authorised her brother and her brother-in-law to continue the business without any reservations, or whether their authority extended only to such acts as were necessary for the winding up of the business carried on by Tirumudi.

As regards the first point, I think that as the family of the defendants belong to a caste whose caste calling is trade in betel and arecanuts and as the father (who had, it is proved, earned moneys by trade in foreign countries) had left properties which were inherited by his sons, Tirumudi Chetti the eldest son, who according to the Hindu Law stands in many respects in the position of a father towards his younger brothers, was justified in taking up the caste calling for the benefit of the family as soon as he came of age. And he seems to have done so with the permission and under the advice of his mother and his mother's brother. There is nothing to show that it was wholly imprudent to embark on that business, and so far as I could gather from the evidence and the recitals in the power-of-attorney, it was a proper business for Tirumudi Chetti to have embarked upon.

Then as to its being proper to further carry on the business, the mother had evidently the advice of her brother and her sister's husband whom one would naturally expect to be the persons best fitted to give such advice and I am, therefore, of opinion that her resolve to continue the business as the best thing to do in the interests of her minor sons after Tirumudi's death is binding on the minors.

Then the next question is whether she intended merely to give those two male relations of hers the power to do only those acts which were required for winding up the business (that is to sell the stock in hand, collect the outstandings and pay the debts) or whether she gave them power to carry on the business as usual (by purchasing the stock required from time to time for the business to be carried on and continuing the trade in the manner in which it has been carried on before). The power-of-attorney was executed about eight days after Tirumudi's death. It does not restrict the powers of the agents in carrying on the business. It expressly provides for the business being carried on thereafter under the style of Tirumudi Chetti and Brothers instead of in the name of Tirumudi Chetti alone, and though it also states that owing to her inability by reason of her sex to collect the outstandings and to pay the debts, she is obliged to give this power-of-attorney, I think, reading the document as a whole, that it contemplates the old business to be carried on as usual, with an addition to the style to show that her minor sons have an interest in and are intended to be benefited by the business.

The plaintiff also relied upon certain printed circulars, Exhibit C series, purporting to have been sent by defendants' mother to all the customers of the business, asking them to continue to patronise the business as usual. But I am rather doubtful, in the absence of any evidence to show that these circulars were issued under her instructions, whether they are admissible in evidence against the defendants. There is no doubt evidence to show that Muthiah Chetti gave orders to the printer in her name to print the circulars. But he cannot bind her by his acts to a larger extent than he was empowered to do under the power-of-attorney. If the power-of-attorney does not give him power to carry on the business *except with limitations*, the issuing of the circular in her name, in which circular it is recited that he has been given power to continue the business without reservation, cannot bind the defendants. However, whether Exhibit C series are admissible or not, I think (as I said before) that the power-of-attorney itself does indicate that she had resolved upon carrying on the business as usual and gave her agents power to so carry on the business.

Then the last question that remains is, whether the minors are liable only to the extent of the assets embarked in the arecanut business

or to the extent of all the joint family properties which belonged to them and to Tirumudi Chetti. The question as above formulated implies that it was some definite amount taken out of the whole of the joint family properties which had been invested in the business by Tirumudi Chetti. There is nothing to indicate that it was so, and I think that the ordinary presumption in the case of a trading caste or family is that the entire family credit and all the joint family properties are embarked in the business. There are no doubt certain observations, which are rather in the nature of *obiter dicta*, found in the judgment of one of the learned Judges who decided the case of *Sanka Krishnamurthi* v. *Bank of Burma, Ld.* (1), which observations lend support to the idea that the assets directly involved in the business carried on by the managing member of a Hindu family, in which there are minors, can alone be proceeded against so far as the minor members' liability for the trade debts is concerned. But the question whether in an ordinary Hindu trading family the presumption is not that all the joint family assets are involved even as regards minor members was not considered in that case, and as I said before it was unnecessary to consider that question for the purpose of deciding that case. There is another considered later decision in *Muthaya Pillai* v. *Tinnevelly South India Bank, Ltd.* (2), and I respectfully agree with the observations therein, which establish that the whole of the joint family properties are liable for the joint family trade debts, which cannot be, on principle, distinguished from any other joint family debts. That for all ordinary joint family debts the whole of the family properties could be proceeded against in execution cannot be disputed. Mr. Madhavan Nair sought to make some distinction between an ancestral trade carried on by a father and a joint family trade begun for the first time either by the father or by the elder brother. I do not think that on principle any such distinction can be made so far as this question is concerned.

(1) 11 Ind. Cas. 79; 14 Ind. Cas. 389; 35 M. 692; 21 M.L. J. 620; (1911) 1 M. W. N. 385; 11 M. L. T. 56.
(2) 37 Ind. Cas. 230; 5 L. W. 341.

In the result I would dismiss the appeals with costs.

AYLING, J.—I agree.

Appeals dismissed.

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2156 OF 1915.

June 6, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Smither.

JAGADISH CHANDRA ROY CHOWDHURY—PLAINTIFF—APPELLANT

versus

BISWESWARI DEBYA AND OTHERS—PRINCIPAL AND *pro forma* DEFENDANTS—RESPONDENTS.

Lease, construction of—Lease for indefinite period, whether heritable or permanent—Renewal of lease.

Where a *kabuliyat* which stated that the lands were settled for five years as a *sarasari jote* at a certain rent, provided that after the expiration of the term the lessee shall take a fresh settlement under a fresh *kabuliyat* and that in case of failure he shall hold and enjoy possession of the land on payment of an excess rent of one anna per rupee every five years, and that the lessee shall not be competent to make a gift, sale or mortgage of the tenure to anybody:

Held, that upon a proper construction of the *kubuliyat* the lessee, if he failed to take a fresh settlement on the expiry of the first term, was to hold and enjoy possession of the land at an increased rent as provided in the *kabuliyat* and that there was no renewal of the lease at the end of every five years; that the tenancy, therefore, after the expiry of the first term was for an indefinite period; but as there were no words of inheritance in the lease nor were any circumstances, such as long possession, or the fact of succession to heirs or a series of transfers established, the tenure could not be presumed to be a heritable or permanent one. [p. 230, col. 2.]

Appeal against the decree of the District Judge, Rangpur, dated the 4th June 1915, reversing that of the Munsif, Gaibanda, dated the 28th August 1914.

FACTS of the case appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Romesh Chandra Sen*), for the Appellant.—The plaintiff is the appellant, and the appeal arises out of a suit for ejecting the defendants Nos. 1 and 2. One Sris Chandra, the husband of defendant No. 1, was holding the land in suit under a lease from the

plaintiff. The lease was granted for a term of five years from 1311 to 1315 *B. S.* It contained a provision for renewal at the expiration of the term, and stipulated that if the tenant holds the land without renewing the lease he shall be liable to pay a higher rent. On the 25th May 1912, *i. e*, after the expiration of the term of five years, the lessee died. Then the lessee's widow sold the holding to defendant No. 2 in June 1913. The suit was brought on 1st of September 1913. The lease was limited only for a term of five years; it was neither a transferable nor a heritable lease; it determined on the termination of the lease, or at any rate on the death of the lessee, so the lessee's widow had no right to transfer it and consequently the purchaser obtained no right by virtue of his purchase. There is not a single word in the lease that the lessor even intended to confer any hereditary or transferable right on the lessee. The only possible construction that can be put on the lease is that it is a simple lease for a limited term with an option of renewal on the part of the lessee, or at least it may be a lease for life. By no stretch of language can the lease be taken as a lease in perpetuity or a hereditary lease. The word used is second person singular number "you" and such words as son, grandson, heirs and legal representatives must have been intentionally avoided. There is not a single word of heritability or transferability. If the lessee had been alive he could have taken advantge of the absence of a clause for re-entry after the lapse of five years limited by the lease. But on his death after the expiry of the term of the lease, the lease determined and the defendant No. 1, the heir, becomes a trespasser and so the defendant No. 2 who is only a purchaser from defendant No. 1 can acquire no right or title to the land by virtue of his purchase. So that as upon a construction of the lease it cannot be treated as a perpetual and hereditary lease, the lower Appellate Court should have given the plaintiff a decree for *khas* possession.

[CHATTERJEA, J.—Was any rent accepted by the plaintiff after the death of the lessee?]

No. There is a clear finding on this point.

The lower Appellate Court seems to have thought erroneously that because Srish Chandra, the lessee, had the option to renew the lease at the end of every five years, therefore, the lease must be a heritable and permanent lease. The *kabuliyat* restrains the lessee from giving, selling or mortgaging the leasehold interest. It also gives the lessee an option to renew the lease, but it provides that in case of his failure to renew if he holds he shall be liable to pay a higher rent; so this clause is a penal one like that in *Tejendro Narain Singh* v. *Bakai Singh* (1) and *Abdul Aziz* v. *Karu* (2). There cannot be any dispute about this, that a lease for an indefinite term without any word of heritability and transferability or any word importing perpetuity can be nothing more than a lease for life. See *Bilasmoni Dasi* v. *Raja Sheopersad Singh* (3), *Tulshi Pershad Singh* v. *Ramnarain Singh* (4), *Agin Bindh Upadhya* v. *Mohan Bikram Shah* (5), *Narsingh Dyal Sahu* v. *Ram Narain Singh* (6), *Ram Narain Singh* v. *Chota Nagpur Banking Association* (7), *Syed Mahammad Khan* v. *Maharja Ram Narain Singh Bahadur* (8), *Lekhraj Roy* v *Kanhya Singh* (9), *Lekhraj Roy* v. *Kunhya Singh* (10), *Prodyot Coomar Tagore* v. *Krishnamoni Dasya* (11).

Babu *Broja Lall Chuckerbutty* (with him Babu *Kali Prosunno Piplai*), for the Respondents.—The cases referred to in support of the appellant's case do not apply to the facts of the present case. They are distinguishable from the facts and circumstances of the present case, because in none of these cases was there any covenant for renewal as we have got in the present case Therefore, in this case the legal effect of the covenant for renewal contained in the lease is to be considered. Where the lease is for a term and the

(1) 22 C. 658; 11 Ind. Dec. (N. S.) 439.
(2) 21 Ind. Cas. 443; 18 C. L. J. 95.
(3) 8 C. 664; 6 Ind. Jur. 274; 4 Sar. P. C. J. 325; 9 I. A. 33; 11 C. L. R. 215; 4 Ind. Dec. (N. S.) 427 (P. C.).
(4) 12 C. 117; 12 I. A. 205; 9 Ind. Jur. 433; 4 Sar. P. C. J. 646; 6 Ind. Dec. (N. S.) 80 (P. C.).
(5) 30 C. 20; 7 C. W. N. 314.
(6) 30 C. 883 at p. 887.
(7) 36 Ind. Cas. 321; 43 C. 332.
(8) 7 C. L. J. 90.
(9) 14 W. R. 262.
(10) 3 C. 210; 4 I. A. 223; 3 Suth. P. C. J. 453; 3 Sar. P. C. J. 758; 1 Ind. Jur. 636; 1 Ind. Dec. (N. S.) 722 (P. C.).
(11) 40 Ind. Cas. 513; 21 C. W. N. 809.

lessee, dies during the continuance of the lease it has been held in *Alejan Bibi* v. *Raham Ali* (12) that the lease is heritable for the rest of the term. In the present case the lease provides that it shall remain in force for a period of five years, that at the end of every period of five years the lessee would be entitled to renew the lease and that if the lease is not renewed and the lessee holds without taking any fresh settlement, he shall be liable to hold on payment of a certain excess rent. It has not been provided that in case of failure of renewal the lessee would be liable to ejectment, and such a clause must have been intentionally avoided. The lessee in this case died on the expiry of the first term of the lease and during the continuance of the second term. Reading the whole lease it appears that it is a lease with an option of perpetual renewal. After the death of the original lessee his heirs can renew the lease, and in case of non-renewal can hold on payment of the excess rent as provided for in the lease, and they cannot on any account be ejected by the lessor. On a construction of the lease and the covenant for renewal, on the death of the lessee during the term or on the expiry of the term the lease remains in force and the option for renewal can be exercised by his representatives-in-interest, and so the lease should be taken as a heritable, perpetual and transferable lease. The covenant implies that the lease should be renewed for ever—the covenant is one for perpetual renewal and not for a single renewal. The case of *Secretary of State* v. *Forbes* (13) is an authority on this point. Where in a lease there is an express covenant for renewal every time the term expires, there is nothing in law which would prevent the covenant from being one of perpetual renewal. See Woodfall on Landlord and Tenant, 19th Edition, page 437. If the document shows that the lease can be renewed for more than one term, the covenant should be taken as one of perpetual renewal. See *Hare* v. *Burges* (14), *Furnival* v. *Crew* (15).

(12) 31 Ind. Cas. 26; 22 C. L. J. 232; 20 C. W. N. 756.

(13) 17 Ind. Cas. 180; 16 C. L. J. 217.

(14) (1857) 70 E. R. 19; 4 K. & J. 45; 27 L. J. Ch. 86; 3 Jur. 1294; 6 W. R. 144; 116 R. R. 255.

(15) (1744) 26 E. R. 851; 3 Atk. 83.

The case for the plaintiff was that immediately on the death of the original lessee his widow, the defendant No. 1, and the assignee from her became trespassers. But although the lease was not renewed after the termination of the first term, yet a lease has been created in equity, and the assignee from the heir at-law of the original lessee cannot be ejected. The case is covered by the case of *Secretary of State* v. *Forbes* (13); see also *Bengal Coal Company* v. *Rajendra Lal Mitra* (16). It appears that the lease was for a term of five years with an option of perpetual renewal, which makes it a perpetual and heritable lease. So the defendant No. 2, who is the assignee of a portion of the land covered by the lease from defendant No. 1, must have obtained a good title to the land purchased by him, and is not liable to ejectment as a trespasser. The question of forfeiture on transfer cannot arise inasmuch as there is not a covenant against alienation, or a right of re-entry in the lessor.

Then again the suit was brought at a time when there was no cause of action for its institution. The first term of the lease expired in 1907. Then the lessee Srish Chandra died in 1912, *i. e.*, during the continuance of the second term. On the death of the lessee during the continuance of the second term the plaintiff cannot sue for the ejectment of the lessee's representatives-in-interest. It has been stated in the plaint that the cause of action arose on the expiry of the first five years, and also on the death of Srish (the original lessee). Both these positions are untenable, because the lease certainly did not terminate on the lapse of the first five years or on the death of the lessee, Srish.

Babu *Jogesh Chandra Roy*, in reply.—Reading the lease as a whole, the only possible construction that can be put upon it is that it is a lease for a limited term of five years. Of course, there was an option to renew the lease. But that option was never exercised or claimed to be exercised. The question of renewal, about which so much has been said here in second appeal, does not appear in the written statement or in the issues or in the judgment of the lower Courts. It is a new point taken for the

(16) 21 Ind. Cas. 929; 18 C. W. N. 420.

first time here in second appeal and that even at the time of argument, and so it should not be allowed to be raised at this stage of the case. See *Surendra Nath Sen* v. *Dinabandhu Naik* (17), *Rajani Kanta Mukherjee* v. *Yusuf Ali* (18).

JUDGMENT.—The plaintiff-appellant sued to recover possession of the land in dispute on the ground that it was held under a temporary tenancy, that on the death of the lessee the right to the tenure did not pass to his widow, the defendant No. 1, and that the latter had no right to transfer it to the defendant No. 2.

The suit was decreed by the Court of First Instance. On appeal, the District Judge has reversed that decree and dismissed the suit. The plaintiff has appealed to this Court.

The learned District Judge has held that the tenure was a permanent one because it was held not for a limited time, and that it was heritable.

The question turns upon the construction of the *kabuliyat*, which is dated September 1904. If states that the lands were settled with Srish Chandra Chuckerbutty, husband of defendant No. 1, for a term of five years as a *sara sari jote* at a rent of Rs. 15-14-2½ *gundas* per year. It then provides that after the expiration of the term the lessee shall take a fresh settlement under a fresh *kabuliyat* and that, in case of failure, he shall hold and enjoy possession of the land on payment of an excess rent of 1 anna per rupee every five years. It further provides that the lessee shall not be competent to make a gift, sale or mortgage of the tenure to anybody.

We think upon a proper construction of the document that if the lessee failed to take a fresh settlement on the expiry of the first term, he was to hold and enjoy possession of the land at an increased rent as provided in the *kabuliyat* and that there was no renewal of the lease at the end of every five years. The tenancy, therefore, after the expiry of the first term, was for an indefinite period. That being so, the rule of construction that a grant for an indefinite period enures, generally speaking, for one's lifetime and passes no interest to his heirs, unless there are some words showing an intention to grant a hereditary interest, applies. In this case, there are no words of inheritance, nor are there any circumstances such as long possession, or the fact of succession to heirs, or a series of transfers, from which the Court might draw a presumption that the tenure was a heritable or permanent one. On the contrary the tenure is described as merely a temporary one and the lessee was expressly restrained from selling or otherwise transferring it. It is true that in the absence of any covenent for re-entry such a clause does not give the landlord a right to re-enter; but the terms have a bearing upon the question of intention as to the nature of the grant.

It is true, as contended on behalf of the appellant, that on the expiry of the first term of five years, the lessee could resist the landlords' suit for possession under the covenant for a fresh settlement, but the question is whether the right which he had in the tenure passed to his widow and whether the latter could transfer such right to the defendant No. 2.

As we have already said, the interest was not heritable. We are accordingly of opinion that the defendants are not entitled to resist the action of the plaintiff.

The decree of the lower Appellate Court is accordingly set aside and that of the Court of First Instance restored with costs in all Courts.

Appeal allowed.

(17) 4 Ind. Cas. 535; 13 C. W. N. 595.
(18) 34 Ind. Cas. 92; 21 C. W. N. 188 at p. 193.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 924 OF 1914.

January 18, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

NANDA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HIRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Agnates living in seperate village and owning no land in village of deceased, right of.

Prima facie agnates of a deceased person are entitled to a share in his estate, even though they live in another village and own no land in the village in which the land in dispute is situate. [p. 231, col. 2.]

Kaila Singh v. *Tahal Singh*, 143 P. R. 1888; *Lokha* v. *Hari*, 64 P. R. 1893 and *Sham Ram* v. *Musammat Hemi Bai*, 73 P. R. 1896, distinguished.

Second appeal from the decree of the Divisional Judge, Ludhiana, dated the 12th January 1914.

Pandit *Rambhaj Datta*, for the Appellants,

MOHAMMMAD ABDUL GHAFOOR *v.* MAHTAB.

Mr. *Abdul Ghani*, for the Respondents

JUDGMENT.—In this suit the plaintiffs-appellants claimed one third share of certain land in Fategarh Niwan left by Daya Singh, deceased, of whom they claim to be the collaterals. The lower Appellate Court, while admitting that plaintiffs were related to Daya Singh in the way shown in the pedigree-table entered in the judgment of the first Court, held that they had no right to share in the land left by the deceased because they belonged to another village and there had been a complete separation between their branch of the family and that of the deceased for the last hundred years. Plaintiffs have filed a second appeal to this Court upon a certificate granted to them by the lower Appellate Court. Plaintiffs belong to Bhagor village and have no land in Fatehgarh Niwan where the land in dispute is situated. It appears that Daya Singh's ancestor and the ancestor of defendants Nos. 1 to 21 emigrated from Bhagor and founded the village of Fatehgarh Niwan in which the plaintiffs have no land at all The question of custom involved is, whether under such circumstances the plaintiffs are excluded from inheriting a share in the land left by Daya Singh, deceased. The lower Appellate Court relies upon *Kaila Singh* v. *Tahal Singh* (1), but in our opinion that case is distinguishable from the present. Article 25, Rattigan's Digest of Customary Law, lays down that by virtue of the right of representation, all collateral heirs succeed together and not to the exclusion of each other, whether they were associated with, or separated from the deceased.

Counsel for the respondent relies *inter alia* upon *Lokha* v. *Hari* (2) and *Sham Ram* v. *Musammat Hemi Bai* (3). These rulings were considered by a Full Bench of this Court in the case reported as *Daya Ram* v. *Sohel Singh* (4), and it was held that it has not been laid down in these and other rulings on the point that mere community of descent does not give agnates of a deceased landowner a right of succession to acquired land left by him in the village in which they did not own any land. It was further held that such a rule is neither borne out by the results of judicial enquiries nor deducible from the general principle of Customary Law. *Prima facie* then the plaintiffs as agnates of the deceased are entitled to a share in his estate even though they live in another village and own no land in the village in which the land in dispute is situate. Once they showed that they were agnates, in the way they claimed, of Daya Singh, the onus was shifted to the defendants to show that they were not entitled to a share. Defendants produced no evidence on this point and the plaintiffs' claim must, therefore, succeed.

We accept the appeal and setting aside the order of the lower Courts give plaintiffs a decree for one-third share in the land left by Daya Singh. Defendants Nos. 1 to 21 will bear plaintiffs' costs in all the Courts.

Appeal allowed.

(1) 143 P. R. 1888.
(2) 64 P. R. 1893.
(3) 73 P. R, 1896.
(4) 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907.

PATNA HIGH COURT.
CIVIL REVISION NO. 31 OF 1917.
April 16, 1917.
Present:—Mr. Justice Chapman and Mr. Justice Jwala Prasad.
Sheikh MOHAMMAD ABDUL GHAFOOR —DECREE-HOLDER—PETITIONER
versus
MAHTAB CHOUDHURY—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O XX, r. 12 (2), O. VII, r. 10—Mesne profits—Decree—Application for enquiry into mesne profits—Jurisdiction—Order directing application to be returned for presentation to proper Court—Appeal, whether lies.

Where the question of a Court's jurisdiction is concerned, it is the plaint alone which should be considered. [p. 232, col. 1.]

The enquiry as to mesne profits is a part of the proceedings in the suit consequent upon a preliminary decree and is terminated by a final decree after the mesne profits are ascertained. The Court which passes a decree for mesne profits has jurisdiction to enquire into the amount of the mesne profits although the amount claimed in the application for enquiry, or that found by the enquiry may exceed the pecuniary limits of the jurisdiction of the Trying Court which had jurisdiction to try the suit as originally laid. [p. 233, cols. 1 & 2.]

MOHAMMMAD ABDUL GHAFOOR *v.* MAHTAB.

An application for the ascertainment of mesne profits is an application for an order in the suit and is not an application for execution of a decree, and an order returning such an application for presentation to the proper Court is not an order returning a plaint and is not appealable. [p. 232, col. 2.]

The provision contained in Order VII, rule 10, of the Civil Procedure Code applies only to the paper on which a suit is instituted and not to an application made in the course of a suit. [p. 232, col. 2; p. 233, col. 1.]

Civil revision against an order of the Munsif, Madhubani, dated the 14th November 1916.

Mr. *Ragho Prasad*, for the Petitioner.

Mr. *Ram Prasad*, for the Opposite Party.

JUDGMENT.

CHAPMAN, J.—The petitioner in this case obtained a decree for possession of certain property with costs and mesne profits. The decree was obtained in the Court of the Munsif of Samastipur on the 15th of February 1913. On the 23rd of March 1916, the petitioner filed a petition in the Munsif's Court of Samastipur asking for the ascertainment of mesne profits and estimated the amount due at Rs. 1,149-12 0. The Munsif's pecuniary jurisdiction is limited to Rs. 1,000. He held that he had no jurisdiction to entertain the application for the ascertainment of mesne profits and directed that the application be returned for presentation to the proper Court. The petitioner thereupon presented his application in the Court of the first Munsif of Darbhanga, who has power up to Rs. 2,000.

The first Munsif of Darbhanga held that the Munsif of Samastipur had fallen into error in declining to exercise jurisdiction, that the application was one which could have been dealt with by the Munsif of Samastipur, and he returned the application. The petitioner thereupon again moved the Munsif of Samastipur but without success. Thereupon the petitioner has moved this Court and asks that the order of the Munsif of Samastipur dated the 14th of November 1916 finally refusing to entertain his application be set aside.

It is common ground that in the plaint mesne profits were not claimed. So far, therefore, as the plaint is concerned the Munsif of Samastipur had jurisdiction over the entire suit. Where the question of the Court's jurisdiction is concerned, it is the plaint and the plaint alone that should be considered. The judgment-debtor may have a grievance upon the ground that the Munsif of Samastipur granted a decree for mesne profits when no mesne profits were claimed in the plaint. His remedy was to appeal against the decree for mesne profits. That decree not having been appealed against is now final. That decree having been made, I find it impossible to say that the Munsif had no jurisdiction to entertain the application for the ascertainment of mesne profits, although the applicant estimated the amount of mesne profits at a sum higher than the limit of the Munsif's jurisdiction. In the first place that estimate included a period of some two years during which the suit was pending. It cannot, therefore, be treated as an application for amendment of the plaint and it is impossible to say that it necessarily involved a supposition that the plaint would have, if it had been rightly framed, included an estimate of mesne profits in excess of the limit of the Munsif's jurisdiction. The amount claimed is only Rs. 1,149. The limit of the Munsif's jurisdiction is Rs. 1,000, and for the period of five years for which it would be possible for the Munsif to give mesne profits, two years would be the period subsequent to the plaint for which the suit was pending. From the estimate of Rs. 1,149 made in the application it is impossible to infer that the plaint would have included a sum above Rs. 1,000. I am, therefore, of opinion that the Munsif of Samastipur had jurisdiction to entertain this application and that he should have entertained it.

A preliminary objection was made that an appeal lay against the order of the Munsif returning this application and that, therefore, it is not open to us to interfere in revision. An application for the ascertainment of mesne profits is an application for an order in the suit and is not an application for execution of a decree. This has been made clearer still by the recent amendment of the Code of Civil Procedure. We are asked to say that the order returning this application was an order returning a plaint. I am unable to say that it is an order returning a plaint. There is a special provision in the Code, Order VII, rule 10, which enables the Court to return a plaint. It is quite clear that that provision applies only to the paper on which the suit was

instituted and not to an application made in the course of a suit.

It has then been contended that the decree for mesne profits, inasmuch as it did not state the period for which mesne profits should be calculated, is too vague for the purposes of execution. This is a technical objection to which I am not prepared to accede. It is open to the Court to calculate mesne profits for the period for which the plaintiff is entitled, which I presume will be three years prior to the institution of the suit.

It is also contended that inasmuch as the first order returning the application was made with consent and inasmuch as no motion in this Court was made against the first order, it is not open to us now to interfere. This objection is really only one of form and if we were to give effect to it, it would be merely by intimation to the petitioner to amend his petition and to ask for extension of the period during which he was attempting to comply with the first order made by the Munsif of Samastipur in order to save limitation.

In the circumstances of the case I am of opinion that the order of the first Munsif of Samastipur declining to entertain this application be set aside and I would direct that he entertain this application and dispose of the same in accordance with law. The petitioner is entitled to his costs.

JWALA PRASAD, J.—I entirely agree. The decree was passed under Order XX, rule 12, and directed an enquiry to be made by the Court as to mesne profits payable to the decree-holder. The Court of the Munsif of Samastipur had jurisdiction to try the suit as instituted in his Court and under clause (2) of rule 12 the enquiry as to mesne profits should be made by that Court. The enquiry as to mesne profits is a part of the proceedings in the suit consequent upon a preliminary decree and is terminated by a final decree after the mesne profits are ascertained. In view of the law as now embodied in the present Code of Civil Procedure, I think the Court of the Munsif of Samastipur had jurisdiction to enquire into the mesne profits, although the amount of mesne profits claimed in the application for enquiry, or that found by the enquiry, may exceed the pecuniary limits of the jurisdiction of the Trying Court which had jurisdiction to try the suit as originally laid. I also agree with the observations on the other points made by my learned brother and as to the order proposed in this case.

Application allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 276 OF 1915.

May 2, 1917.

Present:- Mr. Justice Piggott and Mr. Justice Walsh.

MUHAMMAD ZAKARIYA—DEFENDANT—APPELLANT

versus

MUHAMMAD HAFIZ AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2, O. XXXIV, rr. 2, 4—Mortgage—Covenant to pay principal and interest—Suit for interest—Subsequent suit for principal, whether barred—"Cause of action", meaning of—Two suits for sale on same mortgage, whether permissible.

A mortgage-bond recited the advance of the money and the promise of the obligor to re-pay it within three years with interest at a stipulated rate, and provided that after the expiration of three years the creditor shall be entitled to sue for the whole amount of principal and interest if default was made in the payment of the amount of the bond with interest within that time. After the expiration of the period of three years the mortgagee brought a suit to recover the interest from the date of the bond, and the suit was decreed. He then brought a suit for the recovery of the principal and for the sale of the property:

Held, that the second suit was barred by Order II, rule 2, of the Civil Procedure Code. [p. 235, col. 1.]

The expression "cause of action" means every fact necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. [p. 234, col. 2.]

Murti v. *Bhola Ram*, 16 A. 165; A. W. N. (1894) 65; 8 Ind. Dec. (N. S.) 106, followed

Per Piggott, J.—The object of rules 2 and 4 of Order XXXIV of the Code of Civil Procedure is that in any suit for sale on a mortgage, an account should be taken once and for all, of the amount due, for principal and interest on the mortgage. Two successive suits for sale on one and the same mortgage should be an impossibility. [p. 236, col. 1.]

First appeal from a decree of the Subordinate Judge, Agra.

The Hon'ble Dr. *Sundar Lal* (with him Mr. *Narain Prasad Asthana*), for the Appellant,

MUHAMMAD ZAKARIYA *v.* MUHAMMAD HAFIZ.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *S. K. Dar*), for the Respondents.

JUDGMENT.

WALSH, J.—I have come to the conclusion that this appeal must be allowed. The suit is one to recover the principal due, the interest being abandoned under circumstances which I will mention in a moment, and for the sale of the property hypothecated under a bond, dated the 14th of September 1910. The plaintiffs in April 1914 had brought a suit against the defendant for interest for three years and seven months due from the date of the bond, namely, the 14th September 1910 to the 14th of April 1914, the date of the suit. That action had been brought and determined after the expiration of the period of three years from the date of the bond, three years being the period stipulated for the re-payment of the money; and the question which arises in the present suit, raised by the defendant and decided against him by the learned Subordinate Judge, is whether having regard to the provisions of Order II, rule 2 of the Code of Civil Procedure, and of this particular bond, the plaintiffs can, after having sued for the interest in the way which I have mentioned, nonetheless institute a fresh and a subsequent suit for the principal. The question really turns on the view we take of the meaning of Order II, rule 2, and of the provisions of this particular bond. The preliminary clause of the bond recites the advance of the money and promise of the obligor to re-pay within three years at a stipulated rate of interest. Clause 7, which is in common form, provides that after the expiration of three years the creditor shall be entitled to sue for the whole amount of principal and interest if failure is made to pay the amount of the bond with interest within that time. If that clause providing for re-payment of principal and interest and for the right of the creditor upon default stood alone, there would be, in my opinion, no doubt at all that claims for principal and interest would be claims which the plaintiffs were entitled to make within the meaning of Order II, rule 1. The provision of that rule is that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." The meaning of the expression "cause of action" has long been judicially settled and finally pronounced in the Courts in England in *Read* v. *Brown* (1) and adopted by a Full Bench of this Court in *Murti* v. *Bhola Ram* (2), a decision which is binding upon us, to mean every fact necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. This definition obviously involves in it the addition made by Lord Justice Fry in *Read* v. *Brown* (1), "everything which if not proved gives the defendant an immediate right to judgment." Applying that definition to this case, the plaintiffs in order to recover the interest would have to prove the execution of the bond, the advance although of course that would be involved in the bond, unless there was some circumstance calling upon them to do it, the terms of the bond, and the right to recover interest under clause 7, namely, the non-payment of the principal. They would have to prove precisely the same facts if they were suing for the principal. And I feel constrained to hold that if clause 7 stood alone, the application of Order II, rule 2, would compel the plaintiff to include both principal and interest in one suit, being the whole of the claim which he was entitled to make in respect of the cause of action. It is quite true that one or two authorities which are entitled to great respect have been relied upon by Dr. Sapru for the respondents, which throw doubt upon the correctness of this view. It is sufficient to say that in each of these cases, namely, *Yashvant* v. *Vithal* (3) and *Ram Bhaj* v. *Devia* (4), the circumstances of the contract were not the same as that before us, and the *ratio decidendi* proceeds upon a consideration of English authorities which are not really relevant to this point, inasmuch as the provision we are now considering does not occur, so far as I am aware, in any express provision of English Law. It should be observed that no injustice is

(1) (1889) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.
(2) 16 A. 165; A. W. N. (1894) 65; 8 Ind. Dec (N. S.) 106.
(3) 21 B. 267; 11 Ind. Dec. (N. S.) 181.
(4) 123 P. R. 1881.

contemplated or really can occur by the application of this provision, because any result of that kind is carefully guarded against by the further provision which enables the Court in a proper case upon the application of the plaintiff to allow him to pursue one or other of his claims and to suspend the other. We have, however, to give effect to all the provisions of this document and in interpreting it as a whole, to examine each independent provision relied upon in support of the plaintiff's contention. It is argued on behalf of the respondents that even if Order II, rule 2, has the effect which we think it has, clause 2 of the bond enables them to do what they did here. I do not agree. I think the meaning of clause 2 is quite clear. It gave the creditor an additional right inconsistent with that contained in clause 7, and was, therefore, a modification of that clause. I think that it relates only to the period between the expiration of six months from the date of the bond and the expiration of three years from the date of the bond. And all that clause 2 does is to confer upon the creditor an option to do two things during that period which otherwise he could not do. *One* is to sue for the principal within three years, *secondly*, to sue for interest without suing for the principal. I think this is the only possible construction which can be read consistently with clause 7. The respondents' contention makes clause 7 superfluous, and this is the error we think the learned Judge below, who agreed with the respondents', view, fell into. Clause 7 is the basis of the contract, clause 2 provides for a special contingency and confers special rights, clause 3 merely as the result of clause 2 defines the rights given by clause 7 and provides that the rate of interest and mode of payment shall be the same and are not to be affected by the provisions of clause 2.

The result may seem somewhat startling. The defendant out of a debt of Rs. 14,000 with considerable accumulation of interest has re-paid only Rs. 3,000, and the learned Judge, being in a difficulty with regard to the authorities, not unnaturally took a view which he thought was in accordance with the justice of the case But if the law is clear, we have no right to consider the consequences, and it is to be borne in mind, as already observed, that the plaintiffs might have protected themselves against such consequences by an ordinary application such as that indicated in the last clause of Order II.

A further contention has been raised on behalf of the respondents which creates a certain amount of difficulty. I am not prepared to say that if the plaintiffs had clearly put forward their interpretation of the document as a necessary part of the claim which they were making in the previous suit, and their explanation of the form of the claim, in such a way that the defendant ought to have but did not contest it, it might not be held that the parties were bound by that view of their own contract whatever the general law might otherwise be. But when the proceedings in the first suit are carefully examined, it is clear that nothing of the kind really occurred when the plaintiffs were, so to speak, cutting down their claim to a claim for interest. In the plaint in the previous suit they said that Rs. 3,010 were due on account of interest in respect of which only the claim was brought according to the terms of the bond. That was a correct statement of a claim for interest. In paragraph No. 5 of the plaint they stated that they were entitled to realize only the amount of interest due under this bond without instituting a suit in respect of the principal. That was a perfectly innocuous and accurate statement. In paragraph No. 6 they alleged that they were entitled to bring the property to sale subject to the principal and the remaining amount of interest due on the bond. Nowhere did they allege that they still had a right, or claimed to have a right, or intended to pursue such right, to sue for the principal at a subsequent date. And inasmuch as the defendant did not appear and put in no written statement, it is impossible to hold that any issue as to the construction of the bond on this point was raised and determined in that suit, or that the plaintiffs compelled the defendant to plead to the point. Furthermore, the Court rightly and carefully decided the plaintiffs' suit in the proper from, that is to say, gave a decree for sale of the mortgaged property in respect of the amount claimed in the suit, but made no

decree in the form claimed by the plaintiffs indirectly in paragraph No. 6 of the plaint; so that even if it could be said that the plaintiffs raised the point in the former proceeding, the Court left it entirely undecided. As a matter of fact the place and time to determine such a point is on a proper application by the plaintiff to abandon a part of his claim and to have it decided by the Court before the suit is finally entertained.

Two further observations may be made. It is a remarkable circumstance that in view of the fact that the original suit for Rs. 3,010 was brought by these plaintiffs for interest only, they should in the suit now before us have expressly abandoned any claim for interest on conscientious grounds; *secondly*, it by no means follows from this decision, nor indeed does Order II appear to provide, that the liability for the principal is extinguished, and it may be that any view of the justice of the case may be reconciled by a subsisting liability from the defendant to the plaintiffs to pay interest so long as the principal is outstanding. As to this I express no opinion. The parties can, if so advised, raise that question in another suit.

The result is that we allow this appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs here and in the Court below.

PIGGOTT, J.—While concurring generally in the above judgment I desire to add a few remarks. In the suit of 1914 the plaintiffs asserted that they were entitled to bring the mortgaged property to sale, "subject to the principal and the remaining amount of interest due under this bond." I am clearly of opinion that such a claim could not be sustained, in view of the provisions of rules 2 and 4 of Order XXXIV of the Code of Civil Procedure. The object of these rules seems to be that in any suit for sale on a mortgage, an account should be taken once and for all, of the amount due –"for principal and interest on the mortgage." Two successive suits for sale on one and the same mortgage should be an impossibility. I do not believe it to be possible for parties to draw up a contract of mortgage so drafted as to avoid these statutory obligations; but in any case they have not done so on the wording of the document in suit, or on the facts of this particular case. When the suit of 1914 was instituted there was no room for the contention that the entire mortgage-debt, both principal and interest, was not "due."

If, however, in the suit of 19 4, the plaintiffs had in plain terms claimed the relief to which they said they were entitled, namely, a decree for the sale of the mortgaged property subject to the principal debt due on the same bond, and to any further interest that might accrue due under the same, it might with some force be contended that an obligation would thereby have been cast on the defendant-mortgagor of resisting this claim. A defendant who deliberately elects to enter no defence against an improper claim, or one legally unsustainable, cannot complain if in a subsequent litigation he finds himself caught by the rule of *res judicata*.

I do not find any such rule to be applicable in the present case. When we come to look at the plaint in the suit of 1914, we find that the plaintiffs carefully refrained from including this inadmissible relief, to which they said they were entitled, in the specification of the reliefs actually claimed. What they asked for was simply— "that the amount due may be awarded, with interest *pendente lite* and future interest: otherwise the property mortgaged may be sold by auction." This claim the defendant obviously could not resist: the amount claimed was due from him and the mortgaged property was liable to be sold in satisfaction of the debt. I do not see that any obligation was cast on the defendant of warning the plaintiffs as to the probable consequences of their claiming a decree for a much smaller amount than was due to them on the date of the suit. The Court decreed the claim as brought; that is to say, the decree passed was for the sale of the mortgaged property and not of the equity of redemption of a subsisting mortgage of Rs. 14,000.

Under these circumstances I agree with my learned colleague that a second suit for sale on the same mortgage is not maintainable.

Appeal decreed.

BARHMA DEO LAL *v.* SHEO PRASAD LAL.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 19 OF 1917.

May 11, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Mullick.

BARHMA DEO LAL—DEFENDANT—APPELLANT

versus

SHEO PRASAD LAL—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), *ss.* 170, 171 *—Occupancy holding—Mortgagee, right of, to question collusive decree obtained by landlord against tenant for enhancement of rent.*

A mortgagee of an occupancy holding, who has after contest been allowed to deposit arrears of rent under sections 170 and 171 of the Bengal Tenancy Act, has a sufficient interest in the holding entitling him to maintain a suit for a declaration that a collusive decree obtained by the landlord against the tenant for enhancement of rent is not binding on him. [p. 237, col. 2; p. 238, col. 1.]

Letters Patent Appeal from the decision of Mr. Justice Atkinson, dated the 19th January 1917, reported as 38 Ind. Cas. 366, reversing that of the Subordinate Judge, Chapra, dated the 3rd August 1915, confirmidg a decision of the Munsif, Siwan, dated the 20th May 1915.

Mr. *Atul Krishna Roy* for Mr. *Sushil Madhab Mullick*, for the Appellant.

Mr. *S. N. Sahay* for Mr. *Rajendra Prasad* for the Respondent.

JUDGMENT.

MULLICK, J.—The plaintiff in this suit is the transferee of an occupancy holding. It is not found by any Court whether the holding is transferable or non-transferable. The first defendant is the landlord and the second defendant is the recorded tenant. The plaintiff brings the present suit for a declaration that a rent-decree obtained by the landlord against the recorded tenant is fraudulent and not binding upon him, and *secondly*, he asks for a further declaration that he is a tenant. The Munsif who tried the suit in the first instance found in favour of the plaintiff on all points and decreed the suit. On appeal that decree was affirmed by the Subordinate Judge. There was then a second appeal to this Court which was heard by Mr. Justice Atkinson, who disagreed with both the Courts below and held that the plaintiff's whole suit should be dismissed. He was of opinion that the fact that the plaintiff had been permitted under sections 170 and 171 of the Bengal Tenancy Act to deposit the amount of the arrears with a view to saving the holding from sale and that the amount so deposited had been withdrawn by the landlord, did not constitute the plaintiff a tenant under the landlord as the landlord did not withdraw the amount as rent. He accordingly held that the plaintiff was not entitled to any declaration that he was a tenant in the holding.

The matter now comes up on Letters Patent appeal before us, and the first point urged is that apart from the question of the transferability of the holding or the question whether the plaintiff has validly acquired the interest of the recorded tenant, the plaintiff is under section 171 of the Bengal Tenancy Act a statutory mortgagee of the holding and that he is interested in the amount of rent payable upon the holding, for if the recorded tenant again defaults he (the plaintiff) will be called upon to pay the rent in order to save his mortgage. It is urged that in these circumstances the plaintiff is a person who has a sufficient interest to challenge the decree obtained by the landlord against the recorded tenant collusively enhancing the rent. The Trial Court and the Subordinate Judge both found that the rent had in fact been collusively enhanced, and the only question is whether the plaintiff has a sufficient interest to maintain the suit as mortgagee. In my opinion he has. He is vitally interested in the amount of rent payable, because in the event of a second rent sale his mortgage charge as an encumbrance will be extinguished. The plaintiff, therefore, is entitled to a declaration that the decree obtained by the landlord against the second defendant is not binding upon him. I have assumed in the absence of evidence adduced by the landlord that the mortgage charge is still subsisting and learned Counsel appearing for the landlord before us is not in a position to make any submission to the contrary. It will be sufficient to say that in the event of any future litigation, it will be open to the landlord to prove that the plaintiff's mortgage charge is extinguished and that he is no longer entitled as mortgagee under section 171 to make the deposit. The order of Mr. Justice Atkinson will be set aside and a decree will be made in favour of the plaintiff, declaring that he is not bound by the decree obtained by the landlord against defendant No. 2 referred to in the plaint. The plaintiff is entitled to costs as against the landlord in all the Courts.

KURGODIGAUDA *v.* NINGANGAUDA.

CHAMIER, C. J.—I agree that the plaintiff, having been allowed after a contest to deposit arrears of rent under sections 170 and 171 of the Bengal Tenancy Act, has become a mortgagee of the holding and that gives him an interest entitling him to maintain the present suit. I agree that he is entitled to a declaration that he is not bound by the decree obtained by the landlord against defendant No. 2. I agree also as to the costs.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 72 OF 1916.

April 13, 1917.

Present:—Sir Basil Scott, KT., Chief Justice and Mr. Justice Batchelor.

KURGODIGAUDA LINGANGAUDA—PLAINTIFF—APPELLANT

versus

NINGANGAUDA NINGANGAUDA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 6, scope of—Civil Procedure Code (Act V of 1908), s. 144—Application for restitution, whether application for execution of decree.

Section 6 of the Limitation Act is an enabling section to enable persons under disability to exercise their legal rights within a certain time, and it should be construed liberally rather than narrowly. [p. 238, col 2.]

An application for the execution of a decree within the meaning of section 6 of the Limitation Act is not limited to applications under Article 182 of that Act, but includes an application for restitution in consequence of the decree and the time for making such application in the case of a minor is, therefore, extended under the provisions of section 6. [p. 238, col. 2.]

First appeal from the decision of the Subordinate Judge, Dharwar, in Darkhast No. 375 of 1914.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.—On the 4th of November 1901, a decree was passed by the Trial Court at Dharwar for delivery to the plaintiff of certain lands. In execution of that decree the lands were delivered to the plaintiff. On an appeal preferred on behalf of the applicant, who was then a minor, the High Court amended the decree on the 17th of August 1903, by excepting from the decree for delivery two surevy numbers. Those survey numbers, however, remained in the possession of the plaintiff and the applicant attained majority on the 1st of October 1912. On the 4th of August 1914, the present application was made for delivery to him of the two survey numbers excepted by the judgment of the High Court in appeal from the scope of the decree of the Trial Court. The application, which is one which the applicant would be entitled to make under section 144 of the Code of Civil Procedure, is barred by time, unless it is an application for the execution of a decree within the meaning of section 6 of the Indian Limitation Act.

It is clear, we think, that an application for the execution of a decree in section 6 is not limited to applications under Article 182 of the Indian Limitation Act. It would apply also to applications under Article 183 in which the expression "execution of a decree" is not used, but reference is made to the enforcement of a decree of any Court established by royal charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council. There is reason for thinking that the words "an application for the execution of a decree" are not to be construed so narrowly as to exclude an application for restitution in consequence of the decree, if such an application could fairly be treated as an application for execution, for section 6 is an enabling section to enable persons under disability to exercise their legal rights within a certain time, and it should be, we think, construed liberally rather than narrowly.

Now an application for restitution, according to the provisions of section 144 of the Code, is to be made to the Court of first instance whose decree is varied or reversed, and in that respect it differs from applications for execution under part II of the Code, section 38 of which provides that "a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution." Nevertheless it appears to us that an order made under section 144 is an order in execution of a decree of the Appellate Court. The section provides that "the Court may make any order, including orders for the refund of costs and for the payment of interest, damages, compensation and

mesne profits which are properly consequential on such variation or reversal," and it is made clear by the second clause of the section that the relief allowed, as in execution matters, can only be allowed by application under the Code and not by a separate suit. We are, therefore, of opinion that the lower Court was right in holding that the application was virtually an application for the execution of the High Court decree amending the decree of the Dharwar Court. We dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1334 OF 1914.

January 20, 1917.

Present: - Mr. Justice Chevis.

Musammat HAYAT—DEFENDANT—APPELLANT

versus

RUSTAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Sister v. collaterals—Mahwal Jats, Tahsil Alipur, Muzaffargarh District.

Among Mahwal Jats of Tahsil Alipur, District Muzaffargarh, a sister does not exclude collaterals, whether she be married in the family or not. [p. 240, cols. 1 & 2.]

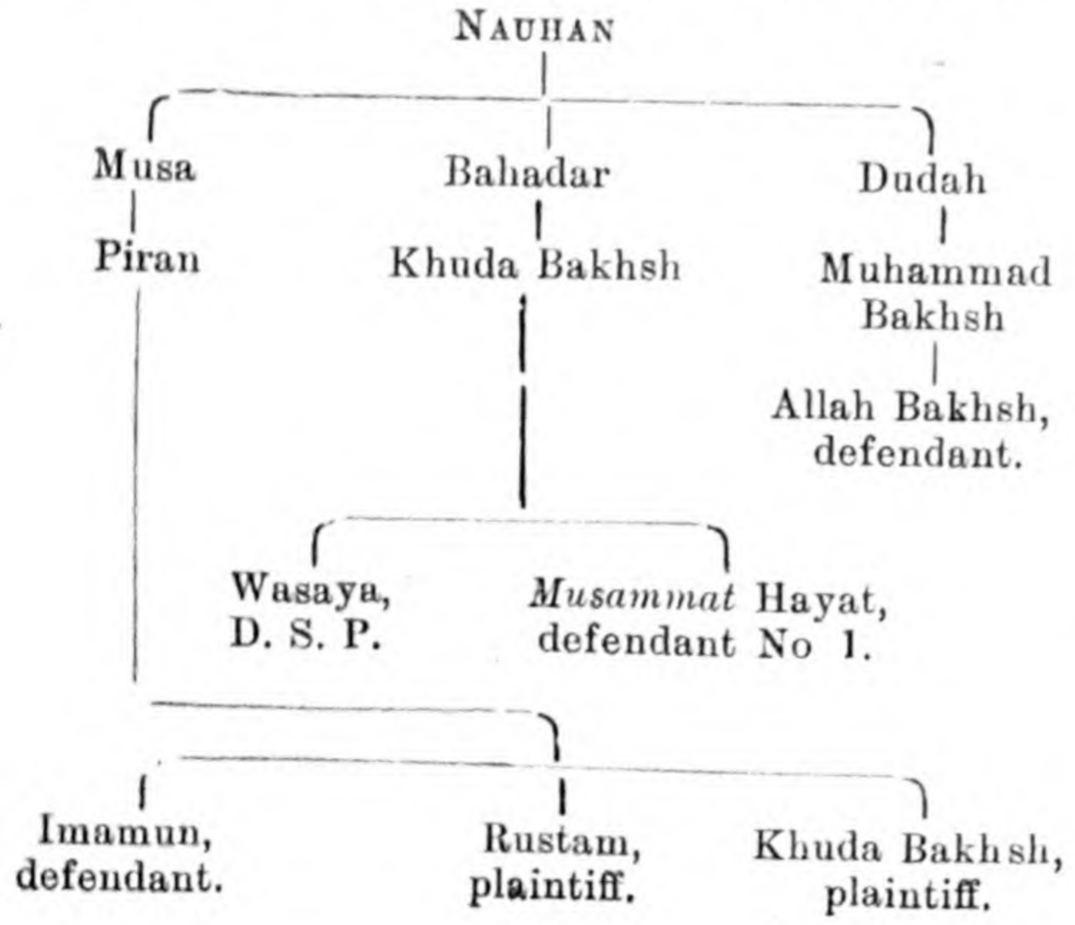
Sawan v. *Sahib Khatun*, 2 Ind. Cas. 71; 44 P. R. 1909; 69 P. W. R. 1909; 67 P. L. R. 1909, *Musammat Fatima* v. *Khanda*, 25 P. R. 1895, distinguished.

Second appeal from the decree of the Additional Divisional Judge, Multan Division at Muzaffargarh, dated the 18th April 1914.

Mr. *Badr-ud-Din*, for the Appellant.

Mr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—The genealogical tree is:—



The dispute is as to the estate of Wasaya. The parties are Mahwal Jats of the Alipur Tahsil of the Muzaffargarh District. *Musammat* Hayat is married to Imamun, and it is said her son is going to marry the daughter of Allah Bakhsh, so Imamun and Allah Bakhsh, not having joined in the suit, are *pro forma* defendants. The plaintiffs claim their share of Wasaya's estate. The only question is whether the sister of the last male owner succeeds in presence of the second cousins.

The lower Courts have both found in favour of the plaintiffs. *Musammat* Hayat, armed with a certificate, has lodged this second appeal. The first Court placed the onus on the plaintiffs, and for the appellant it is urged that the District Judge has treated the case as if the onus were on the defendants. It is urged that if the onus is to be changed, there should be a remand. But both sides have produced their evidence, and I do not see that a remand would serve any useful purpose. Further, it is the plaintiffs who are suing, and the Customary Law of the District (page 36) shows Jats as stating that in the absence of lineal descendants or widow the estate goes in succession to (1) father, (2) brothers or their desecendants, (3) sisters or their descendants, (4) mother, (5) grandfather or his descendants and (6) so on to the other male agnates. This is in favour of the sister, so I am not at all sure that the initial onus was not rightly placed on the plaintiffs.

But the value of the entry in the Customary Law is lessened when we turn to page 32, where we read that some Jats say that daughters and sisters succeed first, while others say that collaterals exclude daughters. See also remarks on page 5, "the Jats have quoted instances in which daughters have excluded the collaterals of the deceased or *vice versa*; or have shared the property half and half with the collaterals sisters come after the daughters." There can, I think, be no doubt whatever that sisters occupy a less favourable position than daughters, and even as regards daughters the position does not seem to be above doubt.

For appellant reliance is placed on *Sawan*

v. *Sahib Khatun* (1), a case of Panwar Jats of Muzaffargarh Tahsil. Here a sister, married in the family, was preferred to a collateral in the fifth degree, but this seems to have been mainly because there was a considerable number of witnesses produced in that case of sisters having excluded collaterals.

In *Musammat Fatima* v. *Khanda* (2) a daughter's claim was thrown out because she had married outside the family, but it was said there were several instances on record in the family of daughters succeeding when they had married a member of the same family. This was a case of Ganga Jats.

Another instance cited is a judgment of the Divisional Judge, dated 16th June 1910, where a sister's claim was allowed. This, too, is a case of Ganga Jats of the Muzaffargarh Tahsil.

Both sides have produced evidence in this case. The learned District Judge has analysed the instances cited by the plaintiffs' witnesses and held that they do not amount to anything. But the plaintiffs' case seems to me proved by the evidence for the defendants. Not only are none of the witnesses unable to cite any instances of a sister having succeeded, but Allah Bakhsh Mahwal, *lambardar*, says that as far as he knows sisters do not inherit, and he goes further and says even daughters are sometimes excluded by collaterals, and gives an instance in his own family of exclusion of a daughter. Pir Bakhsh Mahwal says no sister has up to the present inherited among Mahwals. And Imamun, defendant, says plainly that among Mahwals daughters inherit, but sisters do not. Considering that this man is married to *Musammat* Hayat I regard this statement as a most important piece of evidence. Surely if sisters did succeed he would be the first to say so, seeing that his own wife is the sister who is claiming a brother's estate in this case.

I think that whatever may be said as to Jats of the Muzaffargarh District generally, it is clear from the evidence in the present case that among Mahwal Jats of this particular Tahsil a sister does not exclude collaterals, whether she be married in the family or not.

Then it is urged that if no custom applies Muhammadan Law should be followed. But this is not a case of succession not being proved to be governed by custom. Custom undoubtedly governs succession, and the only question in the case is whether by custom the sister excludes the collaterals or *vice versa*.

I uphold the decision of the lower Courts decreeing the claim and dismiss this appeal with costs.

Appeal dismissed.

(1) 2 Ind. Cas. 71; 44 P. R. 1909; 69 P. W. R. 1909; 67 P. L. R. 1909.

(2) 25 P. R. 1895.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 3 OF 1917.

March 29, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Smither.

SARPAT SINGH AND ANOTHER—PETITIONERS

versus

Rai BUDH SINGH DUDHERIA *Bahadur*—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—District Judge ordering payment of allowance to guardian of person of minor.

A District Judge made an order directing the guardian of the property of a minor to pay to the guardian of his person a certain allowance, on condition of the latter removing with the infant to a certain house that had been provided for the residence of the minor. This condition was, however, superseded by some other orders but a subsequent application for the allowance was refused by the District Judge on the ground that the guardian of the minor's person had not complied with the condition:

Held, (*Fletcher, J.*, hesitating), that the order of the District Judge refusing the application should be set aside by the High Court in revision under section 115, Civil Procedure Code. [p. 242, col. 2.]

Rule against the order of the District Judge, Murshidabad, in Case No. 46 of 1904.

FACTS of the case appear from the judgment.

Mr. *B. C. Mitter* (with him Babus *Brojolal Chakravarty* and *Gurudas Sinha*), for the Petitioners.—The District Judge by his order dated the 8th May 1912 directed that no payment was to be made to the guardian of the person of the minor until she removed to live in a house provided for the resi-

dence of the infant. This order of the 8th May was obviously superseded by the Judge's order of the 22nd May 1912, which did away with the condition as regards the mother's removal with the infant to a certain house. So the order of 8th May is not binding upon the petitioner. The subsequent orders of the Judge clearly indicate that he intended that the allowance should be paid, even if the mother who was the guardian of the person of the minor did not fulfil the condition of removing to the particular house. So the Judge has erred in dismissing the petitioner's application on the ground that the mother did not comply with the condition imposed by the order of the 8th May 1912. This is certainly a case where the petitioner can invoke your Lordships' revisional jurisdiction under section 115 of the Civil Procedure Code, *vide Rashmoni Dasi* v. *Ganada Sundari Dasi* (1). Also refers to *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry* (2) and *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (3).

Babu *Dwarkanath Chuckerbutty* (with him Babus *Hamendra Nath Sen* and *Dhirendra Nath Sen*), for the Opposite Party.—The Rule in this case was issued to show cause why the order of the District Judge refusing review should not be set aside. Where is the error which the Judge has committed in refusing to grant review, so that an application is entertainable under section 115, Civil Procedure Code? The Legislature makes no provision for appeal against an order by which the Judge refuses to review his order and in which he commits an error of law.

Mr. *B. C. Mitter*, in reply.—The Judge has exercised his jurisdiction illegally or with material irregularity. I do not say that there has been gross or palpable error of law. If the Judge decides on the ground that the order of 8th May is the foundation of his jurisdiction, he is wrong. *Venkubai* v. *Lakshman Venkoba Khot* (4), *Sivaprosad Ram* v. *Tricomdas* (5). There is no question of review here. It was an interlocutory order.

(1) 26 Ind. Cas. 275; 20 C. L. J. 213; 19 C. W. N. 84.
(2) 20 C. 8; 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6 (P. C.).
(3) 15 C. 47; 7 Ind. Dec. (N. S.) 617.
(4) 12 B. 617; 13 Ind. Jur. 270; 6 Ind. Dec. (N. S.) 895.
(5) 27 Ind. Cas. 917; 42 C. 926.

JUDGMENT.

FLETCHER, J.—This is a Rulecalling upon the opposite party to show cause why the order complained of in the petition should not be set aside. The order complained of was passed on an application which is stated in the order-sheet to be an application for review of judgment. As a matter of fact, it was not such. It was a renewal of an application that had been dismissed in May 1916. The application was made for a direction upon the guardian of the property of a minor to make certain payments that had been directed to be made by the District Judge, the amount being Rs. 300 per mensem, for the minor's maintenance. The question turned upon the consideration of a condition that the District Judge had imposed by an order dated the 8th May 1912, the District Judge having by that order directed that no payment should be made to the guardian of the person of the minor, that is, the mother, until she went with the infant to live in a house provided for the residence of the infant. Then on the 22nd May 1912, an order was made that is said to have superseded the order of the 8th May of the same year, by which the District Judge is said to have set aside the condition as to the removal of the guardian with the infant to the house provided for their residence. The words of the order are these:—"Having regard to the certificate of the Civil Surgeon on the subject of the condition of the health of the minor's mother, I am unable for the present to make any order for her to remove into the house that has heen provided for the minor's use." The matter, if it rested there, might have occasioned some difficulty. Speaking for myself, I am not at all sure that the Judge made that order permanently superseding the order of the 8th May 1912. I think it was simply meant *prima facie* as a temporary measure during the then exciting illness of the minor's mother. But the subsequent orders made by the District Judge show that the allowance was to be paid to the minor's mother notwithstanding her failures to reside in the residence provided for her use. There was an order when the mother was living at Madhupur—although apparently the Judge did not view with favour her

residence at that place which clearly recognized that Rs. 300 a month was to be paid to the mother. The mother is now dead. The District Judge dismissed the application that was made to him, on the ground that the mother of the infant never complied with the condition imposed by the order of the 8th May 1912. This Rule has been obtained against that order.

It has been urged that this Court cannot interfere under section 115, Code of Civil Procedure. I must confess I am considerably impressed with that argument. I feel considerable hesitation in interfering in a case of this nature. However, the other learned Judge on the Bench does not feel that difficulty and I do not think that, in a case like this where all the merits are on the side of the guardian who maintained the infant, I should press my doubt so far as to dissent from the order that is going to be made. The amount of the arrears of maintenance claimed stands in two parts. First of all, the part that accrued due on the date of the order of the learned District Judge, that is, the 22nd April 1912. As regards that, it could not matter whether the mother resided at the house provided for her or in any other place. All that money has been spent and laid out for the benefit of the infant and the condition as to the residence was imposed as regards the future payment, and not as regards the amount that became due for past years. The learned Judge obviously ought not to have deprived the guardian of the person of the minor of that money. The other part, that is, as regards the arrears that accrued due after that order of the 22nd April 1912 stands on a different footing. On the whole, I am not prepared to say that the learned Judge by his order of the 8th May 1912, did mean that the payment of the allowance should be made only in the event of the guardian of the person of the minor removing to the house that had been provided for the residence of the minor. The subsequent orders passed by the learned District Judge seem to recognize the fact that the mother and guardian of the person of the minor was entitled to receive an allowance of Rs. 300 a month without residing at the house that had been provided for their use. On the whole, I think the order of the learned District Judge ought to be set aside and, with regard to the allowance of Rs. 300 per mensem that accrued due prior to the 22nd April 1912, the petitioner is entitled to receive it and, with regard to the allowance subsequent to that date, he is entitled to receive it upon satisfying the learned Judge that the minor was suitably and properly maintained by the mother during the period between that date and up to her death. The Rule is, therefore, made absolute on these terms with costs, one gold *mohur*.

SMITHER, J.—I agree.

Rule made absolute.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 292 OF 1916.

February 27, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

RAJANI KANTA MONDAL—PLAINTIFF—APPELLANT

versus

Haji LAL MUHAMMAD SARDAR—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872*)*, *ss.* 69, 70—Putni, *sale of, in execution of rent-decree—Deposit of decretal amount by* dar-putnidar — Putnidar, *liability of — Bengal Tenancy Act (VIII B. C. of* 1885*)*, *s.* 171, *erroneous order under—Injunction, suit for—Decree, conditional.*

The landlord of a *putni* tenure brought a suit for arrears of rent against some only of the *putnidars* and obtained a decree. Defendant, a *dar-putnidar* of the judgment-debtors, deposited the decretal amount in Court to save the tenure from being sold, and was ordered to be put in possession as mortgagee under section 171 of the Bengal Tenancy Act. Plaintiff, a *putnidar* who was not a party to the landlord's suit for rent, brought a suit for a declaration and an injunction that his right in the tenure was not affected by the order under section 171 of the Bengal Tenancy Act, and the Court gave him a decree conditional on his paying to the *dar-putnidar* his proportionate share of the rent:

Held, (1) that the payment made by the defendant fell as against the plaintiff within sections 69 and 70 of the Contract Act; [p. 244, col. 1.]

(2) that the condition attached to the decree in favour of the plaintiff was not improper. [p. 244, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Rajshahi, dated the 22nd September 1916.

Babus *Sarat Chandra Roy Chowdhury* and *Bireswar Bagchi*, for the Appellant.

Babus *Mohini Mohan Chakrabarty* and *Jotindra Mohan Chowdhury*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against a judgment of the learned Additional Subordinate Judge of Rajshahi, dated the 22nd September 1916. The plaintiff brought the suit for a declaration that his right in certain property had not been affected by the charge said to have existed in favour of the defendant No. 1 under section 171 of the Bengal Tenancy Act. The facts are somewhat complicated as they appear from the judgment of the Court below, but from the very clear and lucid statement made by Mr. Roy Chowdhury who opened the appeal, the following may be taken as the facts necessary to be considered for the purpose of this case. There was a *putni* in which one Nafar Mandal had a 9-annas share. The other 7 annas was vested in two persons named Ram Coomar and Mahabharat. Nafar Mandal died leaving three sons, Srinath, Lakshi Kant, and Baruni. Srinath died without issue leaving a widow Nayantara. Lakshi Kant also died without issue leaving a widow Bisseswari. Baruni died leaving six sons, the plaintiff being the eldest of those sons. As to the 7-annas share in the *putni*, Ram Coomar died leaving Akrurmani his widow and the widow of a pre-deceased adopted son, namely, Ramsasi. Mahabharat died also without issue leaving Bama Sundari his widow. The landlord brought a suit to recover the rent in arrears due on the *putni*. In that suit, he made Nayantara the first defendant, Akrurmani, the second defendant and Chandra Kamini who was the widow of a nephew of Mahabharat the third defendant. After the decree, the property was put up for sale in execution. The defendant No. 1 in the present case holds a *dar-putni* under the 7-annas co-sharers and he deposited the whole amount of the decree and prevented the property from being brought to sale. After that, the defendant No. 1 made an application under the provisions of section 171 of the Bengal Tenancy Act to be put in possession as a mortgagee and the Court made that order. Then the plaintiff brought the present suit on the footing that the decree in the suit brought by the landlord to which he was no party was not binding on him and that, it not having been a decree for arrears of rent within the meaning of the Bengal Tenancy Act, no order could be made under section 171 of the Bengal Tenancy Act as against him. The learned Judge of the Court below in the course of his judgment has found the title of the plaintiff and has held that the decree was not a decree for rent within the meaning of the Bengal Tenancy Act, as the landlord did, in fact, know of the interest of the plaintiff in the tenure and, therefore, he has made a declaration in the suit in favour of the plaintiff. He has also granted to the plaintiff an injunction as prayed for by him; but in his opinion, the plaintiff being liable under the law to pay to the defendant No. 1 his portion of the rent which is represented by the 9-annas share in the *putni*, he has attached a condition to the issue of the injunction, namely, that the injunction would issue only on the plaintiff paying to the first defendant his portion of the rent that has been paid by the defendant No. 1. That is the only point involved in the present appeal, all the other matters being found and declared in favour of the plaintiff.

The first point that arises in this case is whether the payment made by the defendant No. 1 falls within the terms of sections 69 and 70 of the Indian Contract Act, or whether it was purely a voluntary payment made by the first defendant. The cases that have been cited to us on this point seem to me not to offer much assistance. The case of *Raja Baikunto Dey Bahadur* v. *Udoy Chand Maiti* (1) is a perfectly simple case. There the sale was being made of the interest of the *zemindar* under the Public Demands Recovery Act and the payment by the *putnidar* was not deemed to be a payment made by a person having an interest in the payment, as the *putni* by reason of the sale of the interest of the *putnidar* could not be affected in any way. So is the case of *Panchkori Ghosh* v. *Hari Das Jati* (2), because the finding

(1) 2 C. L. J. 311.

(2) 34 Ind. Cas. 341; 25 C. L. J. 325; 21 C. W. N. 394.

made there was that the mortgage was a fictitious one and the person claiming under a fictitious deed could neither be called interested in the payment of the money within the meaning of section 69, nor was the payment lawful within the meaning of section 70 of the Indian Contract Act. But when one comes to the case of a *dar-putnidar* of a share of a *putni* making a payment of the whole rent due on the *putni*, on the ground that the *dar-putnidar's* interest in the property is liable to be or may be destroyed if the property is brought to sale, it seems to me that that is a totally different case and I think that such a payment falls within the terms of both sections 69 and 70 of the Indian Contract Act. The present *dar-putnidar* was clearly interested in the payment of the money because, if the money was not paid, the *putni* was liable to be destroyed and with it would go the *darputni*. Obviously the *putnidar* was bound by law to pay the rent due to the *zemindar*. That seems to me clearly to bring the case within the terms of section 69 of the Indian Contract Act. I also think that the case comes within the terms of sections 70 of that Act, because it is quite clear, in a case of this nature, that the *darputnidar* did not intend to act gratuitously when he paid the rent of the *putni* and the payment was a lawful one without doubt, because it was made by depositing the money in Court and the present plaintiff has, in fact, enjoyed the benefit of that, because it is not his case that anybody else except the first defendant paid the rent that he owed to the landlord. Therefore, it seems to me clear that the payment comes within the terms of both sections 69 and 70 of the Indian Contract Act.

Then it is said that the first defendant ought to have been left to realise the money from the plaintiff by a separate suit. The view of the learned Judge was that he had a discretion before he awarded an injunction and it was an equitable remedy and the Court could impose terms on the plaintiff before awarding it. The condition which the learned Judge imposed was that the plaintiff in this suit—the rights of all the parties having been ascertained—must undertake to pay to the defendant No. 1 the amount that he was liable to pay in respect of the *putni* rent paid by the *dar-putnidar* and that otherwise the injunction would not be awarded. That view seems to me to be a view which the learned Judge was entitled to take before granting the injunction asked for. There can be no advantage gained in the present case by leaving the parties to a separate suit, the rights being ascertained of all the parties and the learned Judge, I think, exercised a wise discretion in directing that, before this injunction should issue, the plaintiff must undertake to pay to the defendant No. 1 his portion of the amount of the rent paid by the first defendant for the *putni*, the plaintiff having enjoyed the benefit of such payment. Without that condition, the learned Judge declined to award the injunction. I am not prepared to say that in that he exercised his discretion wrongly or in a manner that we ought to review his order. It is quite clear that without the award of an injunction the declarations that have been made by the learned Judge in favour of the plaintiff would not be of such value as when the injunction is awarded. I see no reason to dissent from the view taken by the learned Judge that the injunction in this case ought not to be granted, except on conditions that the plaintiff should undertake to pay to the defendant No. 1 his portion of the *putni* rent which has been paid by the defendant No. 1. In that view of the case, the decree passed by the learned Judge of the Court below will be affirmed, subject, however, to the slight variation that, in lieu of the order of the learned Judge that on failure to pay the money, the whole suit would be dismissed, there should be a direction that on failure to pay the money, the declarations that have been made in favour of the plaintiff would remain but that the injunction would not be issued, as the injunction was made conditional upon payment of the said money. Subject to this slight modification, the decree of the lower Court is affirmed and this appeal dismissed with costs—one hundred and fifty rupees.

The cross-objection not being pressed is dismissed. We make no order as to costs in the cross-objection.

RICHARDSON, J.—I agree.

Appeal and cross-objection dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 903 OF 1914.

March 2, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

RAJ CHANDRA MANDAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAGHUNATH DAFADAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration and award—Representative of party to reference, whether can enforce award.

A proceeding for the purpose of setting aside an execution sale was compromised and the matter in dispute was referred to an arbitrator, who made an award by which he directed that the judgment-debtors, whose property was sold, should pay a certain sum in cash to the other party within twenty days of the date of the award to have the sale cancelled. In a suit for possession of the property by the plaintiffs, who acquired it from the judgment-debtors subsequent to the award:

Held, that in order to get the benefit of the award the plaintiffs must prove that the condition which the arbitrator stipulated had been complied with. [p. 246, col. 1.]

Appeal against the decree of the Additional District Judge, 24-Pergannahs, dated the 6th January 1914, modifiying that of the Additional Munsif, Basirhat, dated the 2nd January 1913.

FACTS of the case appear from the judgment.

Babu *Ram Chunder Mazumdar* (with him Babus *Probodh Chunder Ghose* and *Nil Kant Ghose*), for the Appellants.—The appeal arises out of a suit for recovery of *khas* possession of two plots of land, one of which the plaintiffs purchased at a Court sale and the other by a private conveyance from defendant No. 5 on 30th November 1909. These two plots were formerly sold in execution of a rent-decree, but on the application of the defendants other than the defendant No. 5 the matter was referred to arbitration, and the arbitrator appointed set aside the sale. The Court of Appeal below has held that with regard to the plot acquired by private purchase from the defendant No. 5, no title passed to the plaintiffs because prior to that sale the title had passed by the rent-sale.

My submission is that when the sale was set aside it must have been set aside *in toto*, inasmuch as under the Civil Procedure Code of 1882 there could be no partial setting aside of a sale. See section 311 of Act XIV of 1882. The defendant No. 1 cannot say in the face of the arbitrator's award setting aside the sale that the title of the defendant No. 5 passed away by the rent-sale. Defendant No. 5 can claim the benefit of the award, and defendant No. 1 has no right to retain possession of the property. The sale could not but be set aside *in toto*.

[FLETCHER, J.—That is so, if the sale is set aside judicially. Moreover you did not fulfil the conditions of the arbitrator's award.]

I can still take advantage of the award so long as it stands good.

Babu *Ramgati Sirkar*, for the Respondents, was not called upon in reply.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Additional District Judge of the 24-Pergannahs, dated the 6th January 1914, modifying the decision of the Additional Munsif of Basirhat. The plaintiffs brought the suit for possession of two plots of land, each measuring about 7 *cottas*. One of these two plots, it is alleged, has been acquired by purchase in execution of a mortgage decree and the other plot has been acquired by a private sale from the defendant No. 5. The only question in this case is: "Had the defendant No. 5 a title to the property that could be passed to the plaintiffs?" The Primary Court decreed the plaintiffs' suit in full. The learned Judge in the lower Appellate Court has reversed the decision of the Primary Court on appeal with regard to the plot acquired by private purchase by the plaintiffs from the defendant No. 5. The case has been argued with great ability by Mr. Mazumdar on behalf of the plaintiffs-appellants; but I am not satisfied that, on the materials on the record, the decision of the learned Judge of the lower Appellate Court is wrong. It appears that the defendant No. 5 was originally a co-sharer in the *jote*. The *jote* itself was brought to sale in execution of a rent decree and purchased by the defendant No. 1. The predecessor of the defendant No. 5 then made an application to have the sale set aside; but he died before the application was disposed of and that application appears to have been abandoned. Subsequently, the other co-sharers

instituted proceedings for the same purpose and an agreement was come to between those other co-sharers and the defendant No. 1, by which the matter in dispute was referred to the arbitration of a particular named arbitrator. The arbitrator made an award by which he directed that the applicants, that is the other co-sharers, should pay a certain sum in cash to the defendant No. 1 within twenty days of the date of the award to have the sale cancelled. The plaintiffs claim to have the benefit of that award and of the order passed on the award being filed in Court. I am not satisfied that the plaintiffs are entitled to the benefit of the award. I think the ordinary rule is to apply to an award just as much as to a contract. But whether that is so or not, the plaintiffs must prove before they can get the benefit of the award that the condition which the arbitrator stipulated had been complied with, and the condition was that the payment should be made within twenty days. There is not a word to be found in the judgment of either of the Courts below that the payment was made within twenty days, nor is it admitted in the defence that any such payment was made. It was clearly the duty of the plaintiffs, if they meant to claim the benefit of the award, to show that the condition imposed by the arbitrator had been strictly complied with. Then the learned Judge in the lower Appellate Court says that the subsequent conduct is the only evidence as to what was done under the terms of the award; and the subsequent conduct shows that the sale had not been set aside *in toto*, because the evidence that we have got on the record led the learned Judge of the lower Appellate Court to the conclusion that the defendant No. 1, at some time in the year 1910, was in possession of the share of the defendant No. 5. The learned Judge found that, in that view at any rate, the whole sale could not have been set aside. Whether the condition in the award was strictly complied with or whether there was a future agreement arrived at between the defendants, the evidence shows that the whole sale was not set aside because the defendant No. 1 continued to be in possession of the share of the defendant No. 5. I think on the facts that the plaintiffs could not satisfy the Court that they were entitled to the benefit of this award and that the evidence shows that the defendant No. 1 continued to be in possession of the share of the defendant No. 5. In that view, the judgment of the learned Additional District Judge cannot, in my opinion, be disturbed. The appeal is, therefore, dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 62 OF 1916.

March 12, 1917.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Heaton.

Raja Bahadur MOTILAL SHIVLAL—PLAINTIFF—APPELLANT

versus

THE POONA COTTON AND SILK MFG. CO., LTD.—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 52, 2 (d)—Mortgage suit—Charge created pending suit, how far effective—Lis pendens, *doctrine of—Transfer in execution of order of Court—Mortgagee, second, position of.*

Plaintiff instituted a mortgage suit in the High Court against the mortgagor, a Company in liquidation, and the second mortgagee. The liquidators of the Company applied to the District Court in which the liquidation proceedings were going on for sanction to raise Rs. 25,000 for costs of litigation on the security of the assets of the Company except the goods pledged to the plaintiff. The plaintiff and the second mortgagee both opposed the application, but the District Judge gave the sanction and apparently decided that the mortgaged property was assets which could be charged. Thereafter the liquidators executed two documents of charge for Rs. 10,000 each in favour of the plaintiff reciting the decision of the District Judge, and agreed that upon the sale of the mortgaged premises the sums so charged and all interest due thereon should be payable out of the sale proceeds in priority to all other payments. The mortgaged property was ordered to be sold. and out of the surplus sale proceeds after the satisfaction of the plaintiff's mortgage, the latter claimed by virtue of the documents of charge to be paid the amount secured thereby in priority to the claim of the second mortgagee:

Held, (1) that the second mortgagee as party to the pending mortgage suit was protected, by section 52 of the Transfer of Property Act, against any postponement of his security by the charges created *pendente lite* by the liquidators, inasmuch as the

authority of the District Court could not affect orders in a pending suit in the High Court; [p. 248, col. 2.]

(2) that the liquidators' charges could not be treated as transfers in execution of an order of a Court, within the scope of section 2 (*d*) of the Transfer of Property Act, inasmuch as the District Court's sanction was not an order capable of execution but merely an authority to the liquidators to act in a certain manner if occasion should arise. [p. 248, col. 2.]

Appeal from the following judgment of Kemp, J. :—

"It appears from the reasons given by the District Judge for his order that he considered that as the liquidators had no moneys in their hands and it was contended that the mortgages of the plaintiff and the second defendant were open to defects, he was justified in giving a first charge in respect of the proposed loan of Rs 25,0.0. The way in which the District Judge's order is worded really gives the first charge on the assets and this of course would save the rights of the plaintiff and second defendant under their mortgages, but there is no doubt the District Judge intended to give Rs. 25,000 priority over them. The assets really are whatever remains over after the claims of the secured creditors under their securities have been satisfied. So that if I take it that the District Judge's order means only the assets after satisfaction of the claims of the secured creditors it is not open to objection, although the amount of the claims of the secured creditors under their mortgages leave nothing over of the unsecured creditors and there would, therefore, be nothing on a first charge on which the liquidators could raise Rs. 25,000. Clearly, on this construction of the order, the plaintiff who himself subsequently advanced the sum the liquidators required *viz.*, Rs. 20,000, could have no right to credit for that sum in priority to the claim of the second defendant under his mortgage, in the price at which he (plaintiff) purchased the mill.

If, however, the District Judge's order is to be taken as expressing what he undoubtedly meant, *viz.*, that the first charge for the proposed loan was to have priority over the mortgages of the plaintiff and second defendant, then I am of opinion hat that order was not only wrong but passed entirely without jurisdiction. The District Judge could not by any order passed on that petition take away the rights of secured creditors without their consent. The sections of the Indian Companies Act cited by Mr. Mulla regarding preferential payments and the priority of payment out of the assets of a Company of the costs and expenses of winding-up refer only to the fund available as assets, *i.e.*, after the claims of secured creditors have been satisfied. If the liquidators themselves realise property subject to a specific charge, the proceeds are distributable in priority in the following order, *viz.*, *firstly*, to the costs of realisation; *secondly*, in payment of the costs of preservation, strictly so described, so far as the other assets of the Company are not sufficient; and *thirdly*, in payment of the principal, interest and mortgagees' costs, all of which have priority over the general costs of the liquidation and the costs of carrying on the business of the Company. In the present case the money raised by the liquidators under the District Judge's order has been and is being spent partly in litigating with the second defendant-mortgagee regarding a claim for two lacs by the mill against that defendant and partly in the public examination of the agents of the mill. I think it unnecessary to labour the point. It seems to me quite clear that the loan raised by the liquidators under the Poona Court's order of the 22nd of November 1915 is not entitled to priority over the mortgages of plaintiff and second defendant and I, therefore hold the plaintiff is not entitled to credit for this sum in the price at which he purchased the mill and that Rs. 20,000 must be postponed to second defendant's mortgage. It is only necessary to add that Rs. 20,000 were advanced to the liquidators by the plaintiff himself under a deed of charge dated the 10th of July 1916 and a deed of further charge dated the 19th August 1916 for Rs. 10,000 each, which have been put in and marked Exhibits G and H in the case. Nor can the plaintiff complain that he was misled into a belief that Rs. 20,000 would have a first charge, because he was a party to the petition to the Poona Court and vehemently opposed it and even commenced proceedings for an appeal against the order. The plaintiff must pay

SALABAT *v.* ABDEL RAHMAN.

Rs. 20,273-1-0 with interest at 2 per cent. to the liquidators.

Mr. *Strangman* (with him Messrs. *Inverarity*, *Desai* and *Mulla*), for the Appellants.

Messrs. *Kanga* and *Taraporevala*, for the Respondent No. 2.

JUDGMENT.—This is a mortgage suit instituted in this High Court by the present appellant against the mortgagor, the Poona Cotton & Silk Manufacturing Co. in liquidation, the Poona Bank, the second mortgagees, and the Poona Swadeshi Company.

On the 9th October 1915, leave was obtained from the Court for the plaintiff to proceed with this suit against the Company in liquidation. Subsequently, the liquidators applied to the Poona District Court, in which the liquidation proceedings were going on, for sanction to raise Rs. 25,000 for costs of litigation on the security of the assets of the Company except the goods pledged to the plaintiff. On this application both the plaintiff and the second mortgagees contended that the sanction should not be given so as to affect their security, as the 'assets' would not include the interests in the property held by the mortgagees. The District Judge, however, on the 22nd November 1915, gave the liquidators the sanction and apparently decided that the mortgaged property was assets which could be charged. The liquidators, thereafter, on the 10th July and 19th August 1916, executed two documents of charge for Rs. 10,000 each in favour of the present plaintiff reciting the decision of the District Judge and agreed that upon the sale of the mortgaged premises the sums so charged and all interest due thereon should be payable out of the sale proceeds in priority to all other payments.

On notice of motion for sale of the mortgaged properties made in this suit on the 17th November 1915, an order had been passed by consent on the 13th March 1916 for sale of the mortgaged properties by the liquidators reserving the contentions of all the parties. The surplus sale-proceeds after satisfaction of the plaintiff's mortgage claim in the suit amount to Rs. 81,000 or thereabouts, and the plaintiff now claims by virtue of the documents of charge to be paid the amount secured thereby in priority to the claim of the second mortgagees, the Poona Bank.

Kemp, J., has decided that the Bank as second mortgagees have priority on the ground that the District Judge had no jurisdiction to sanction the first charge of mortgaged property as assets of the Company in liquidation to the prejudice of the mortgagees.

It is not contended that the decision of the learned District Judge can be supported as a correct decision in law, but the appellant relies upon it as effective as an estoppel because the second mortgagees appeared before the District Judge and did not appeal against his decision.

It appears to us that whether or not the decision is binding as a sanction in face of the mortgagees' protest to the charging by way of first charge assets already mortgaged, the second mortgagees are as parties to the pending mortgage suit protected by section 52 of the Transfer of Property Act against any postponement of their security by the charges created *pendente lite* by the liquidators, for the authority of the District Court in Poona cannot affect orders in a pending suit in the Bombay High Court. We cannot hold that the liquidators' charges were transfers *in execution of* an order of a Court within the scope of section 2 (*d*) of the Transfer of Property Act. The Poona Court's sanction was not an order capable of execution but merely an authority to the liquidators to act in a certain manner if occasion should arise.

We affirm the order of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 938 OF 1914.

January 29, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal

SALABAT—PLAINTIFF—APPELLANT

versus

ABDUL RAHMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 119—Exchange—Warranty of title—"Agreement to the contrary"—Suit to recover equivalent portion of land given in exchange, maintainability of.

SALABAT *v.* ABDUL RAHMAN.

In the absence of an agreement to the contrary, parties making an exchange are deemed to covenant for title, and if in consequence of defective title either party to the transaction is deprived of the property, or part thereof, received by him in exchange, he is entitled at his option either (*a*) to cancel the bargain and to get back his property or (*b*) to obtain compensation for the loss suffered by him. He is not, however, entitled to recover an equivalent portion of the land given by him in exchange. [p. 249, cols. 1 & 2.]

Veera Pillai v. *Poonnambala Pillai*, 9 M. L. J. 137, relied upon.

A clause in a deed of exchange, to the effect that neither party would have any claim against the other contrary to the exchange, does not amount to an agreement excluding the implied warranty of title. [p. 249, col. 2.]

Second appeal from the decree of the Divisional Judge, Shahpur Division at Sargodha, dated the 2nd February 1914.

Messrs. *Nand Lal* and *Asquith*, for the Appellant.

Mr. *Morton*, for the Respondents.

JUDGMENT.—The appellant, Salabat, has undoubtedly lost 60 odd *bighas* of land out of the area he received in exchange from Saleh, the predecessor of defendants Nos. 1—5, by reason of the latter's defective title, and the crucial point for consideration is whether the plaintiff is, by reason of the deprivation of a part of the bargain, entitled to any relief, and, if so, whether he can recover an area of land equivalent to what he has lost, or is confined to his remedy by way of compensation. His allegation of fraud or misrepresentation has not been established, and the finding of fact on this point arrived at by the learned Divisional Judge cannot be disturbed in second appeal. Now, section 119 of the Transfer of Property Act lays down that in the absence of an agreement to the contrary the parties making the exchange are deemed to covenant for title, and if in consequence of defective title either party to the transaction is deprived of the property, or part thereof, received by him in exchange, he is entitled at his option (*a*) either to cancel the bargain and to get back his property, (*b*) or to obtain compensation for the loss suffered by him.

There being an implied warranty of title, the onus lies on the defendants to establish a contract which would exclude the operation of the section. The learned Divisional Judg holds that such a contract has been established, but we are unable to concur in his view. The clause in the agreement upon which he bases his finding is in the following terms:—

Aj ke bad bar khilaf tabadale ke kisi qism ka koi dawa ek dusre ko nahin raha. Jis qadr haquq-i-malikana ek dusre ko apni apni arazi men hasil the un ke malik kamil arazi tabadala shuda men ek dusre ko honge.

This clause translated literally means that neither party "has after to-day any claim against the other contrary to the exchange; whatever proprietary rights each party had in his own land will be owned by the other party." The first portion of the clause merely provides that the written contract contains the terms between the parties and that neither party is entitled to urge anything contrary to those terms; and the second portion is merely a formal recital of the fact that each party to the exchange steps into the shoes of the other. We do not think that the parties to the transaction contemplated the abrogation of the warranty of title, or intended to enter into an express contract which would do away with the implied covenant which according to the Statute is to be deemed to be a part of every transaction of exchange. Had they intended to enter into a contract to the contrary, they would have certainly couched their intention in language free from ambiguity. We must, therefore, hold that the implied warranty of title has not been taken away by any contract to the contrary, and that the plaintiff is entitled to avail himself thereof.

It is, however, clear that he must sue to set aside the whole transaction and claim to be placed in the position in which he was before the exchange. The law does not permit him to bring a suit to recover an equivalent portion of the land he gave, *vide Veera Pillai* v. *Poonnambala Pillai* (1). Now a perusal of the plaint shows that the plaintiff brought the present suit for the recovery of an area of land equal to that he had lost, and in the Courts below he never expressed his intention of surrendering the land in his possession and recovering the plot which he had transferred by way of exchange. Indeed in answer to the pleas of the defendants he insisted upon his right to

(1) 9 M. L. J. 13 ,

maintain the suit as contained in the plaint and asked the Court to frame an issue on this point. In these circumstances we are constrained to hold that he is not now entitled to avail himself of the first option given to him by section 119, and that his remedy is confined to the recovery of damages for the loss sustained by him.

As regards the amount of compensation, it is sufficient to say that in the deed of exchange the value of the entire area, 112 *bighas*, was fixed at Rs 600 and it cannot, therefore, be said that Rs 400, the amount fixed by the Court of first instance, is an inadequate price for 60 *bighas*. On the record there is no evidence which would help us in fixing the amount of damages, and we must, therefore, accept the amount determined by the learned Subordinate Judge.

The plaintiff was evicted from the land in 1911 and he instituted the present suit a few months afterwards. The limitation began from the date of dispossession, and the present claim for damages is, therefore, clearly within time.

The result is that we accept the appeal so far as to grant the plaintiff a decree for Rs. 400 as against all the defendants. In view of all the circumstances of the case we leave the parties to bear their own costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 108 OF 1915.

March 9, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

CHANDI CHARAN SAHA AND ON HIS DEATH HIS HEIR BEHARI LAL SAHA—PLAINTIFF AND *pro forma* DEFENDANT—APPELLANT

versus

JNANENDRANATH BHATTACHARJEE—DEFENDANT—RESPONDENT.

Letters Patent, cl. 15—*Judgment, what amounts to—Order remanding appeal for re-hearing on merits, whether judgment.*

To determine whether an adjudication is a judgment within the meaning of the Letters Patent, the test is, not what the form of the adjudication is, but what is its effect on the suit or proceeding in which it is made. If its effect, whatever its form and whatever the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment. [p 252, col. 1.]

Mathura Sundari Dassi v. *Haran Chandra Shaha*, 34 Ind. Cas. 634; 43 C. 857; 20 C. W. N. 594; 23 C. L. J. 443, followed.

Where in a suit for accounts against the defendant as an agent or, in the alternative, as a partner of the plaintiff, the District Judge in appeal did not hear the appeal on the facts but proceeded to determine the status of the defendant as a pure question of law and a single Judge of the High Court in second appeal set aside the decision of the District Judge and remanded the case for the re-hearing of the appeal on the merits by the District Judge:

Held, that the decision of the single Judge was a judgment within the meaning of the Letters Patent, as it affected the merits of the question between the parties by determining a right or liability which need not be one in controversy in the suit itself, its effect being to deprive the plaintiff of the benefit of the decree made in his favour by the District Judge and to re-open the entire controversy between the parties, as it terminated the appeal in the High Court and vacated the decree made by the District Judge. [p 252, col. 1.]

Appeal against the decree of Mr. Justice Walmsley, dated the 12th March 1915, reported as 29 Ind. Cas. 480, in Appeal from Appellate Decree No. 904 of 1913.

FACTS of the case appear from 29 Ind. Cas. 480, where the judgment of Mr. Justice Walmsley is reported.

Babu *Baranasibasi Mukerji*, for the Respondent, raised a preliminary objection to the hearing of the appeal, on the ground that the questions in controversy between the parties had not at all been determined by Mr. Justice Walmsley who had simply asked the lower Appellate Court to decide again all questions of law and fact arising in the case, so that it was not a judgment within the meaning of section 15 of the Letters Patent.

[Babu *Siva Prosanna Bhuttacharji*, for the Appellant.—If there be no judgment the case has not been decided, and my learned friend ought not to oppose your Lordships hearing the appeal. There has been a decree following the judgment and I have a clear right of appeal.]

[MOOKERJEE, J.—But the question is whether there has been a judgment within the meaning of the Letters Patent. There is a clear distinction between a judgment under the Civil Procedure Code and a judgment within the meaning of clause 15 of the Letters Patent. Babu Baranasibasi Mukerji, you had

better argue the point as it seems your friend was not prepared to meet this argument.]

Babu *Baranasibasi Mukerji*.—The point I raise is that in this case there has been no judgment within the meaning of clause 15 of the Letters Patent. The term judgment in that clause was interpreted by Sir Richard Couch in *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (1), and his view was practically affirmed by the Judicial Committee, *Hurrish Chunder Chowdhry* v. *Kal Isunderi Debi* (2). Some light may also be thrown on the point by the despatch of Sir Charles Wood accompanying the Letters Patent. In two recent cases where the question arose as to the scope of an appeal under the last portion of that clause, your Lordships had occasion to consider the question [*Upendra Nath Bose* v. *Bindeshri Prosad* (3), *Krishen Doyal Gir* v. *Irshad Ali Khan* (4)].

[MOOKERJEE, J.—I think we must overrule the preliminary objection and proceed to hear the appeal. We shall deal with the point in our judgment.]

JUDGMENT.—This appeal is directed against an order of Mr. Justice Walmsley, whereby he has set aside the decision of the District Judge and directed the appeal to be re-heard. A preliminary objection has been taken to the competency of the appeal on the ground that the decision is not a judgment within the meaning of clause 15 of the Letters Patent. To determine the validity of the preliminary objection it is necessary to state briefly the nature of the suit and the scope of the orders made at various stages thereof.

The plaintiff sued the defendant for accounts and put his case in the alternative. He alleged in the first place that the defendant was his servant employed in two wine shops, and was consequently liable to render accounts. He asserted in the second place that if the defendant was not a servant, he was a partner and was in that character liable to render accounts. The Court of First Instance came to the conclusion that the defendant was a partner and made a decree for dissolution of partenrship and for accounts. The plaintiff was dissatisfied with this decision and appealed to the District Judge. The District Judge did not, as we gather from the records, hear the case on the facts, but held as a matter of law that the defendant could not be a partner of the plaintiff. He accordingly set aside the decision of the Trial Court and gave the plaintiff a decree for accounts against the defendant as an agent of one of the two wine shops mentioned. The defendant appealed to this Court. Mr. Justice Walmsley has allowed the appeal and remanded the case in order that the appeal may be re heard by the District Judge.

On behalf of the respondent it is contended that as all the matters in controversy between the parties have been left open for fresh adjudication by the District Judge, this decision is not a judgment within the meaning of the Letters Patent. In support of this view reliance has been placed upon the now classical definition given by Sir Richard Couch, C. J., in the case of *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (1). We are of opinion that the preliminary objection cannot be sustained.

Sir Richard Couch defined the expression 'judgment' in clause 15 of the Letters Patent to mean a decision which affects the merits of the question between the parties by determining some right or liability, and added that it might be either final, preliminary or interlocutory. This definition does not assist the respondent. The decision here does affect the merits of the question between the parties by determining a right or liability: its effect is to deprive the plaintiff of the benefit of the decree made in his favour by the District Judge and to re-open the entire controversy between the parties. It is plain that the expression 'some right or liability' is not restricted to the right in controversy in the suit itself. This is clear from the illustrations given by Sir Richard Couch in his judgment, as also from his judgment in the case of *Hadjee Ismael Hadjee Hubeeb* v. *Hadjee Mahomed Hadjee Joosub* (5). On the other hand, if we adopt the wider definition formulated by White, C. J., in the case of *Tuljaram Row* v. *Alagappa Chettiar* (6), the decision is unquestionably a judg-

(1) 8 B. L. R. 433; 17 W. R. 364.

(2) 9 C. 482; 10 I. A. 4; 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar. P. C. 406; 4 Ind. Dec. (N. S.) 970 (P. C.).

(3) 32 Ind. Cas. 468; 22 C. L. J. 452; 20 C. W. N. 210.

(4) 31 Ind. Cas. 965; 22 C. L. J. 525.

(5) 13 B. L. R. 91; 21 W. R. 303.

(6) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1.

ment within the meaning of the Letters Patent. The test is, not what the form of the adjudication is, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment [*Mathura Sundari Dassi* v. *Haran Chandra Shaha* (7)]. The effect of the decision of Mr. Justice Walmsley is to terminate the appeal in this Court and also to vacate the decree made by the District Judge; and a decree has been drawn up in this Court to give effect to this decision [*Doucett* v. *Wise* (8), *Upendra Nath Bose* v. *Bindeshri Prosad* (3), *Krishen Doyal Gir* v. *Irshad Ali Khan* (4)]. We are of opinion that, in these circumstances, the decision of Mr. Justice Walmsley is a judgment within the meaning of the Letters Patent and the preliminary objection cannot be sustained.

As regards the merits it is plain that the order must be sustained. The District Judge did not hear the appeal on the facts but proceeded to determine the status of the defendant as a pure question of law. It is not necessary for us to express an opinion upon the legal questions in controversy between the parties; and as we read the judgment of Mr. Justice Walmsley, he did not commit himself to a definite proposition of law on the question, whether or not the defendant could legally be a partner of the plaintiff. He has held in substance that the facts must be investigated before the legal relation between the parties can be determined. This view is manifestly right.

The result is that the order of Mr. Justice Walmsley is affirmed with costs and the case remitted to the District Judge in order that he may determine, *first*, the questions of fact which arise in the case and *secondly*, all questions of law which may require adjudication on those facts.

Case remitted.

(7) 34 Ind. Cas. 634; 43 C. 857; 20 C. W. N. 504; 23 C. L. J. 443.

(8) 2 Ind. Jur. (N. S.) 280 at p. 296.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 129 OF 1914.

June 15, 1917.

Present:—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Mullick.

SHAHZADI BEGAM AND OTHERS—APPELLANTS

versus

FASIH-UD-DIN AHMAD AND OTHERS—RESPONDENTS.

Public Demands Recovery Act (I B.C. of 1895) —Sale for arrears of road-cess—Certificates issued against persons having no interest in property, validity of—Sale, whether binding on real owner.

A sale of a property held under the Public Demands Recovery Act by issuing certificates for arrears of road-cess against the persons on the Collector's books who have virtually no interest in the property, does not affect the real owner of the property. [p. 255, col. 2.]

Appeal from a decision of the Additional District Judge, Patna, dated the 4th August 1913.

Messrs. *Wasi Ahmad* and *S. M. Sharif* (with them Messrs. *Khurshed Hasnain*, *Nirsu Narain Singh*, *Pugh*, *Gangadhar Das* and *Shivnandan Rai*), for the Appellants.

Mr. *P. R. Das* (with him Messrs. *Purendra N. Sinha*, *Bhupendra N. Ghosal* *B. N. Mitra* and *Panchanan Banerji*), for the Respondents.

JUDGMENT.

MULLICK, J.—This was a suit for recovery of possession with mesne profits of 10 annas 17 *dams* 10 *cowries* 4 *bowries* 14 *phouries* proprietary interest, 3 annas 13 *dams* 18 *cowries* 19 *bowries* 13 *phouries mokarari* interest and 6 annas 13 *dams dur-mukararri* interest including *khud kast* lands in *Mauzah* Sonawan, which is entered in the Collectorate books as *Lakhiraj* No. 49. It is admitted that the above different interests aggregating 14 annas 10 *dams* 19 *cowries* 4 *bowries* 7 *phouries* belonged to one Zahurul Huq, who mortgaged the same to one Mukhtiar Bahadur by registered instrument dated the 4th July 1884. On Mukhtiar Bahadur's death, his widow Parbati Kuer sued the heirs of Zahurul Huq, who died in 1890, and all subsequent purchasers with the exception of two upon the mortgage-bond and obtained a decree on the 24th April 1897. The properties were not, however, brought to sale till the 21st January 1903, on which day they were knocked down for a sum of Rs. 2,400 to one Abdul

Latif. The sale was confirmed on the 18th May 1903 and possession was delivered on the 21st July 1904.

On the 23rd May 1908, Abdul La'if sold 3 annas 11 *dams* 5 *cowries* to the plaintiffs Nos. 1 and 2 in the present suit, who took the sale-deed in the names of their wives, defendants Nos. 13 and 14. On the 30th July 1910, Abdul Latif again sold a 5-annas share to plaintiff No. 3 Rachya Singh. On the 24th November 1910, the Sub-Divisional Magistrate of Bihar took proceeding under section 145, Civil Procedure Code, in consequence of a dispute between Abdul Latif on the one side and the heirs of Zahurul Huq on the other and directed that the latter be maintained in possession till evicted in due course of law. The present suit was brought on the 21st December 1911.

The plaintiffs Nos. 1, 2 and 3, as already stated, are purchasers. The plaintiff No. 4, Syed Gulam Mustafa, sues as the heir of Abdul Latif who died in June 1911. It is alleged that subsequent to the institution of the suit, Mustafa sold a further share of 5 annas to the plaintiff No. 3. That sale, however, is not very material, because it is admitted that the four plaintiffs now on the record between them represent the whole right, title and interest of Zahurul Huq.

A written statement was filed by the defendants Nos. 1 to 4, namely, Shahzadi Begum, the widow of Zahurul Huq, Wahidul Haq, son of Zahurul Huq; *Musammat* Kubra, the widow of Sahidul Huq, the deceased son of Zahurul Huq; and Mazibul Huq, the minor son of the aforesaid Sahidul Huq. The substance of the defence was that the defendants had sent money through Abdul Latif, who was their servant, to purchase the property in suit in their names, but that Abdul Latif had fraudulently got his own name recorded as purchaser and that neither title nor possession passed to Abdul Latif.

The suit was instituted in the Court of Mr. Prasanna Kumar Gupta, when he filled the office of Subordinate Judge. Upon his promotion to the office of the Additional District Judge, the case was transferred to his file and he completed the trial in that capacity. The Court framed the following issues:—

1. Is the Court-fee paid by the plaintiffs insufficient?

2. Is the valuation given in the plaint wrong?

3. Is the suit bad by reason of non-joinder of parties and misjoinder of parties and causes of action?

4. Is the suit barred by Articles 12, 14 and 91 of the Limitation Act?

5. Is the suit barred by the rule of estoppel?

6. Are the bond executed by Zahurul Huq and the decree and the execution sale based thereon illegal and invalid?

7. Did *Musammat* Shahzadi pay Rs. 2,400 the purchase money of the execution sale based on the mortgage-decree?

8. Are the certificates under the Public Demands Recovery Act illegal and invalid? Could they affect the right, title and interest of the plaintiffs, if any?

9. Who are the heirs of Abdul Latif?

10. What right or rights have plaintiffs got to the disputed properties?

11. Was *Musammat* Fazilan a *farzidar* of *Musammat* Saliman? Was the *ekrarnama* executed by *Musammat* Zainab in favour of Abdul Latif a valid and *bona fide* transaction? How does this question affect the plaintiffs' right, if any?

12. What mesne profits, if any, are the plaintiffs entitled to and against whom?

13. Are the plaintiffs entitled to the amount in deposit in the Court of the Sub-Divisional Officer of Behar?

14. What relief, if any, are the plaintiffs entitled to?

The learned Judge after a very patient trial found all the issues in favour of the plaintiffs and decreed the claim. The present appeal before us is preferred by the defendants, and Mr. Wasi Ahmad, who appears on their behalf, has limited his argument only to two issues, namely, the seventh and the tenth. He admits that he cannot successfully attack the other findings of the Trial Court.

I will deal first of all with issue No. 10, in which the defendants attack the title of the plaintiffs. Before discussing the various titles set up by the defendants in derogation of the title of the plaintiffs, it will be useful to refer shortly to the attempts made by the

members of Zahurul Huq's family to set aside the mortgage sale.

The first of these attempts was made by Shahzadi on the 11th February 1903. It was resisted by Abdul Latif by a petition dated the 28th March 1903, and Shahzadi's application was rejected on the 16th May 1903. The second attempt was made by Sahidul Huq on the 15th of January 1904. The application was at first dismissed for default and then revived. Shahzadi gave evidence on commission in support of Sahidul Huq, but on the 3rd July 1904, that attempt also failed. With regard to these two attempts the case of the defendants is that they were never made and that petitions in the names of Shahzadi and Sahidul Huq, who is alleged to have been a minor at that time, were forged by Abdul Latif for the purpose of creating evidence that the sale was held with the knowledge of the heirs of Zahurul Huq. In my opinion this defence is wholly and utterly false. The evidence conclusively points to the facts that Shahzadi and Sahidul Huq did make the petitions to set aside the sale. It will be necessary to consider this question in greater detail hereafter and I will then give my reasons for the conclusion at which I have arrived.

Almost immediately after Sahidul Huq's petition had been dismissed, Saliman, the sister of Zahurul Huq, made an application on the 11th July 1904, with no better result. Finally *Musammat* Zainab, the granddaughter of Fazilan, who was the sister of Zahurul Haq's father, made a similar objection on the 1st August 1904. That objection too was rejected. Not deterred, Zainab in the following year brought a suit for redemption against Abdul Latif and others in respect of the property, but the history of that litigation will be related hereafter. To return, however, to the title of the plaintiffs in the present suit, the first defect which the defendants can suggest is that on the 17th of August 1891, one Chamru Singh belonging to a family known as the Pandui Babus purchased in execution of a money-decree against Zahurul Huq, on account of claims due in respect of an *ijara* lease, a 10-annas odd share in the property. The auction-purchaser at that sale was Amirul Hyder and he made a transfer four days later to Karu Singh. It is alleged that Karu Singh was the *benamidar* of the Pendui Babus.

It is next shown that on the 18th February 1893, Chamru Singh in execution of another money-decree bought through his *benamidar* Badruddin the 3-annas odd *mukarrari* interest of Zahurul Huq. Badruddin subsequently mortgaged that *mokarrai* interest to Ahmadi Begam who sued upon her mortgage and on the 16th August 1896 purchased the *mukarrari* interest in execution of her decree. The defendants contend that by the above sales of 1891, 1893 and 1896 the proprietary and *mukarrari* interest of Zahurul Huq passed out of the possession of his heirs long before Abdul Latif's auction-purchase and that the only saleable interest left to Zahurul Huq was the *dur-mukarrari*. The reply to this is very simple. The money-decrees obtained by Chamru Singh were clearly subject to the mortgage of 1884, and, therefore, whatever be the right, title and interest that passed by the sales in execution of those decrees, the auction-purchaser at the sale on the decree upon the mortgage of 1884 must always have priority. The purchasers at the sales in execution of Chamru Singh's decrees were parties to *Musammat* Parvati's mortgage suit and as they failed to redeem they cannot now claim any part of the mortgaged property.

The defendants next rely on the title of Saliman, the sister of Zahurul Haq. It is admitted that Zahurul Huq got the properties in suit from his grandmother Raziban, who died in 1883. In 1884, Saliman brought a suit for the recovery of an one-third share and on the 21st March 1884, obtained a decree. There was an appeal, but during the pendency of the appeal, Zahurul Huq compromised with Saliman by executing a deed in favour of *Musammat* Fazilan, who was the sister of his father, by which he made a gift to her of 7 *dams mukarrari* interest and $7\frac{1}{2}$ *dams dur-mokarrari* interest. The compromise petition, Exhibit 83, is dated the 1st September 1884.

The case of the plaintiffs is that Fazilan was the *benamidar* of Saliman, while the case of the defendants is that the consideration for the compromise was a transfer to Fazilan as the *benamidar* of *Musammat* Zainab, the granddaughter of

Fazilan. It is contended by the defendants that whether Saliman or Zainab was the true owner of these 14½ *dams*, Zahurul Huq had no interest in the same at the time of the mortgage of 1884 and, therefore, the title of the plaintiffs is defective to this extent. Now so far as Saliman is concerned, the reply is simple. Saliman was party to Parvati's mortgage suit and as she did not redeem, her title, whatever it may have been, has been extinguished. But as regards Zainab, she was not a party to the mortgage suit and if she can establish the proposition that Fazilan was her *benamidar*, then she is entitled to defeat the plaintiffs.

Fazilan made a formal transfer by a deed of gift in February 1896 in favour of Zainab who, having failed in her efforts to get the sale set aside in 1904, brought a suit in 1905 for recovery of the 14½ *dams* and also for redemption of the whole share which had been mortgaged by Zahurul Huq. The plaint in that suit is not forthcoming, but we know that although she was successful in obtaining a decree in the first Court, Abdul Latif got that decree set aside on the 2nd August 1909, on appeal to the District Judge. Abudl Latif's defence in that suit was that Zainab had no interest whatsoever and that Zahurul Huq had in 1884 made a transfer to Saliman in the *farzi* name of Fazilan. There was a second appeal to the High Court, which was summarily rejected on the 28th of October 1910, but with the hardihood which has characterised the proceedings of every person whose dealings we have had occasion to notice in connection with the property in suit, Zainab was not to be deterred by the decree of the District Judge and on the 11th November 1909, she executed an *ekrarnama* in favour of Shahzadi and her sons by which she relinquished a 10-annas odd share in the property inclusive of the 6 annas 13 *dams dur-mukarrari* interest, and again on the 14th of December 1909, she executed another *ekrarnama* in favour of Abdul Latif giving up all claims to the property in suit. It is not necessary to consider the effect of these conflicting *ekrarnamas*, for it is clear that the decision of the District Judge that Zainab had no title to the 14½ *dams*, nor any right to sue for redemption, effectually disposes of her pretensions so far as the present suit is concerned.

The only other defect which the defendants can suggest in the title of the plaintiffs is connected with two sales under the Public Demands Recovery Act for arrears of road-cess. The property being *lakhiraj* no Government revenue was payable, but certificates for arrears of road cess were issued against the persons on the Collector's books, and in 1907 the Collector sold the property by auction to one Khairuddin, who, later on, sold it to one Abdul Kader. A similar sale was held in 1910, and the auction-purchaser Yasin Mukhtiar subsequently transferred it to one Amir Hussain.

The case of the defendants is that the purchasers at these sales or their transferees were the *benamidars* of Shahzadi and that Abdul Latif had in consequence of these sales nothing left in 1903, which he could transfer to the plaintiffs. The reply to this is that these sales transferred only the right, title and interest of the defaulting judgment-debtor, and it has been clearly demonstrated that the persons upon whom the Collector served his notice of demand had no interest whatever in the property. At that time Abdul Latif was the proprietor of at least 14½ annas, and a notice of demand made against parties who had no interest in his property and the sale of the interest of those parties cannot in any way affect Abdul Latif.

It is next contended that Zahurul Huq did not mortgage any *dur-mukarrari* interest. It is true that the mortgage-bond of 1884 does not in terms mention any *dur-mukarrari*, but I agree with the learned Judge that as the bond expressly transferred all the interest owned and possessed by Zahurul Huq and as the *dur-mukarrari* has been established to have been in the possession of Zahurul Huq, it follows that the *dur-mukarrari* also was mortgaged. The existence of this *dur-mukarrari* was admitted in Zainab's *ekrarnama* in favour of the defendants on the 11th November 1909, and also in the proceedings under section 145, Civil Procedure Code, between Abdul Latif and

the heirs of Zahurul Huq in 1910. This *ekrarnama* was relied upon by Wahidul Huq for the purpose of supporting the title of himself and his mother to the 6 annas 13 *dams* of the *dur-mokarrari*, I do not think there can be any doubt now that the *dur-mokarrari* was in fact covered by the mortgage. In these circumstances I am satisfied that Abdul Latif had title to the lands now in suit.

[After discussing the evidence his Lordship went on:—]

In my opinion it has not been shown that Abdul Latif was not the true owner. On the contrary his acts are consistent with the view that he was the true owner and that he was doing all in his power to enforce his rights.

The Trial Court's findings on the other issues have not been challenged, and the conclusion at which I have arrived is that the decree appealed against is correct. The appeal is dismissed with costs.

CHAMIER, C. J.—I have nothing to add to the judgment which has just been delivered. The conclusions stated by my learned colleague are those at which we arrived after hearing the arguments of Counsel I concur in his judgment and agree that the appeal should be dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 63 OF 1916.

March 22, 1917.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Heaton.

ABRAHAM E. J. ABRAHAM—

PLAINTIFF—APPELLANT

versus

SARUPCHAND HAKAMCHAND—

DEFENDANTS—RESPONDENTS.

Custom of trade—Bombay Silver Market—Kachchi *and* pakki adat—*Selling* shroff *whether personally liable to principal of buying* adatia.

The custom of the Bombay Silver Market for forward contracts is that only shroffs are the ostensible buyers and sellers though shroffs may have and often do have outside principals for whom they are acting. The shroffs, when acting for principals, work sometimes for *kachchi adat* and sometimes for *pakki adat*. In the case of *kachchi adat* the *adatia* shroff guarantees the performance of the contract to the other shroff but does not guarantee its performance to his own principal. In the case of *pakki adat* the *adatia* shroff, who then acts for a higher rate of commission, is liable as a principal both to his own employer and to the other shroff. [p. 256, col. 2; p. 257, col. 1.]

There is no custom in the Silver Market whereby the selling shroffs are exempted from personal liability to the principal of the buying *adatia* for damages for breach of a contract entered into by them. [p. 259, col. 1.]

Mr. *Strangman*, Advocate-General, and Messrs. *Taleyarkhan* and *Mulla*, for the Appellant.

Messrs. *Desai* and *Bahadurji*, for the Respondents.

JUDGMENT.—The plaintiff is a Jewish merchant dealing in various commodities.

The defendants are a firm of Marwari shroffs dealing in silver in Bombay.

On the 13th of July 1914, the plaintiff, in the name of his *kachcha adatia* or agent Hiralal Ramgopal and acting by his broker Bholaram, entered into a contract whereby Hiralal Ramgopal agreed to buy and the defendants to sell 50 bars of silver at Rs. 75-5-0 per 100 tolas for the ensuing Shravan *vaida*.

The contract was entered into subject to the rules of the Panch Shroff Association, whereby it was the duty of the defendants to tender a delivery order by the 12th of August 1914.

On the 10th of August the plaintiff tendered to Hiralal the price of the bars and on the 11th Hiralal wrote asking the defendants to send a delivery order.

No delivery order was given by the 12th.

The difference in price between the contract rate and the rate prevailing on the 13th was Rs. 3-3-0, which the plaintiff claims from the defendants as damages for breach of contract.

The main defences raised in the written statement are a custom of the silver market, whereby the selling shroffs are not personally liable to the principal of the buying *adatia*; non-liability on the ground that if they had known Hiralal was not a principal they would not have entered into the contract; and that the rate of Rs. 76-12-0 is the highest rate at which damages can be assessed. It is not disputed that a custom of the Bombay Silver Market for forward contracts is that only shroffs are the ostensible buyers and sellers, though shroffs may have and

often do have outside principals for whom they are acting. The shroffs, when acting for principals, work sometimes for *kachchi adat* and sometimes for *pakki adat*. In the case of *kachchi adat* the *adatia* shroff guarantees the performance of the contract to the other shroff but does not guarantee its performance to his own principal. In the case of *pakki adat* the *adatia* shroff, who then acts for a higher rate of commission, is liable as a principal both to his own employer and to the other shroff.

This custom whereby only shroffs are the ostensible parties is observed for two reasons agreeable to the Marwari shroffs: *first*, that on every forwarded silver transaction a commission becomes payable to one or both of the Marwari shroffs; and, *secondly*, that the *adatia* shroff guarantees to the other shroff performance of the contract.

In practice it may be assumed that shroffs carry out their contracts as between themselves as also with their constituents, for the evidence discloses no instance of any dispute such as the present before the *vaida* of Shravan 1914. The Shravan *vaida* fell on the 12th and 13th August, the first month of the war, and the shroffs being alarmed at the prospects held a special meeting on the 16th August and resolved that where a party is not able to give delivery goods (silver bars) be bought and sold at Rs. 76-12-0.

The plaintiff, Abraham, claimed delivery both from the defendants of the 50 bars in suit and from another shroff, Vinodiram, whom another *adatia* employed by Abraham had agreed to buy silver from on Abraham's account for the Shravan *vaida*, and failing to get delivery sued the selling shroff in each case for the difference between the contract rate and the actual market price of Rs. 78-8-0.

In the suit against Vinodiram, Abraham sued his *kachcha adatia*, Khetridas, in the alternative. In the present suit he has impleaded the selling shroff alone.

The suit against Vinodiram was tried by Macleod, J., and the plaintiff obtained a decree against Vinodiram. The present case differs from Vinodiram's in that the defence of want of privity between Abraham and the selling shroff is expanded and based upon an alleged custom of the market. The custom is stated thus in the written statement:—

"According to the custom prevailing in the market there is no privity between the shroff and an outsider for whom another shroff may have entered into a forward contract as his *kachcha adatia*, and the shroff or the outsider can never claim either the performance of the contract or the damages for breach thereof from each other and that the shroff considers the other shroff who has acted as the *adatia* as principal and deals with him accordingly, the remedy of the outsider being only against the shroff or *choksi* employed by him."

Beaman, J., the Trial Judge, has found the alleged custom established and dismissed the plaintiff's suit.

The evidence called by the defendants to prove custom was that of eight Marwari *munims*, one of them being the man who represented the defendants at the making of the contract in suit.

In my opinion it falls far short of proving the custom alleged.

Foolchand, the defendants' former *munim*, says he accepted the deal, which Bholaram, the broker, suggested and the cashier entered it in the defendants' books. Bholaram gave Hiralal's name as the shroff. Though a non-shroff or *choksi* may be the real buyer or seller, his name is never entered. If Hiralal failed he would not consider the defendant had any claim against Abraham and only Hiralal could proceed against defendant. If there was in defendant's books any other name besides Hiralal's as buyer defendant might go against him. If Hiralal had not paid defendant's money was gone even though the constituent was worth crores of rupees. That is the system of the bazar.

Briladrai, *munim* of Momraj Rambhagat, says: "A constituent cannot exact performance from the other shroff. It is the recognized practice in the silver, linseed and cotton markets." He did not approve of Macleod, J.'s decision which he thought would be a great hardship. In cross-examination he said: "Silver business can be done by Marwaris with any one. Some Marwaris may ask for the name of the constituent of the broker. There is no objection. Some good brokers do enter into such transactions without naming a shroff, they do it in their own names. When the *souda* is made if a shroff has not been named, the shroff's name

is left blank and the broker must bring the name later. If he brings the name of a shaky shroff, the name would not be accepted and a more substantial name would be required. Till the shroff's name is given the broker himself is responsible."

Radhakissen says: "The constituent of the *adatia* shroff cannot enforce contracts." He thinks Macleod, J.'s judgment was against the practice of the shroffs. The reason for the practice is to keep all the business in the hands of the Marwaris and to enable them to earn commission.

The remaining five *munims* were pressed more closely upon the question of the constituent's remedies.

Motilal knows of no case in which knowing the name of the outsider (constituent) and on failure of the shroff they lost their money and did not attempt to recover it from the man they knew to be the principal. He says: "it would be very difficult to trace the constituent. In *pakki adat* we are responsible to our constituents—in *kachchi adat* we are not. The constituent (in *kachchi adat*) has no remedy. Abraham may ask Hiralal to proceed against defendant at Abraham's cost. If he won't file a suit, Abraham is helpless. He has no remedy against either Hiralal or defendant."

Luxmandas says: "If defendant cannot pay, Abraham loses his money. If defendant won't pay, Abraham can ask Hiralal to proceed against defendant at Abraham's cost. Hiralal is not liable to Abraham. He must tell Abraham that defendant is his seller but does not tell defendant of Abraham's identity. By lending his name the shroff becomes responsible only to the other shroff, not to his constituents."

Narsingdas says: "In *kachchi adat* the constituent cannot file a suit against his own *adatia* in the event of the other shroff becoming insolvent." At the close of his evidence he became hopelessly confused and said in the last resort: "the *kachcha adatia* is liable to his constituent."

Sukhdevdas says: "The constituent has rights—he can compel his own shroff to bring a suit against the other and if his shroff will not bring a suit, then the constituent can bring a suit against his own shroff direct."

Omkarmal says: "If defendant will not pay, Abraham might ask Hiralal to sue defendant. If Hiralal wo'nt sue then Abraham can notify that if he won't sue he, Abraham, will sue Hiralal."

Thus the three last witnesses are driven by the manifest injustice of the position to say that Abraham might in the last resort sue Hiralal. Motilal and Laxmandas, however, say there is no such remedy.

It is difficult to see what the remedy could be unless damages for breach of duty. It could not be a right of action on the contract, for the *kachcha adatia* is only an agent, not a guarantor of his principal.

Probably the witnesses had not clearly in their minds the distinction between the respective consequences of *kachchi* and *pakki adat*. In *pakki adat* the principal of the *adatia* has no relation to the contractor on the other side of the *adatia*.

In the present case, as in the case before Macleod, J., the unjust position has arisen, for the *adatia* declined to sue the defendant except for damages based upon an arbitrary and fictitious figure not related to the market price of the *vaida* day.

The truth appears to be that if damages are recoverable by the usual and recognised measure, *i.e.*, the difference between the contract price and the market price at date of breach, it cannot matter whether the *adatia* or his principal sues, if any suit is necessary. The question who is the right person to sue is only of importance where the Marwari ring have, as here, fixed an arbitrary measure of damages for a particular *vaida*. It is then that they strive to confine the right of action to their own associate who will decline to claim damages from his principal except at a purely conventional rate.

The present situation had never arisen till August 1914 and there cannot be any custom or usage to cover it.

But the evidence of Hiralal's solicitors letters is inconsistent with the notion that there is no connection between the *adatia's* buying constituent and the selling shroff, for Hiralal not only is careful to impress upon defendant that he is only acting as an agent but to impress upon Abraham that the latter ought to tender direct to the defendent (see Hiralal's letter of the 17th August) and yet,

as Narsingdas admits, Hiralal knows the custom of the market

We have here in the action of Hiralal the only concrete case on the record of the spontaneous action of an *adatia* in such circumstances.

In Macleod, J.'s judgment we have the only concrete instance of the result of similar relations when carried to their ultimate conclusion.

In that suit no evidence of custom was tendered, nor was custom alleged. The evidence now produced is a very obvious attempt to manufacture a custom to avoid a similar result in this case.

The defence that the defendant would not have contracted if he had known that Hiralal was not a principal will not bear investigation, for the defendant, after Hiralal's letter asserting he was only an agent, actually tendered damages for breach at the rate he now seeks to impose on Abraham.

Fulchand, the defendant's *munim*, is emphatic that he did not know or care who was Bholaram's principal. The defendant cannot, therefore, contend with any hope of success that Abraham cannot be allowed to take advantage of the contract if the ordinary law of principal and agent applies.

It is clearly proved that the market rate at the time of breach was Rs. 78-8-0.

Decree reversed. Decree for plaintiff in terms of paragraph (*a*) of the prayer of the plaint with costs throughout on defendant.

Decree reversed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 87 OF 1917.

June 27, 1917.

Present:—Mr. Justice Chitty and
Mr. Justice Beachcroft.

GENU SHEIKH AND OTHERS—DEFENDANTS—APPELLANTS

versus

TARAMANI CHOUDHURANI—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 50 (2), presumption under, whether applies to holding where abatement has been allowed for lands gone out of cultivation.

Section 50 (2) of the Bengal Tenancy Act applies to a holding held at a certain rate in which abatement has been allowed in respect of portions of the holding which have gone out of cultivation, if the abatement bears to the whole rent the same proportion that the land given up does to the whole area. [p. 261, col. 1.]

Appeal against the order of the Special Judge, Mymensingh, dated the 23rd September 1916, reversing that of the Assistant Settlement Officer of that place, dated the 23rd of February 1915.

FACTS of the case appear from the judgment.

Babu *Nagendra Nath Ghose* (with him Babu *Brojendra Kumar Roy*), for the Appellants.—The learned Special Judge was wrong in holding that the presumption under section 50 (2) of the Bengal Tenancy Act does not apply to a case like this. The presumption may be either that the rent was fixed or that the rate of rent was fixed from the time of the Permanent Settlement. In clause 2 of section 50 there are the express words that "it shall be presumed * * * that the tenants have held at that rent or *rate of rent* from the time of the Permanent Settlement." Here the tenants claimed that notwithstanding abatement of rent on account of lands which were not under cultivation in particular years, the rate of rent remained invariable during the twenty years immediately before the institution of the landlord's suit. Therefore, they are entitled to the presumption arising under section 50, clause 2, Bengal Tenancy Act.

[Babu *Dwarka Nath Chakravarty* for the Respondent.—I object to my friend urging such a point in this appeal, because he has got no right of appeal against the order of remand of the Special Judge. Under the Civil Procedure Code he could only claim a right of appeal against an order of remand in those cases in which an appeal would lie from the decree of the Appellate Court. *Vide* Order XLIII, rule 1 (*u*). He may object to the form of the remand order but he can't say that the remand order was wrong and should be set aside in this appeal.]

I have got a right of appeal under the special provisions of the Bengal Tenancy Act. The general provisions contained in the Civil Procedure Code are overridden

by the special provision in section 109A (3) of the Bengal Tenancy Act. There the words are "an appeal shall lie to the High Court from the *decision* of a Special Judge."

A decision may be a decree or an order. So that from every order of a Special Judge there is a right of appeal subject to the provisions of the Civil Procedure Code relating to the second appeals. My learned friend cannot contend for a moment that no questions of law are involved in this case. Indeed he himself says that the form of the remand order was erroneous in law. Therefore, I have got a right of appeal against this remand order. The Special Judge has thought that fixity of rent is the only matter to be considered, overlooking the fact that fixity of *rate of* the *rent* is also a matter for consideration. A *ryot* holding at fixed rates may be a *ryot* holding either at a rent fixed in perpetuity or at a rate of rent in perpetuity. I want the status of a *ryot* holding at fixed rates by showing that the rate of rent, at which I hold the lands, has not been changed for 20 years.

Babu *Dwarka Nath Chakravarty* (with him Babu *Akhil Bandhu Guha*), for the Respondents.—The judgment of the Special Judge shows that the rate of rent for the lands in the holding did not remain invariable. Lands were re-classified from time to time and rates of rent were fixed upon the different plots according as they fell into one class or the other. A particular plot in one year might fall in a particular class for which a particular rate was fixed, but in another year on re-classification it might fall into a different class paying rents at a different rate. Hence it is clear that the rate of rent did not remain fixed.

Babu *Nogendra Nath Ghosh* replied.

JUDGMENT.

CHITTY, J.—I agree in the judgment about to be delivered by Mr. Justice Beachcroft.

BEACHCROFT, J.—This is an appeal by the tenant defendants in proceedings under section 105 of the Bengal Tenancy Act The Assistant Settlement Officer without going into the details of the holdings of the various tenants decided in general terms that the tenants were entitled to the presumption provided for in section 50 of the Act. On appeal the learned Special Judge remanded the case to the Assistant Settlement Officer, for the purpose of deciding which tenants held at fixed rents and of disposing of the applications in view of the other considerations affecting enhancement of rent, which arose in the case.

The learned Special Judge rightly held that the case of each tenancy must be considered separately. He further made certain observations with regard to the fixity of rent, and it is these remarks that have been called in question in the present appeal.

For the respondents it has been argued that no appeal lies. In my opinion it is not necessary to decide this point for whether an appeal does or does not lie, the appeal should be dismissed. For it is conceded by the appellants that the order of remand was a proper order, though objection is taken to the lines on which the enquiry ordered should proceed, as indicated in the learned Judge's judgment. Now if we find that the learned Judge has laid down wrong principles for the guidance of the Settlement Officer, in my opinion we ought to indicate in what respect the learned Judge is in error, whether the present appeal does or does not lie, to obviate the possibility of the further enquiry being subsequently challenged on the ground of the same error in law.

The learned Judge has pointed out that various rates of rent obtain in the locality for various classes of land. He has further found as a fact that lands in the village have been re-classified and alterations made with the effect generally of alterations in rent. In such cases of alteration he has held, and the correctness of this part of his judgment is not and cannot be disputed, that there cannot be a presumption of fixity of rent. He has also held, in my opinion rightly, that the holding must be regarded as the unit.

The part of his judgment to which exception has been taken is that part in which he says that the presumption of section 50 cannot be applied except in cases where the tenant can show that in the twenty years preceding the application there has been no change of rent or only such slight

variations as are of no account. It appears that the holdings of some of the tenants originally included land, referred to as *jalı* land, which has become incapable of cultivation and in respect of which the tenants got abatement of rent. In such cases it is possible that the proposition stated by the learned Judge is in too wide terms. For though there may have been a change of rent it is possible there has been no change in the rate of rent. If a holding has been held at a certain rate and abatement has been given in respect of a portion of the holding which has gone out of cultivation and the abatement bears to the whole rent the same proportion that the land given up does to the whole area, it is obvious there has been no alteration in the rate of rent, though there has been an alteration in the rent itself. In such a case section 50 (2) of the Act will apply. But obviously this will not be the case if the holding includes various classes of land assessed at different rates of rent.

No other point is urged.

The appeal should, in my opinion, be dismissed, each party bearing their or his own costs respectively.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 69 OF 1916.

April 4, 1917.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Heaton.

NAROTTAM MORARJI GOKALDAS—PLAINTIFF – APPELLANT

versus

THE INDIAN SPECIE BANK—DEFENDANT—RESPONDENT.

Companies Act (VII of 1913), s. 187—Company—Shares, sale of, through Managing Director Winding up—Director, default of, in selling shares - Call—Suit to recover money paid on call, maintainability of.

A share holder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the Company, and it is inconsistent with his position as a share-holder, where he remains as such, to claim back any of that money. He must not directly or indirectly receive back any part of it. [p. 262, col. 1.]

Plaintiff owned a certain number of shares in the efendant Bank. In April 1913 he asked the Managd ing Director of the Bank to sell the shares and the latter undertook to do so. In May the Managing Director paid to the plaintiff a sum of money which would be approximately the equivalent of the net sale proceeds of the shares at Rs. 66 per share and falsely represented that the shares had been sold at that figure. The Bank went into liquidation in December and the plaintiff was placed upon list A of contributories in respect of the said shares on the ground that he remained a registered share-holder, and was compelled to pay the amounts of the calls made in the liquidation. He brought a suit to recover the amount paid by him from the Bank on the ground that the Managing Director in the course of his employment by the defendant Bank was guilty of neglect and misconduct towards the plaintiff in not selling the said shares:

Held, that the plaintiff had no cause of action against the Bank. [p. 262, col. 1.]

Houldsworth v. *City of Glasgow Bank*, (1880) 5 A. C. 317; 42 L. T. 194; 28 W. R 677; *Addlestone Linoleum Co., In re*, (1888) 37 Ch. D. 191 at p. 198; 57 L. J. Ch. 249; 58 L. T. 428; 36 W. R. 227, relied upon.

Appeal against the judgment of Mr. Justice Macleod, dated the 17th November 1916, reported as 38 Ind. Cas. 717.

Mr. *Strangman*, Advocate-General (with him Messrs. *Inverarity*, *Setalvad* and *Desai*), for the Appellant.

Messrs. *Weldon* and *Mulla*, for the Respondent.

JUDGMENT.—The first plaintiff, through his three nominees, the 2nd, 3rd and 4th plaintiffs, was the owner of 161 shares in the Indian Specie Bank. In the month of April 1913, upon instructions from the 1st plaintiff, the share certificates and blank transfers executed by the nominal registered holders of the shares were handed to the Managing Director of the Specie Bank who undertook to sell the shares on commission. The Managing Director, in the month of May, paid in respect of the shares a sum of Rs. 10,500, which would be approximately the equivalent of the net sale-proceeds of the shares at Rs. 66 per share, and he represented that the shares had been sold at that figure. The Specie Bank went into liquidation in or about the month of December 1913. The 2nd, 3rd and 4th plaintiffs were thereafter placed upon list A of contributories in respect of the said shares standing in their name on behalf of the 1st plaintiff, on the ground that they remained registered share-holders. It is not disputed that the representation of the Managing Director of the Bank that the shares had been sold was fals

In consequence of the shares not having been sold, the 1st plaintiff has been obliged to pay the amounts of the calls made in the liquidation aggregating in all Rs. 8,050 with interest up to payment amounting to Rs. 219, and these sums he seeks to recover from the Bank in liquidation on the ground that the Managing Director in the course of his employment by the defendant Bank was guilty of neglect and misconduct towards the plaintiffs in not selling the said shares; and that the direct consequence of such neglect and misconduct has been that the 2nd, 3rd and 4th plaintiffs were placed upon list A instead of list B, and that the 1st plaintiff has been obliged to pay the calls on the said shares as aforesaid; and that in any event the plaintiffs have been deprived of their rights to indemnity against a purchaser.

The suit was dismissed in the Trial Court on the ground that the plaintiffs had received full consideration for the shares, and that there was no loss to them in so remaining owners The learned Judge remarked:

"It would be a very strange contradiction if the plaintiffs, having been placed upon the list of contributories in spite of certain facts (brought to the notice of the Court at the time of settling the list) and having paid the calls, should be entitled on the same facts to recover the amont so paid to the liquidators in an action."

In our opinion the plaintiffs have no cause of action. According to the decision of the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (1) (an action based upon misrepresentation) a share-holder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the Company, and it is inconsistent with his position as a share-holder, where he remains as such, to claim back any of that money. He must not directly or indirectly receive back any part of it.

The same principle was applied in *In re Addlestone Linoleum Company* (2), where persons upon being registered as shareholders sought to recover as damages for breach of contract or otherwise in respect of the issue of fully paid up shares the amount which they had had to pay as contributories in the winding-up upon shares which were not in fact fully paid up. Mr. Justice Kay, whose decision was affirmed in the Court of Appeal, observed:—

"Practically, what these applicants are seeking to recover by their proof is a dividend in respect of the £2-10*s.* per share which they have been compelled to pay in the winding-up. But as shareholders they have contracted that they will pay this money, and that it shall be first applied in payment of the creditors whose debts are not due to them as members of the Company—that is, they are practically admitting their liability to pay the £2 10*s.* per share to such other creditors and yet seeking to get part of it back out of the pockets of those very creditors themselves. I confess it seems to me that the money so claimed is not only claimed in the character of members but that the claim is just as unreasonable as if it were a claim of dividends or profits, and that, accordingly, it comes within the words 'or otherwise', which I have read from section 38."

Section 38 corresponds with section 61 of the Indian Companies Act of 1882. Subsection (*g*) of that section is as follows:—

"No sum due to any member of a Company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the Company, payable to such member in a case of competition between himself and any other creditor not being a member of the Company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves."

In the case of the Specie Bank there is no probability that the assets will ever suffice to pay the claims of the cerditors in full, and, therefore, there is no chance of any final adjustment of the rights of contributories amongst themselves. It is improbable, having regard to the decision of the Master of the Rolls in *Burgess's case, Hull and County Bank, In re* (3), that

(1) (1880) 5 A. C. 317; 42 L. T. 194; 28 W. R. 677.
(2) (1888) 37 Ch. D. 191 at p. 198; 57 L. J. Ch. 249; 58 L. T. 428; 36 W. R. 227.
(3) (1880) 15 Ch. D. 507; 49 L. J. Ch. 541; 43 L. T. 45; 28 W. R. 792.

even if there were surplus assets, the plaintiff would be entitled to recover in respect of his present claim.

We dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 972 OF 1913.

January 26, 1917.

Present:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Shah Din.

Musammat BEGAM—DEFENDANT—APPELLANT

versus

JALAL DIN—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Muhammadan Law- Succession—Step-son, whether heir to step-mother.

Under the Muhammadan Law a step-son is not an heir to the property of his step-mother. [p. 263, col. 2.]

Second appeal from the decree of the Divisional Judge, Ludhiana, dated the 25th April 1913.

Pandit *Rambhaj Datta*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—The house regarding which the present dispute has arisen is admittedly in the possession of defendant No. 2, *Musammat* Begam, daughter of Banna, *tawaif*. On the 21st April 1911 defendant No. 3, Rai Fatteh Muhammad Khan, son of Rai Imam Bakhsh Khan, executed a deed of sale of this house for Rs. 1,400 in favour of plaintiff, Jalal Din. As defendant No. 2 refused to vacate the house, the plaintiff first brought an ejectment suit which, however, was dismissed on the ground that the relation of landlord and tenant did not exist between the parties. He then brought the present suit for possession with a claim for Rs. 16 by way of rent or damages at the rate of Rs. 3 per mensem. Defendant No 1, *Musammat* Walayato, daughter of Miro Mirasi, has been impleaded by the plaintiff because she also is in possession. Defendant No. 3, of course, supports the plaintiff, defendant No. 2 resists the claim and defendant No. 1 has absented herself altogether. Certain matters were not very clearly stated by the parties at the early stages of the case, but it is not necessary for us to go through all the different allegations made. We can take it that the real facts and essential points in the case are as follows:—Sometime in the sixties Rai Imam Bakhsh Khan aforesaid married a woman of the name Rani, who was a prostitute. In 1882, *Musammat* Rani purchased the house in suit, and not long after that Rai Imam Bakhsh Khan died, leaving defendant No. 3 as his son by another wife. *Musammat* Rani lived till 4th November 1902, and there is absolutely nothing to show that up to that time anybody else ever exercised any dominion over the house; but very soon after, *viz.*, in the following year, defendant No. 3 mortgaged the house to one Buta Mal Later, Buta Mal sued defendant No. 3 for the money due to him and attached the house and had it auctioned in 1909, but the auction sale was set aside in 1910 on defendant No. 3 settling up with Buta Mal. It seems that defendant No. 2 did not intervene at all in those proceedings. Defendant No. 2 claims the whole house as heiress of *Musammat* Rani whom she called her aunt, and upon a gift by the aunt to herself. Now it is admitted, and is quite clear, that she is not the niece of *Musammat* Rani at all, and we can find no proof of the gift either. Therefore, it is fairly clear that defendant No. 2 has no real legal title to the house at all. But this does not dispose of the whole case, for the plaintiff is out of possession, as we shall shew later, and he must prove his title before he can oust defendant No. 2, even if she is a mere trespasser.

Defendant No. 3 has all along seen this difficulty and, therefore, his Counsel argues, *first*, that he is the heir of *Musammat* Rani; *secondly*, that if he be the heir, then defendant No. 2 can only resist his claim on the score of long adverse possession; and *thirdly*, that whatever possession defendant No. 2 may have had, it was certainly not adverse to him until 4th November 1902 when *Musammat* Rani died. In our opinion the plaintiff's case fails on the first of these points. No argument is necessary, and no authority need be cited, for the proposition that defendant No. 3, as the step-son of *Musammat* Rani, is not heir to her property under Muhammadan Law. Mr. Manohar Lal has striven to shew that there is no clear rule of Muhammadan Law on the

subject, and he quotes Tyabji's book on Muhammadan Law, page 620. That authority names all successive heirs to property ending with the Crown; and we cannot find step-sons anywhere and it is impossible to hold from this that step-sons are not excluded. In short, even that book is clear, and all the authorities are agreed, that a step-son has no right of inheritance under the personal law of the parties. The lower Appellate Court has then tried to bring in Punjab agricultural custom in something like the following manner:—The family is governed by custom in all matters of inheritance; *Musammat* Rani being the wife of Rai Imam Bakhsh Khan, by that custom, all her property merged in his estate; therefore, defendant No. 3 succeeded to this house *on his father's death*; *Musammat* Rani died, as already stated, in 1902, and limitation did not begin to run against defendant No. 3 until the date of her death. This appears to us to be built up upon mistaken ideas. There is no indication whatever that up to *Musammat* Rani's death Rai Fatteh Muhammad Khan ever treated the house as his own, and there seems to be no reason why it should not be held that *Musammat* Rani at the least held adversely to him from the date of her husband's death, an event which took place much more than twelve years before suit. Besides this, there is not a particle of evidence on the record to shew that the parties do follow "custom" in matters of inheritance, and also we are not aware of any declared custom under which defendant No. 3 would succeed to *Musammat* Rani at all. In short, it appears that the plaintiff has no title whatever.

Lastly, an attempt is made on behalf of the plaintiff to shew that it is he (defendant No. 3) who has been in possession in the proper sense of the word since *Musammat* Rani's death, and not defendant No. 2. The lower Appellate Court talks about the defendant No. 3's "symbolical possession of the house till lately." We cannot assent to this way of looking at the matter. Nobody has ever tried till recently to oust defendant No. 2 from the house; she has been living in it admittedly without paying rent, and even if she made no objection in 1903 or 1909 or 1910 to defendant No. 3 dealing with the house, this certainly did not divest her of *possession* or put possession into the hands of defendant No. 3. We are satisfied then that there is no possible ground on which the plaintiff's claim can succeed; and we accept the appeal, set side the decree (to which the plaintiff is only entitled if defendant No. 3 was the owner) and we dismiss the plaintiff's claim with costs throughout.

Appeal accepted.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 935 OF 1915.

March 30, 1917.

Present:—Mr. Justice Beaman.

MAHOMEDALI ADAMJI PEERBHOY AND OTHERS—PLAINTIFFS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT.

Resumption of land—Sanad, *construction of*—*Resumption committee*—*Majority award, validity of*—*Arbitrators and valuers, distinction between.*

In the absence of a special provision parties confiding their differences to the judgment of a body made up of an uneven number of individuals ought to be understood as implying that they would accept the decision of the majority of them. [p. 266, col. 1.]

A resumption term in a *sanad* provided that if Government wanted to resume the land it could do so on the payment of a just valuation, such valuation to be determined by a committee appointed by Government. The latter resumed the land and appointed a committee to determine the valuation. The majority of the committee fixed a certain valuation and the Government paid the sum fixed by the majority. The plaintiff contended that the committee was a board of arbitrators and had no power to give a majority award:

Held, that when the *sanad* was drafted it was the understanding and within the contemplation of all the parties to it that the determination of the just value of the land to be made by a committee appointed by Government should be accepted, if that determination represented the concurrent opinion of a majority of such committee, and that, therefore, the plaintiff's contention was unfounded. [p. 266, col. 2.]

Mr. *Mulla* (with him Messrs. *Jinnah* and *Desai*), for the Plaintiffs.

Mr. *Kanga* (with him Mr. *Strangman*), for the Defendant.

JUDGMENT.—The preliminary point I am asked to determine is in effect this:

Whether the decision of a valuation committee appointed by Government under the resumption term of the plaintiff's *sanad* must be an unanimous decision of the committee or may be a majority decision? The resumption term provides that a just valuation shall be paid and that such a valuation is to be determined by a committee appointed by Government. The defendant's contention in the briefest form is that in all such connections the word "committee" necessarily connotes a majority. No case can be given, it was argued, of any committee appointed to settle any matter as yet uncertain where by implication it was not intended that a majority decision should be the decision of the committee. On the other hand the plaintiffs contend that notwithstanding the use of the word "committee" this part of the resumption clause read as a whole provides for an ordinary submission to arbitration.

The point on a first view would seem to be of the simplest. Such difficulties as it may give rise to have been occasioned by the decisions of the English Courts, that in all cases of submission to arbitrators the resultant award must be an unanimous award of the arbitrators named. And it is very difficult to discover in principle or reason any ground upon which a valid distinction could be drawn between the case of three arbitrators appointed by parties to a dispute and three valuers. In the cases of *Carus-Wilson, In re* (1) and *Dawdy, In re* (2) the point of primary importance was whether the valuation of valuers was an award within the meaning of the Common Law Procedure Act and as such could be impeached in the Courts. But in the judgments, the learned Judges took particular pains to distinguish between the object with which arbitrators and valuers are appointed respectively; and upon that ground they proceeded further to mark off the different limits within which the activities of arbitrators and valuers respectively are intended to be confined and the resultant powers of superintendence which Courts may have over them. A very little reflection upon these distinctions, which have afterwards been embodied in all authoritative text-book writings, will show that even if they are valid as far as they go, they do not touch the principle of unanimity which is here in controversy. But the defendant's argument has been made to depend primarily upon the committee appointed under the resumption term being a committee of valuers and not of arbitrators. It is true that as the argument developed, and it began to be perceived that this contention would not go the length of giving valid distinctions for the purposes of unanimity between the two classes of cases under examination, much greater stress was laid upon what was alleged to be the connotation of the word "committee." In the case of *United Kingdom Mutual Steamship Assurance Association* v. *Houston* (3) Mathew, J., ruled very emphatically that where it was a true case of arbitration and there had been a submission to more than one arbitrator, unless all the arbitrators concurred in the award, there could be no arbitration award at all. Now, if that be true of an arbitration committed to two or more arbitrators without any special provision, in the case of this agreement, as I began by saying, it is extremely difficult to find any ground in reason or principle why the same rule should not govern a valuation, pure and simple, committed to two or more valuers. In either case if we start by using the word "committee" in the sense that parties to an arbitration commit the matters in difference between them to the decision of an arbitrator or body of arbitrators, there would be little difficulty in denominating that body in accordance with strict legal usage as a committee of the matters in dispute at the hands of the parties at variance. Yet so naming collectively the individual arbitrators nominated could hardly be said to take the case out of the authority of the current of English decisions upon the point. I should have thought that in every case of the kind, whether the persons concerned were arbitrators in the strict sense or mere valuers assuming the parties relying upon their decision had committed the matters in difference or to be in difference between them to

(1) (1887) 18 Q. B. D. 7; 56 L. J. Q. B. 530; 55 L. T. 864; 35 W. R. 43.

(2) (1885) 15 Q. B. D. 426; 54 L. J. Q. B. 574; 53 L. T. 800.

(3) (1836) 1 Q. B. 567; 65 L. J. Q. B. 484.

their judgment and the members were capable of yielding a majority decision, as a matter of common sense it would have been presumed that the parties intended to accept any such decision of the majority. It is easy to put cases where there may be such a submission to arbitration or appointment of valuers and no majority decision has been come to. As in the case before me the plaintiffs asked what would have been the result if each of the three members of the committee valued the property in dispute differently. Such considerations do not, in my opinion, give rise to any real difficulty The answer is plain. In all cases of that kind, there is no majority decision of the committee, or to take the other supposition, the body of arbitrators. I am, however, wholly unable to discover, as I said, any reason which commends itself to me for applying one rule in the case of arbitration and another in the case of a committee of valuers. I doubt much whether the defendant's main contention here, *viz.*, that a committee connotes a majority of a committee, would be sufficient. But I do emphatically think that all common sense would point to the adoption of the construction I am asked to put upon this resumption term by the defendant. I should not have had the least hesitation in doing so but for the embarrassment caused by the view taken in England of analogous cases of arbitration. There can, I think, be little doubt, however, but that the English Courts were quite satisfied with the distinctions they drew so emphatically between the cases of arbitrators proper and mere valuers, and would have employed them, had it been necessary to do so, to put such a decision as that which I am called upon to give here upon a different ground from such a decision as that in the case of *United Kingdom Mutual Steamship Assurance Association* v. *Houston* (3). My own feeling is that while no such distinction upon an exhautive analysis would be found to be valid, the real answer is that in every case of the kind in the absence of special provision, parties confiding their differences to the judgment of a body made up of an uneven number of individuals ought to be understood as implying that they would accept the decision of the majority of them. There was certainly nothing in the actual wording of the resumption term in the *sanad* before me repugnant to such a construction, nor have I the least doubt that when that *sanad* was drafted it was the understanding and within the contemplation of all the parties to it that the determination of the just value of the land to be made by a committee appointed by Government should be accepted if that determinatinn represented the concurrent opinion of a majority of such committee.

In that view, I find upon the preliminary point raised by the defendant that the valuation agreed upon by the majority of the committee appointed by Government is the valuation expressed to be determined and so made binding upon both the parties to the resumption term in the *sanad*.

Upon the first preliminary issue, which is really merely introductory, I hold as a matter of form rather than substance that the three persons named therein were not arbitrators but constituted a committee of valuers contemplated in the resumption clause of the *sanad*. On the second I have already found. It is unnecessary to find upon the third issue.

The suit will now be dismissed with all costs.

Suit dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 542 OF 1914.

February 2, 1917.

Present:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Shah Din.

AMIR CHAND—PLAINTIFF—APPELLANT

versus

AMAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913*)*, *ss.* 19, 20—*Notice to pre-emptor, defective—Suit, whether barred.*

Where a notice issued by the vendors to a pre-emptor under section 19 of the Punjab Pre-emption Act does not state the price at which the vendors are willing to sell, and the vendors sell the land before the expiry of three months after the issue of notice, the notice is bad and the pre-emptor's right of suit is not barred thereby. [p. 267, col. 2.]

A notice by the owners of a half share in the property comprised in the sale does not debar a pre-emptor from suing to pre-empt the whole bargain. [p. 267, col. 2.]

AMIR CHAND *v.* AMAR SINGH.

First appeal from the decree of the District Judge, Jullundur, dated the 17th December 1913.

The Hon'ble Mr. *Fazl-i-Hussain*, for the Appellant.

Messrs. *Morrison* and *Lal Muhammad Datta*, for the Respondents.

JUDGMENT.—On the 9th of June 1912 defendants Nos. 2, 3 and 4 in this case sold the land in suit to defendant No. 1. Two sets of plaintiffs sued for pre-emption namely, Amir Chand, Khatri, and nine Jats of the village in which the land is situate. The lower Court has given a decree to those nine pre-emptors and Amir Chand has appealed. It has been found by the lower Court that Amir Chand has a superior right of pre-emption as being a collateral relative of the vendors. Amir Chand has expressed his willingness to pay the full price, Rs. 21,600, which sum, it may be said further, the lower Court has found to have been paid in full and fixed in good faith. That Court has nevertheless preferred the second batch of plaintiffs to Amir Chand on the ground that Amir Chand has lost his right by reason of a notice that was served on him, and on this ground Amir Chand's suit has been dismissed. He has appealed, and obviously the only question for us to consider is whether the notice in question does really deprive Amir Chand of his right to sue.

Defendant No. 2 owns half of the land. Defendants Nos. 3 and 4 own the other half. On the 13th March 1912 defendants Nos. 3 and 4 applied to the District Judge under the Act that notice should be given to Amir Chand and other pre-emptors of their intention to sell. On the back of this notice Amir Chand replied that he did not know anything about Court proceedings and that the notice might be sent to his brother, Fakir Chand. In the notice from the Court it was intimated that the case would come on for hearing on the 18th of May 1912. No appearance was put in on that day apparently, but on the 14th of June 1912 Fakir Chand appeared and said that he was ready to buy. The present suit by Amir Chand was brought on the 11th of July 1913. This admittedly was within a year of mutation of names in favour of vendee, but of course is much beyond the three months' statutory time provided by the Act [in cases in which notice has been given. Now it seems to us that Amir Chand is not barred in any way by the aforesaid proceedings taken by the vendors. In the first place, the notice itself is very defective. No price is stated. In the application to the Court it is simply said such and such rate for *barani* such and such rate for *chahi* and such and such rate for land in possession of occupancy tenants. In the notice actually served upon Amir Chand not even these details are given. Probably these defects alone are sufficient to save Amir Chand, but there are many further defects. No copy of application seems to have been given to Amir Chand. Next, the sale to defendant No. 1 was effected on the 9th of June 1912. This sale gave Amir Chand an immediate cause of action, and any notice that he had received previously became a piece of waste paper in view of the fact that on the date of the sale three months had not expired. It would obviously have been idle for Amir Chand to go to the vendors and say on the 10th June 1912, "I am willing to buy the land," inasmuch as that land had already passed out of their ownership. *Thirdly*, the most important point of all is that, whereas the notice aforesaid intimated only the intention of the defendants Nos. 3 and 4 to sell their half share, the actual sale was of the land of all three defendants Nos. 2, 3 and 4. It appears, therefore, that the bargain now in question is a totally different bargain from that offered in the notice.

The lower Court, in deciding issues Nos. 1 and 2 regarding the notice and its effect, relies upon two Allahabad rulings which are wholly inapplicable to the case and need not be discussed further.

We, therefore, find that Amir Chand is in no way affected in this case by the proceedings of defendants Nos. 3 and 4 described above, and as every other point in the case has been found by the lower Court, and correctly found, in his favour, it only remains for us to accept this appeal with costs and to give Amir Chand the usual pre-emption decree allowing him three months from the present date within which to pay the sum of Rs. 21,600. If he fails to pay that sum within the time fixed, the suit will be deemed dismissed with costs. If he pays

as directed, the decree in favour of Umra, Khairati and others, the Jats aforesaid, will stand dismissed with costs.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL No. 109 OF 1915.

December 8, 1916.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

NIMMALA MAHANKALI, MINOR, BY GUARDIAN GORREY GANGIAH—DEFENDANT—COUNTER-PETITIONER—APPELLANT

versus

KALLAKURI SUBBA RAO AND ANOTHER PLAINTIFFS—PETITIONERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182, applicability of—Mortgage decree—Appeal—Application for decree absolute—Limitation, commencement of—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 3—Procedure, law of, retrospective effect of.

In matters of adjective law, the rules of procedure which are in force at the date on which the right to make an application accrues govern the application. [p 268, col. 2.]

Where an appellate decree confirms the decree of the first Court and is silent regarding the time fixed for payment by the Court of first instance, a further period cannot be given for payment from the date of the appellate decree, and the party in default is not entitled to reckon the time from the date of such decree. [p. 269, col. 1.]

But a party who is not bound to perform any act under the decree of the first Court and appeals to get a larger benefit than what the decree grants him is entitled to reckon the period in his favour from the date of the appellate decree, provided he has not disobeyed any direction given by the first Court. [p. 269, col. 2.]

A mortgage decree was passed on 28th September 1908, fixing 28th March 1909 as the date of payment. The decree-holder appealed against the decree and the final decree was passed by the High Court on 29th July 1910. In the meantime the Civil Procedure Code of 1908 had come into force. On 18th July 1913 the decree holder made an application for the execution of the decree, and on 19th August 1914 applied for a decree absolute:

Held, that the application was governed by Article 181 of the Limitation Act, inasmuch as on the date that the right to apply for an order absolute accrued the new Code of Civil Procedure had come into force, but that the application being within three years of the date of the appellate decree it was within limitation. [p. 268, col. 2; p. 269, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Kistna at Ellore, in Appeal Suit. No. 24 of 1915, preferred against the order of the District Munsif, Bhimavaram, in Civil Miscellaneous Petition No. 1822 of 1914, in Original Suit No. 274 of 1907 on the file of the District Munsif's Court, Narasapur.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *B. Somayya* for Mr. *P. Narayanamurthi*, for the Respondent.

JUDGMENT.—The decree in the original suit was passed on the 28th of September 1908. It gave the judgment-debtor six months to pay the amount of the decree: consequently the decree-holder could have executed the decree only after the 28th of March 1909. On the 1st of January 1909, the new Code of Civil Procedure came into force. Order XXXIV of the Code enacted new rules of procedure for the execution of mortgage decrees. Against the decree of the first Court, the decree-holder appealed first to the District Judge and then to this Court. The final decree on second appeal was passed on the 29th of July 1910. An application for execution was presented on the 18th of July 1913, that is, within three years of the final appellate decree. The present application was made on the 19th August 1914 for a decree absolute. It was objected by the defendant that this application was barred by time. The Subordinate Judge disallowed the objection and granted execution. Hence the appeal.

The first point taken by Mr. V. Ramadoss is that the Article applicable to the application is 181 of the Limitation Act and not Article 182. We think he is right. Mr. Somayya contended that as, on the date of the Munsif's decree, the new Code had not come into force and as it was well settled under the Transfer of Property Act that applications for orders absolute were governed by Article 182, his client was entitled to apply for the order absolute as if he were presenting an execution application. The point is one of first impression, but we think, after consideration, that the contention is not well founded. On the date the right to apply for an order absolute accrued, the new Code was in force and in matters of adjective law, the rules of procedure which are in force at the date the right to apply accrues, would govern all the applications. We think, therefore, that the

application was governed by Article 181 and not by Article 182. The decision in *Mahammad Husain* v. *Abdul Karecm* (1) is not against this view. In that case, the right to apply had accrued under the Transfer of Property Act and the earlier applications were all made under the said Act. It was held, following *Abdul Majid* v. *Jawahir Lal* (2), that such applications were in execution and that the decree-holder having acquired a right to apply in a particular manner under the Transfer of Property Act, that right was not taken away by the provisions of Order XXXIV. That decision is not applicable to a case where a right accrues for the first time under the new Code, which has provided a complete remedy for such applications. The decisions in *Lakshmi Achi* v. *Subbarama Aiyar* (3), *Beni Singh* v. *Barhamdeo Singh* (4) and *Madho Ram* v. *Nihal Singh* (5) support this position, although the learned Judges in some of these cases have held that even under the Transfer of Property Act, the application should have been under Article 181 of the Limitation Act.

The next point for consideration is whether under Article 181 of the Limitation Act, the time begins to run from the date fixed in the original decree for payment or from the date of the decree in second appeal. The decisions are practically unanimous that where the appellate decree confirms the decree of the first Court and is silent regarding the time fixed for payment by the Court of First Instance, a further period would not be given for payment from the date of the appeal decree. *Ramaswami Kone* v. *Sundara Kone* (6) and *Thathara Nannabha Chetty* v. *Kuppal Krishnammal* (7). A further proposition follows from these judgments, namely, that the party in default is not entitled to reckon the time from the date of the appellate decree. The position of a party who is not bound to perform any act under the decree but who appeals to get a larger benefit than what the first Court's decree granted him is not covered by any direct authority. The principle applicable to such cases is that ordinarily the decree executable is the decree in appeal, see *Manavikraman* v. *Unniappan* (8): and if the decree-holder has not disobeyed any directions given by the first Court, he would be entitled to reckon the period in his favour from the date of the appellate decree. The observations of Benson and Wallis, JJ., in *Ramaswami Kone* v. *Sundara Kone* (6) lend support to this proposition: and we think it is sound in principle and is in consonance with justice. We are, therefore, of opinion that even under Article 181, the right to apply accrued to the respondent only on the passing of the decree in second appeal. It was conceded that if time accrued from the date of the appellate decree, the present application would not be barred by limitation. We must, therefore, hold that the order of the Subordinate Judge is right and dismiss the appeal. Each party will bear his own costs in this Court.

Appeal dismissed.

V.R.P.

(1) 29 Ind. Cas. 237; 39 M. 544; 17 M. L. T. 424.

(2) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 621; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.).

(3) 29 Ind. Cas. 142; 39 M. 488; 2 L. W. 403; 28 M. L. J. 490; (1915) M. W. N. 327; 17 M. L. T. 385.

(4) 28 Ind. Cas. 211; 19 C. W. N. 473; 22 C. L. J. 66.

(5) 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 985

(6) 31 M. 28 at p. 30; 17 M. L. J. 495; 3 M. L. T. 26.

(7) 16 Ind. Cas. 799; 14 M. L. T. 194.

(8) 15 M. 170; 2 M. L. J. 23; 5 Ind. Dec. (N. S.) 468.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 387 OF 1915.

June 22, 1917.

Present:—Mr. Justice Beacheroft and Mr. Justice Walmsley.

JAGABANDHU PAL CHOWDHURY AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

HALADHAR PAL CHOUDHURY AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Guardian and Wards Act (VIII of 1890), s. 30—Transfer of minor's interest in decree by certificated guardian without leave of Court, whether can be questioned by judgment-debtor—Mortgage—Judgment-debtor assignee of mortgage decree, whether can execute decree—Mortgagors, one of several purchasing mortgagee's interest—Rights of other mortgagors.

A judgment-debtor cannot question the validity of the transfer of a minor's interest in the decree, made by his certificated guardian without the leave

of the District Judge, so as to prevent its execution by the transferee. [p. 271, col. 2.]

A judgment-debtor assignee of a mortgage decree can execute it by putting up the mortgaged property to sale. [p. 271, col. 2.]

Laldhari Singh v. *Managar, Bhabatpura Estate*, 12 Ind. Cas. 70; 16 C. W. N. 132, 14 C. L. J. 639, followed.

The purchase by one of several mortgagors of the mortgagee's interest does not entitle the other mortgagors to apportionment of their debts so as to enable them to redeem their own shares in the mortgaged property. [p. 272, col. 1.]

By an *ekrarnama* fourteen persons divided between themselves responsiblity for a mortgage-debt but only eight of them were actually interested in the mortgaged property. After part payment of the mortgage-debt by some of the persons, the mortgagee sued on his mortgage and got a decree, which was purchased by some of the mortgagors, who then applied for execution by sale of the mortgaged property:

Held, that the equities existing between the parties by reason of the *ekrarnama* could not be worked out in execution proceedings, even though some of the persons liable for the mortgage-debt had individually paid off the shares of the debt due from them; but that the mortgagors who purchased the mortgage decree could not be allowed to sell the mortgaged property for the whole of the decretal debt, but only for the balance on deduction of the shares of the debt due from them. [p. 272, cols. 1 & 2.]

Appeal against the decree of the Second Subordinate Judge, Dacca, dated the 12th July 1915.

Babus *Dwarka Nath Chakravarty*, *Hem Chandra Sen* and *Prakash Chandra Pakrashi*, for the Appellants.

Babus *Mohendra Nath Roy*, *Rajendra Chandra Guha* and *Sasadhar Roy*, for the Respondents.

JUDGMENT.

BEACHCROFT, J.—This is an appeal by the judgment-debtors against an order of the Subordinate Judge dismissing their objection and ordering execution to proceed in execution proceedings on a mortgage decree.

On the 23rd August 1894 fourteen persons took a *patni* lease in the names of four of their number paying a *salami* of Rs. 39,000. Partly for the purpose of raising the necessary funds money had been borrowed by different combinations of these persons. In one of these transactions a mortgage bond for Rs. 12,000 was executed on the 17th August 1894 by ten of the fourteen persons, though it was expressly stated in the mortgage bond that two of the ten had no interest in the property mortgaged.

On the 29th August 1894 the fourteen persons executed an *ekrarnama*, in which it was stated that the parties wished to settle their shares and make arrangements for the re-payment of the debts so as to avoid disputes in future. The interests in the *patni* allocated to individuals were set out in a schedule and the individuals were arranged in two groups; one group of six having $5\frac{1}{2}$ annas and the other of eight having $10\frac{1}{2}$ annas in the *patni*. The *ekrarnama* set out in what proportion the debts were to be borne by the two groups. In short, the $5\frac{1}{2}$ anna co-sharers took the liability for Rs. 15,500 and the $10\frac{1}{2}$ annas co-sharers the liability for the rest of the debts amounting to Rs. 30,000. The liability for the Rs. 12,000 borrowed on the mortgage was divided Rs. 4,000 to the $5\frac{1}{2}$ annas and Rs. 8,000 to the $10\frac{1}{2}$ annas co-sharers.

The position with reference to the mortgage was now somewhat peculiar. Although all fourteen persons had agreed among themselves to be liable for the debt, the individuals in each group being liable for the amount due from the group in proportion to their shares in the *patni*, only eight persons were actually interested in the mortgaged property. These eight had $9\frac{1}{4}$ annas in the *patni*; two others, who joined in the mortgage without having any interest in the mortgaged property, had $4\frac{1}{2}$ annas in the *patni*; the other four who did not join in the mortgage had $2\frac{1}{4}$ annas in the *patni*.

Various sums were subsequently paid by five of the persons and the payments were endorsed on the mortgage bond, but though it is stated on behalf of the appellants that they claim to have paid even more than their shares according to the *ekrarnama*, the figures have not been worked out so as to enable us to say whether that claim is justified or not.

In course of time the mortgagees sued on their mortgage and on the 12th March 1908 got a decree, the amount then due being upwards of Rs. 20,000. On the 7th February 1912 mortgagees sold their rights for Rs. 18,000 to Haladhar, one of the original fourteen persons, and the representatives of Rajkishore, another of the original fourteen. Haladhar and Rajkishore were two of the mortgagors, Rajkishor's interest in the *patni* being $1\frac{1}{4}$ annas out of the $5\frac{1}{2}$ anna

group and Haladhar's 2 annas out of the $10\frac{1}{2}$ annas group.

The present application for execution was made by the purchasers of the mortgagee's interest on the 31st March 1914. Objections to the execution were made on behalf of the present appellants, who represent Jugalkishor, who had an one-anna share in the *patni* out of the $5\frac{1}{2}$ annas, and Krishna, Mangal, Gangadhar and Jagabandhu, who had 3 annas out of the $10\frac{1}{2}$ annas.

The objection petitions contained a number of objections, but those urged before the Subordinate Judge appear to have been the following: (1) limitation: (2) that the Rs. 18,000 had been paid on behalf of all the debtors and accepted in full satisfaction of the decree: (3) that under Order XXI, rule 16, of the Code of Civil Procedure one of the judgment-debtors could not execute the purchased decree against the other judgment-debtors: (4) that the equities existing between the parties by reason of the *ekrarnama* should be worked out in the execution proceeding and not by separate suit: (5) that as the transfer included transfer of the interest of a minor made by the certificated guardian without the permission of the District Judge the transfer was inoperative. The Subordinate Judge decided against all these contentions.

The points now urged on behalf of appellants are: (1) that the transfer of the minor's share is invalid, therefore, the transferees cannot execute the decree as a whole, and as the extent of the minor's interest is unknown the decree is incapable of execution: (2) that the rights and liabilities of the parties can be worked out in the execution proceedings: (3) that the present decree-holders being interested in a portion of the equity of redemption there ought to be an apportionment of the debt between the property held by them and the property held by other judgment-debtors: (4) that the purchase by some of the debtors was really a discharge of the debt as contemplated by the *ekrarnama*.

The first point taken depends on the effect of the transfer of a minor's interest by a certificated guardian without the leave of the District Judge. Section 30 of Act VIII of 1890 provides that such a transfer is voidable, not void, at the instance of any other person, *i.e.*, in addition to the minor, affected by the transfer. In my opinion the objectors cannot question the validity of the transfer. They may be affected by action taken by the transfree subsequently to the transfer but they are not affected by the transfer itself.

The fourth point would appear to have been presented to the Subordinate Judge in a somewhat different light to that in which it has been put before us, *viz.*, on the footing that the objectors had contributed to the purchase money, the purchase being made on behalf of all the judgment-debtors. We have not been referred to any portion of the oral evidence, and the *ekrarnama* on which reliance was placed to support the argument does not contain any provision as to the effect of a purchase of the mortgage by some of the debtors, though there is a provision that a co-sharer who pays the debt of another co-sharer in anticipation of a suit will obtain the share in the *patni* of the defaulting co-sharer. This clause is evidently not sufficient to establish the contention put forward, assuming for the sake of argument that the *ekrarnama* may be referred to to work out the equities between the parties.

A somewhat similar point which might perhaps have been advanced, though in fact it was not, is that the purchase was in substance, though not in form, a redemption of the mortgage and that the rights of the transferees were those possessed by one of several mortgagors who redeems the mortgage. The point in essence differs from that based on Order XXI, rule 16, which was taken before the Subordinate Judge, and which the learned Pleader for the appellants expressly abandoned before us. But there is authority in *Laldhari Singh* v. *Manager, Bhabatpura Estate* (1) that a judgment-debtor assignee of a mortgage decree can execute it by putting up the mortgaged property to sale.

For the third point the learned Pleader for the appellants admits that he can show no authority. His argument is that this is the converse of the case contemplated by section 60 of the Transfer of Property Act and that as a mortgagor is entitled to redeem his own share when the mort-

(1) 12 Ind. Cas. 70; 16 C. W. N. 132; 14 C. L. J. 639.

gagee has acquired the share of a mortgagor, the same rule applies when a mortgagor has acquired the interest of the mortgagee. He argues that the rule is founded on the union in the same person of the interest of the mortgagee and of one or more of the mortgagors, and as it applies when the mortgagee acquires the interest of a mortgagor it ought to apply also in the converse case. But the rule is not founded on the union of the two interests in one person, but on a result which follows that union in the case where the mortgagee purchases the interest of a mortgagor but not in the converse case, namely, that the mortgagee has by his purchase split up his security. The purchase by a mortgagor of the mortgagee's interest does not entitle the other mortgagors to apportionment of their debt.

There remains the question whether the equities between the parties can be worked out in the execution proceedings or only by separate suit. What the appellants are in effect claiming is that they have individually paid off the shares of the debt due from them in accordance with the terms of the *ekrarnama* and that their share in the mortgaged property ought to be released from sale, or that they should be made liable individually only for such amounts by which their payments fall short of the amounts due in proportion to their shares in the *patni*. This abviously cannot be done. I have already pointed out that by the *ekrarnama* all fourteen persons divided between themselves the responsibility for the mortgage debt, but that the persons interested in the mortgaged property only had $9\frac{1}{4}$ annas in the *patni*. Supposing every one of the persons interested in the mortgaged property had paid up his share of the mortgage debt as allocated in the *ekrarnama*, a very large portion of the mortgage debt would still remain unsatisfied, and for that portion of the debt the mortgaged property as a whole and not the shares of the individual members must remain the security; by no process of reasoning could the balance of the debt be thrown on the share rather than on another. And if it is sought to bring all the debts referred to in the *ekrarnama* into the account, that obviously cannot be done in this execution proceeding as it would bring in persons who were not parties to the suit. I am, therefore, of opinion that the appeal should be dismissed.

There is, however, an order which we can make and which I think we ought to make, concerned as we are with seeing that formalities of procedure should not be allowed to obscure substantial justice between the parties.

As already mentioned, various payments were made on the mortgage; one was of Rs. 2,057 made in respect of Raj Kishor's share of the debt on the 6th *Aswin* 1302. Nothing has been paid in respect of what is admittedly Haladhar's share of the debt. His original share would be 2 annas out of $10\frac{1}{2}$ annas, *i. e.*, 4/21 of Rs. 8,000. By now it will have amounted to a very much larger sum. Raj Kishor by his payment of Rs. 2,057 may or may not have paid the full amount due for his share, which was originally 5/22 of Rs. 4,000. A large portion of the judgment-debt is, therefore, due from the decree-holders themselves. They cannot be allowed to sell the property for the whole debt, which is largerly swollen because they have failed to carry out their own undertakings. It must be taken that they have paid to themselves the amount due from themselves. A calculation must be made of the amount due in respect of the shares of Raj Kishor and Haladhar on the footing above indicated, and the amounts so found must be deducted from the sum for which execution is levied, satisfaction for those amounts being entered.

The parties to this appeal will bear their own costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

DAWAL PIRANSHAH *v.* DHARMA RAJARAM.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 312 OF 1916.

March 14, 1917.

Present:—Mr. Justice Beaman and Mr. Justice Macleod.

DAWAL PIRANSHAH—DEFENDANT No. 1—APPELLANT

versus

DHARMA RAJARAM MANGGARUDI—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 4, 54—Registration Act (XVI of 1908), ss. 17, 49—Sale of land less than Rs. 100 in value—Unregistered sale-deed, admissibility of—Delivery of possession.

Section 54 of the Transfer of Property Act still eaves it open to the parties desirous of doing so to make a valid sale of immoveable property of less than Rs. 100 by oral contract and delivery of possession. [p. 275, col. 1.]

Per *Beaman, J.*—By the operation of section 4 of the Transfer of Property Act, section 54 of the Act must be annexed to section 17 of the Registration Act, with the consequence that an unregistered deed of sale of immoveable property below the value of Rs. 100 is not only not effectual to transfer the property but also falls within the comprehensive and stringent prohibition of section 49 of the Registration Act and is inadmissible in evidence. [p. 274, col. 2.]

Per *Macleod, J.*—Section 4 of the Transfer of Property Act does not make documents purporting to be sale-deeds of immoveable property under the value of Rs. 100 compulsorily registrable, so that if they are not registered they cannot be adduced in evidence under section 49 of the Registration Act. [p. 275, col. 2.]

In cases of transfer of property under the value of Rs. 100, if the transfer is effected by delivery of possession accompanied by an unregistered document, that document can be adduced in evidence in order to show what was the character of the possession given by the vendor of the land to the purchaser. [p. 275, col. 2.]

Second appeal from the decision of the 1st Class Subordinate Judge, Nasik, in Appeal No. 19 of 1915, confirming the decree passed by the Subordinate Judge, Malegaon, in Civil Suit No. 177 of 1914.

Mr. *W. J. Nimkar*, for the Appellants.

Mr. *W. B. Pradhan*, for the Respondents.

JUDGMENT.

BEAMAN, J.—Speaking for myself I am in agreement with the contention of the learned Pleader for the appellants touching the admissibility of the unregistered sale-deed of 1899. The point is one of some interest and considerable importance. Not only has it been the occasion of much discussion in the Calcutta High Court [see *Narain Chunder Chuckerbutty* v. *Dataram Roy* (1) and *Makhan Lal Pal* v. *Bunku Behari Ghose* (2)], but I believe it has already come up for consideration in this High Court on more than one occasion. Unfortunately I have not been able to come across the particular appeals in which this may have occurred. The point is this. In 1899 the plaintiffs allege the defendant sold to their father the land in suit by an unregistered sale-deed for the sum of Rs. 40 and at the same time delivered possession. Now, in the Courts below the evidence of the sale, wherever it was separable from the fact of possession, seems to have been principally secondary evidence of the missing unregistered sale-deed of 1899. The learned Appellate Judge of the lower Court has accepted the plaintiffs' story that the original was burnt. It is admitted that the original deed was unregistered. Before the passing of the Transfer of Property Act of 1882, questions arising under section 50 of the old Registration Act, which gives priority to registered over all unregistered instruments, had often arisen and caused much difference of opinion in the Calcutta High Court. As the law then stood, transfers of immoveable property of less value than Rs. 100 could have been validly effected by an unregistered sale-deed or they might have been effected by delivery of possession, or by delivery of possession accompanied by an unregistered sale deed, but the priority given to registered sale-deeds over unregistered sale-deeds by section 50 of the Registration Act was shown to have occasioned very great hardship in many cases, and there can be little doubt that it was in consequence of the judicial pronouncements of the learned Judges of the Calcutta High Court upon the great injustice, which was often thus worked by the strict application of section 50 of the Registration Act, that section 54 of the Transfer of Property Act was enacted in the year 1882. That section altered the law to this extent that it declared that no sale of mmoveable property, although the value was less than Rs. 100,

(1) 8 C. 597; 10 C. L. R. 241; 4 Ind. Dec. (N. S.) 384.

(2) 19 C. 623; 9 Ind. Dec. (N. S.) 858.

could be effected by an unregistered writing. Such transfers could thus be effected in one of two ways only, either by a registered writing or by delivery of possession. That cleared up some of the doubts and difficulties which had arisen in interpreting section 50 of the Registration Act along with section 17 (*b*); and as long as the law remained in that state, the position was this, that if a sale of immoveable property of the value of less than Rs. 100 had been effected both by an unregistered instrument and by delivery of possession, although the unregistered instrument would have no legal effect, that is to say, would not have transferred the property, it could not have been excluded from evidence under section 49 of the Registration Act; because it still stood entirely outside the category of writings compulsorily registrable under section 17 (*b*). It is true that unless such a transfer had been made by delivery of possession as well as by an unregistered writing, the production of an unregistered writing in evidence would have been entirely useless. The party relying on it might have proved, it is true, that the writing was executed and that the intention was to convey the property. But inasmuch as after the passing of the Transfer of Property Act such a writing would not have that legal effect, his rights would have remained entirely unaffected by leading such evidence. The case is different where the sale had been effected both by an unregistered writing and by delivery of possession, for between the years 1882 and 1885, as I have said, there could have been no objection to tendering the unregistered writing as evidence of the nature of the transaction under which possession had been given. Thus, where the Court found possession as a fact, and the only question was as to the nature of its origin, an unregistered sale-deed might very well have been offered in explanation of the transaction pursuant to which possession had been delivered. In my opinion, however, the law was materially altered by the amending Act of 1885. That Act *inter alia* declared that section 54 of the Transfer of Property Act was thenceforward to be treated as supplemental to the Registration Act. Judges have before this commented on the infelicitous use of the language employed, but I can find no other intelligent meaning in it than that section 54 is thereafter to be read and applied by all Courts as supplemental to so much of the Registration Act and to so much only as that to which in reason it belongs. Again, it appears to me that the only portion of the Registration Act to which section 54 can in reason belong is section 17, which declares what instruments are compulsorily registrable. Before section 54 of the Transfer of Property Act was passed, sales of immoveable property of less value than Rs. 100 might be effected by instruments which were not registered and were certainly not compulsorily registrable. Section 54 said that thenceforward no sale of immoveable property, no matter what its value, could be effected by any unregistered instrument. Now, annexing that to section 17, which, as I say, is in my opinion the only section to which it can properly be annexed, the effect would be to add to clause (*b*) of that section the words "all deeds of sale of immoveable property whatever its value." If I am right in this interpretation of the meaning of Act III of 1885, the legal consequences become apparent, for then any unregistered deed of sale of immoveable property below the value of Rs. 100 would not only not be effectual to transfer the property, but would also fall within the comprehensive and stringent prohibition of section 49. That section declares in the most unambiguous language that documents which are made compulsorily registrable and have not been registered shall not be received in evidence of any transaction, etc. So that if after the Act of 1885 all sales of immoveable property, whatever the value of that property might be, were intended to be made compulsorily registrable under section 17, it will be seen to follow clearly that they could not be given in evidence of the transaction, namely the sale, although that transaction might have been effected and have been quite legal, complete and valid by mere delivery of possession. If this be true of the document itself, it necessarily follows that no secondary evidence can be given. For, I think, it is a self-evident proposition that secondary evidence may not be given of that which

the law declares shall not be given as primary evidence.

I am, therefore, clearly of opinion that neither the original unregistered deed of sale of 1899 nor secondary evidence of it was admissible in the present case to support the plaintiffs' allegation that in 1899 there was a complete and valid sale of the property in suit effectuated by delivery of possession. That, however, does not, in my opinion, conclude the case, and in what follows I believe that I may speak for my learned brother as well as for myself. Section 54 still leaves it open to the parties desirous of doing so to make a valid sale of immoveable property of less than Rs. 100 by oral contract and delivery of possession. In the present case we think that it was quite open to the learned Judges below to find that the property in suit had been sold in that manner. Even without adverting in any way to the unregistered sale-deed of 1899, we think that there is ample evidence on the record to support the decision to which the Court of first appeal has come. Both the Courts have clearly found as a fact that the plaintiff has had possession of the land since 1899 up to the year 1911, and they have also held, though here no doubt they have been influenced by the secondary evidence of the unregistered sale-deed, that that possession was given pursuant to a sale. There is evidence *dehors* the unregistered sale-deed which is amply sufficient, in our opinion, to support that conclusion. There is the evidence of Tukaram, for example, who appears to have been the intermediary in the matter and to have first-hand knowledge of all the details of the transaction that in 1899 the defendants did sell the land in suit to the father of the plaintiff and that it was he, Tukaram, himself who delivered possession of the land to the plaintiff pursuant to the sale. That finding of fact would be quite sufficient, standing alone, to meet the defendants' contentions in this appeal. But there is another ground on which the conclusion of the Courts below can be very confidently supported. The Courts below have found as a fact that the plaintiffs have been in possession from 1899 till 1911, and looking to the pleadings and the evidence we cannot doubt that the meaning of the words "till 1911" is that the defendants in that year entered into possession under the lease given them by the plaintiffs. We have not the date of the lease, but it is common ground that its currency was at least eleven months and during that period at any rate the character of the plaintiffs' adverse possession could not have been altered by the *de facto* possession of the defendants. So that in any event it is clearly found that the plaintiff has had more than twelve years' adverse possession from May 1899 till some period very near the end of 1911; and the title thus acquired by adverse possession would be quite sufficient for all the purposes of the present suit even had there been no allegation of sale at all.

On these grounds, then, we think that the decision of the lower Appellate Court ought to be confirmed and this appeal dismissed with all costs.

MACLEOD, J.—I agree that this appeal should be dismissed on the ground that both the Courts below have found as a matter of fact that there was a sale accompanied by delivery of possession, and that is a finding of fact which we are not at liberty to disturb.

But I regret that I cannot agree with my learned brother in the conclusion that the Courts below were wrong in admitting secondary evidence of the deed of 1899, which is said to have been burnt. In my opinion in cases of transfer of property under the value of Rs. 100, if the transfer is effected by delivery of possession accompanied by an unregistered document, that document can be adduced in evidence in order to show what was the character of the possession given by the vendor of the land to the purchaser. I think it must be admitted that it would be so but for section 4 of the Transfer of Property Act, and I am not prepared to say that the effect of that section is to make documents purporting to be sale-deeds of immoveable property under the value of Rs. 100 compulsorily registrable, so that if they are not registered they cannot be adduced in evidence under section 49 of the Registration Act. Section 4 of the Transfer of Property Act says that paragraphs 2 and 3 of section 54 shall be read as supplemental to the Indian Registration Act, 1877. The first

part of section 4 says: "The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act." Therefore, the section makes a distinction between those sections which relate to contracts which are to be taken as part of the Indian Contract Act and certain sections which relate to registration which are to be read as supplemental to the Registration Act. Now, supposing paragraphs 2 and 3 of section 54 of the Transfer of Property Act were to be found at the end of the Registration Act, then, in my opinion, that would not have the effect of including transfers or documents which purport to transfer an interest in property of the value of under Rs 100 in section 17 so as to make them compulsorily registrable. I confess that I cannot see what particular effect it would have if paragraphs 2 and 3 of section 54 of the Transfer of Property Act were read at the end of the Registration Act. But there is one thing I am perfectly clear about, that it would not have the effect of introducing instruments relating to transfer of property under the value of Rs. 100 into section 17. In my opinion, therefore, if a contract for sale is made between two parties of property under the value of Rs. 100 and possession is given, then a transfer takes place under section 54 and if it so happens that at the same time a sale-deed has been executed, and a question arises in future whether as a matter of fact the sale was effected, then that unregistered document can be given in evidence in order to prove that possession was given to the person setting up a right as a purchaser either in pursuance of a contract of sale or to effect a sale. Therefore, in my opinion, the evidence regarding this burnt sale deed of 1899 was rightly admitted in the Court below.

Appeal dismissed.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 928 OF 1916.

March 22, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

RAM PROSAD PRAMANIK AND ANOTHER —DEFENDANTS—PETITIONERS

versus

SRICHARAN MANDAL—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35, sub-cl. (ii)—*Suit for compensation for unlawfully cutting and removing tree—Jurisdiction, objection to, whether can be waived—Civil Procedure Code (Act V of 1908), s. 115—Assumption of jurisdiction by subordinate Court—Revision—High Court, interference by.*

A suit for compensation for unlawfully cutting and removing a tree and misappropriating crops is excepted from the cognizance of a Court of Small Causes by Article 35, sub-clause (*ii*), of the Second Schedule to the Provincial Small Cause Courts Act as amended by the Provincial Small Cause Courts Amendment Act of 1914. [p. 276, cols 1 & 2.]

Where, after such a suit has been decreed by a Small Cause Court without objection by the defendant as to the Court's jurisdiction to entertain the suit, the defendant applies for review, the Court should not refuse the application for review on the ground that the objection as to jurisdiction was not raised at the trial. [p. 277, col. 1.]

Where there is an entire absence of jurisdiction, no action on the part of the plaintiff and no inaction on the part of the defendant can invest the Court with jurisdiction, for jurisdiction cannot be created by waiver or consent. [p. 277, col. 1.]

Where a subordinate Tribunal has usurped jurisdiction it is incumbent upon the High Court to interfere. [p. 277, col. 1.]

Rule against the order of the Munsif, Boalia, exercising powers of a Court of Small Causes, in Suit No. 454 of 1916.

Babu *Jatindra Mohan Chowdhury*, for the Petitioner.

Babu *Krishna Kamal Maitra*, for the Opposite Party.

JUDGMENT.—This Rule is directed against a decree of a Court of Small Causes in a suit for compensation for a tree wrongfully cut and for crops misappropriated by the defendant. The case for the plaintiff was that the land in dispute was his property and was in his possession, that the tree had been grown and crops of mustard raised by him and that the defendant had unlawfully cut and removed the tree and the crops.

It is plain that a suit of this description is excepted from the cognizance of a Court of Small Causes by Article 35, sub-clause (*ii*), of the Second Schedule to the Provincial Small Cause Courts Act, which has been inserted

therein by the Provincial Small Cause Courts Amendment Act (1914). This provision excludes from the jurisdiction of Courts of Small Causes suits for compensation for acts which are, or save for the provisions of Chapter IV of the Indian Penal Code would be, offences punishable under Chapter XVII of the said Code. It is clear that if the acts attributed to the defendants are true, they have been guilty of mischief, if not of theft. Consequently, the suit could not be tried by the Court of Small Causes. No objection, however, appears to have been raised to the trial of the suit. But, after the suit had been decreed, the defendants applied for review of judgment. The Court refused the application for review on the ground that the objection as to jurisdiction was not raised at the trial. In our opinion, the review should have been granted. The objection as to jurisdiction was apparent on the face of the record. The plaintiff could succeed only if his allegations as to possession were established. Indeed, on the evidence the Court ultimately found that the allegations were true and proceeded to grant relief to the plaintiff on that basis. It is clear that under such circumstances omission on the part of the defendants to take exception to the jurisdiction of the Court could not legalise the acts of the Court. Where there is an entire absence of jurisdiction, no action on the part of the plaintiff, no inaction on the part of the defendant can invest the Court with jurisdiction, for jurisdiction cannot be created by waiver or consent [*Golab Sao* v. *Chowdhury Madho Lal* (1)], and when a subordinate Tribunal has usurped jurisdiction it is incumbent on this Court to interfere [*Surendra Nath* v. *Bansi Badan* (2)].

The result is that this Rule must be made absolute and the decree of the Small Cause Court Judge set aside. We direct that under Order VII, rule 10, Code of Civil Procedure, the plaint be returned to the plaintiff for presentation to the proper Court. As the objection to jurisdiction was not raised at the earliest possible stage, the plaintiff is entitled to the costs which have been thrown away, that is, the costs of the hearing in this Court as also in the Court below. We assess the costs in this Court at Rs. 16 and the costs in the Court below at Rs. 10. The defendants must pay the plaintiff this sum (Rs. 26), irrespective of the ultimate result of the suit.

Rule made absolute.

(1) 2 C. L. J. 384; 9 C. W. N. 956.
(2) 36 Ind. Cas. 457; 24 C. L. J. 533 at p. 536.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 847 OF 1913.

April 3, 1917.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Heaton.

BAI RAMAN—DEFENDANT—APPELLANT

versus

JAGJIVANDAS KASHIDAS—PLAINTIFF—RESPONDENT.

Hindu Law—Mayukha—Stridhan, *non-technical—Son, whether excludes son's son.*

Under the Mayukha a son who does not survive his mother cannot pass on by the doctrine of representation any right to his sons to succeed to the non-technical *stridhan* of his mother in competition with her surviving sons. [p. 278, col. 1.]

Second appeal from the decision of the First Class Subordinate Judge, Broach, in Appeal No. 96 of 1911, confirming the decree passed by the Joint Second Class Subordinate Judge, Broach, in Civil Suit No. 511 of 1908.

Mr. *G. K. Parekh*, for the Appellant.

Mr. *Jayakar* (with him Mr. *Ratanlal Ranchhoddas*), for the Respondent.

JUDGMENT.

SCOTT, C. J.—The only question which arises for decision in this appeal is whether the appellant, claiming as the widow of Chunilal Lakhmidas, has an equal right by inheritance to the property left by Bai Parvati with the plaintiff Jagjiwandas Kashidas, who is admittedly an heir. Parvati had two sons, Jagjiwandas the plaintiff and Lakhmidas who pre-deceased his mother, leaving a son Chunilal of whom the appellant Bai Kiki is the widow. Jagjiwan, therefore, is the son, and Chunilal in whose place Kiki stands was the grandson. The property is admittedly *stridhan* of the class styled in the Mayukha non-technical. In the case of any difference between the Mitakshara and the Mayukha the parties will be governed by the Mayukha. With regard to *stridhan* of the class which is known as technical, that is *anvadheya stridhan*, and what wealth is given through affection by the husband, the three writers

on Hindu Law to whom reference has been made in the arguments, namely Vijnaneshwara, Nilkantha and the author of the Smriti Chandrika, are all agreed upon the principle by which inheritance is governed. It is stated concisely in the Smriti Chandrika, Chapter 9, paragraph 4: "the property of a woman leaving children will not be inherited by the husband, even though he survives her but only by the surviving children of the woman." Thus a child who does not survive cannot pass on by the doctrine of representation any right to his children to succeed to technical *stridhan* of his mother in competition with her surviving children. In the Mitakshara the descent with regard to technical *stridhan* is worked out in detail. The property first devolves on daughters, then on failure of all daughters granddaughters take, then great-great-granddaughters, on their failure sons take and then grandsons, then great-great-grandsons, and the same result follows in the case of non-technical *stridhan* under the Mitakshara. In the Mayukha, in the case of technical *stridhan* the rule of inheritance is worked out in the same way as in the Mitakshara, and it is laid down that in default of daughters and the rest, that is, grand-daughters and great-great-granddaughters, the sons, grandsons and the rest succeed. With regard to non-technical *stridhan*, the relations preferred are different in the Mayukha to those preferred according to the Mitakshara. The passage relating to non-technical *stridhan* is as follows on page 97 of Mandlik's translation: "as to the text of Yajnavalkya Chapter II, v. 117 'Let sons divide equally, both the effects and the debts after their parents,'" Nilkantha says the text relates to what is acquired by inheritance or spinning, and the like, excepting the technical *stridhan*. Therefore even if there be daughters, the sons or other heirs, *putradaya*, alone succeed to their mother's property, save the technical *stridhan*.

Upon this reference to the text of Yajnavalkya, the whole argument on behalf of the appellant has been based. It is contended that this text is the basis of the discussion as to the descent of the inheritance of the father discussed on page 46 of Mandlik's translation and as that text was taken by Nilkantha to govern also the inheritance to non-technical *stridhan*, it must follow that the sons, grandsons and great-great-grandsons will all be entitled collectively, inasmuch as they are so entitled in relation to the inheritance of the father, the rule of inheritance being that they take by birth.

As against that argument, it is pointed out for the respondent that the doctrine of religious efficacy in the offering of *shradha* is what governs the inheritance in the case of the property of the father; that the offerings of a son, of a grandson, of a great-grandson all have religious efficacy, and all in theory are combined for the benefit of the deceased ancestor, and that is why where inheritance rests upon the basis of religious efficacy, the sons, grandsons and great-grandsons will take collectively irrespective of their propinquity to the deceased ancestor. In the case of the inheritance of a woman's property, it is pointed out that the doctrine of religious efficacy in the ministrations to the manes can have no place, and it has been so laid down by the Allahabad High Court in *Musammat Ganga Jati* v. *Ghasita* (1); moreover, Nilkantha himself in the passage following that relating to inheritance of non-technical *stridhan* quotes the well-known text of Manu that "of the nearest *spinda* the wealth shall be," declaring propinquity to the deceased as the criterion of the right to take wealth. It is clear that in dealing with technical *stridhan* Nilkantha has followed this principle of propinquity, and there is no reason why in the discussion of non-technical *stridhan* which follows that of inheritance to the technical *stridhan*, and precedes that in which the doctrine of propinquity is again enforced, it should be assumed, merely because a reference is made to a certain text of Yajnavalkya, that Nilkantha abandons the principle of propinquity and reverts quite unnecessarily, since he is discussing woman's property, to the doctrine of religious efficacy. It appears to me that the argument on behalf of the respondent is well-founded, and no sufficient reason has been shown

(1) 1 A. 46 at p. 50; 1 Ind. Dec. (N. S.) 69.

for holding that there is any different principle at the base of the rule of inheritance according to the Mayukha with regard to non-technical *stridhan* from the principle which clearly obtains under the three writers above referred to with regard to technical *stridhan*. I would, therefore, confirm the decree and dismiss the appeal with costs.

HEATON, J.—I concur.

Decree confirmed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 572 OF 1914.

May 15, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

BEHARI LAL MAHTON TATAK GAYAWAL—PLAINTIFF—APPELLANT

versus

GANGA DAI TATKAIN AND OTHERS—DEFENDANTS-RESPONDENTS.

Will-Probate, application for, whether can be treated as application for Letters of Administration-Court, whether to enquire into testator's title or his right to dispose of property.

It is not the business of the Court receiving an application for Probate to hold an enquiry as to the property of the deceased or to consider any issue as to the title of the testator or his power to dispose of the property which the Will purports to deal with. [p. 280, col. 1.]

An application for Probate cannot be converted into one for Letters of Administration. [p. 280, col. 2.]

Appeal from a decision of the District Judge, Gaya, dated the 6th November 1914.

Messrs. *Upendra K. Roy, Ambica Prasad Upadhya, Gobind Ch. De Ray, Rajendra Prasad* and *Shiveshwar Dayal*, for the Appellant.

Messrs. *Nirsu Naray n Sinha, Raghunath Singh, Naresh Chunderr Sinha* and *Gour Chandra Pal*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—This is an appeal against an order of the District Judge of Gaya, dismissing the application of the appellant for Probate of the Will of Buldeo Lal Tatak, who died in Gaya in 1913. The genuineness of the Will appears to have been in issue, but no evidence as to the due execution of it was taken in the Court below and for our present purpose it must be presumed that the Will is genuine. The Will is dated September 6th, 1904. The testator was a Gayawal residing in the town of Gaya. In view of the contentions which have been advanced before us it may be well to give a short summary of the contents of the Will. The testator begins by saying that he has grown old and weak, that he has no legitimate male issue but that he has a wife and a mistress and two sons by the latter, that the two women and two sons are only entitled to maintenance, that his income from his *jajmans* amounts to about Rs. 5,000 per annum, that his sister's son who was maintained and supported by him from childhood has for some time been in charge of all his affairs including his duties as a Gayawal and that he, the testator, had great confidence in him. Therefore with the consent of his wife he has decided to make his nephew his heir. He then goes on to leave to the nephew what he calls his right to receive offerings from pilgrims. He directs the nephew to perform his funeral ceremonies and he further directs him out of the income which he will receive to make certain payments to his widow, mistress and others. Lastly he appoints six persons by name to be his executors and he charges them with the supervision of the duties to be performed by the nephew. There are several expressions in the Will which to my mind make it quite clear that the testator intended to leave to the nephew, the present appellant, all the property of which he might die possessed, including what he calls his right to receive offerings from *jajmans*. There is a passage in the Will in which he says that all his moveable and immoveable property has been sold at the instance of his creditors. But the Will was dated in 1904, the testator did not die till 1913 and the Will would, of course, operate upon any property belonging to the testator at the date of his death. The appellant alleges that in fact the testator did die possessed of some little property in addition to his business as a Gayawal. The District Judge has dismissed the application for Probate on two grounds. The first ground is that the testator himself says that he has no moveable or immoveable property and that he leaves only the offerings of

pilgrims. The District Judge was of opinion that the testator had no power to dispose of his right to receive offerings from the pilgrims, but he does not hold, nor could he have held as no evidence whatever was taken, that the deceased did not die possessed of other property. In my opinion the District Judge was not called upon to enquire whether the testator had any property or not. This question has been the subject of several decisions and the law is now well settled. In the case of *Biri Nath De* v. *Chandar Mohan Banerji* (1) it was held that it was not the duty of the Court entertaining an application for Probate to consider any issue as to the title of the testator to the property with which the Will propounded purports to deal or as to what disposing power the testator may have possessed over such property. That decision rests upon a number of cases which are cited in the judgment of the Court, and it was followed by the Bombay High Court in the case of *Bal Gangadhar Tilak* v. *Sakwarbai* (2), where a number of other cases of English and Indian Courts are cited. The argument advanced before us by the learned Counsel for the widow of the deceased went to the length of suggesting that it was the business of an applicant for Probate to prove what property the testator had of which he was competent to dispose. This would lay an intolerable burden upon a Court exercising Probate jurisdiction. It is quite clear on the authorities that it is not the business of a Court receiving an application for Probate to hold an enquiry as to the property of the deceased or to consider any issue as to the title of the testator or his power to dispose of the property which the Will purports to deal with. So far, therefore, as the first reason is concerned, I am of opinion that the District Judge was wrong in refusing to grant Probate.

The second reason for refusing to grant Probate to the appellant is that he was not appointed an executor by the Will. I have already stated that the Will expressly appoints six persons to be executors. This, of course, is not conclusive against the appellant, for an executor "according to the tenor" or as he is called in the Indian Act an executor by necessary implication, may be joined with an executor or executors expressly nominated. But the Will does not impose upon the appellant any of the ordinary duties of an executor. It does not direct him to pay the debts or get in the assets. It merely leaves practically the bulk of the testator's property to him. It is true that the appellant is directed to pay a number of annuities out of the income which it was supposed he would receive from *jajmans*, but that duty is not imposed upon him as an executor but is imposed upon him as the person who will be the testator's successor and in possession of what he (the testator) regards as his property. I am unable to find in the testator's Will any clear indication that the appellant is to be an executor. For these reasons I am of opinion that the appellant's application for Probate was rightly dismissed.

It was suggested in the course of the argument that we should allow the appellant to amend his application and convert it into an application for Letters of Administration with a copy of the Will annexed. In my opinion he ought not to be allowed to do this. Six persons are expressly nominated as executors and if the appellant wishes to compel them to take out Probate or to renounce Probate, the procedure is prescribed by the Probate Act and he may make an application to the Court below accordingly, if he is so advised. I would dismiss this appeal with costs. Hearing fee three gold *mohurs* payable to Balajit.

JWALA PRASAD, J.—I entirely agree. It is clear from the Will that the appellant is not an executor of the Will of the deceased. He has not been expressly named as such in the Will. Six persons other than the appellant have been named in the Will as executors, and the English word 'executor' has been used to avoid any doubt or difficulty as to the legal significance of its vernacular equivalent. It is clear, therefore, that the testator intended to appoint the aforesaid six persons as executors in the sense in which the expression is understood under the Act. The appellant was not even by implication appointed an executor of the Will. He has,

(1) 19 A. 458; A. W. N. (1897) 106; 9 Ind. Dec. (N. S.) 295.
(2) 26 B. 792; 4 Bom. L. R. 637.

no doubt, been made absolute owner of the property of the deceased and has been directed to pay certain annuities to the persons named in the Will. As there is no direction to pay the annuities out of the general estate of the testator, but from the income that the appellant might derive from the gifts of the pilgrims in future after the death of the testator, the learned District Judge was perfectly right in rejecting the application of the appellant under section 6 of the Act.

There can be no doubt that the document in question is a valid Will as defined in the Act, for the testator has bequeathed all the property that he had at the time of the execution of the Will, or that he would be possessed of at the time of his death.

I, therefore, agree to the order proposed in this case.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1178 OF 1916.

March 15, 1917.

Present:—Mr. Justice Sadasiva Aiyar.

CHINTA RANGAYYA AND OTHERS—DEFENDANTS—PETITIONERS

versus

CHINTA BUTCHAMMA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Withdrawal of suit long after institution, permission for—Insufficiency of evidence—Jurisdiction—Material irregularity—High Court—Revision, powers of.

An order permitting a suit in proper form to be withdrawn under Order XXIII, rule 1, Civil Procedure Code, long after its institution on the ground of insufficiency of evidence is illegal and irregular, though passed with jurisdiction. [p. 281, col. 2.]

The High Court can interfere with such an order in revision under section 115, Civil Procedure Code. [p. 281, col. 2.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif, Gudivada, in Original Suit No. 250 of 1914.

FACTS appear from the judgment.

Mr. *B. Narasimha Rao*, for the Petitioners.—The suit is simply one to recover money; under Order XXIII, rule 2, of the Code of Civil Procedure a Court has got power to permit withdrawal only under certain circumstances. There is no defect in the suit as framed but the only ground urged is that the plaintiff was not able to produce his witnesses. A Court has no jurisdiction to give permission to withdraw with liberty to bring a fresh suit under such circumstances.

Aiya Gounden v. *Jayan Mandalathipathi Gopanna Mauradiyar* (1) clearly supports my view.

Mr. *K. V. L. Narasimham*, for the Respondents.—The question is whether the High Court can interfere under section 115 of the Code of Civil Procedure. The Court had jurisdiction to pass the order. The case of *Thuljaram Row* v. *Gopala Aiyan* (2) clear supports my view.

JUDGMENT.—The respondents in this petition, which has been filed under section 115 of the Code of Civil Procedure for revising the order of the District Munsif of Gudivada, brought a suit in proper form for recovery of Rs. 700 and odd. The suit was filed in January 1914. In July 1915 the plaint was amended (that is, about 18 months after suit). Then in March 1916 (more than two years after the institution of the suit) the Munsif allowed the suit to be withdrawn with liberty to bring a fresh suit and the only ground for granting this extraordinary relief is that "the plaintiff is of opinion that the present evidence" (let in on plaintiff's side) "is not sufficient."

That the order is wholly improper goes without saying. It is argued by Mr. B. Narasimha Rao for the petitioners (defendants) that it was also passed without jurisdiction. He is, no doubt, supported by some Calcutta decisions. But this Court in *Aiya Gounden* v. *Jayan Mandalathipathi Gopanna Mauradiyar* (1) interfered in revision only on the ground that the District Munsif's "discretion was not exercised judicially" in similar circumstances, that is (I take it), the District Munsif acted illegally and with material irregularity in the exercise of his jurisdiction.

Mr. Justice Srinivasa Aiyangar has deprecated the loose use of the word

(1) 26 Ind. Cas. 57; 27 M. L. J. 480; 1 L. W. 726; 16 M. L. T. 253; (1914) M. W. N. 832.

(2) 40 Ind. Cas. 611; (1917) M. W. N. 234 at p. 237; 21 M. L. T. 229; 32 M. L. J. 434.

"jurisdiction" (in connection with orders granting permission to withdraw) in his judgment in *Thuljaram Row* v. *Gopala Aiyan* (2) and I entirely concur in those observations.

I set aside the District Munsif's order (including, of course, the permission to bring a fresh suit) and direct the suit to be restored to the file of pending cases and proceeded with to its natural termination according to law. As the petitioners have delayed in bringing the matter in revision before this Court, I make no order as to costs.

Petition allowed; *Case sent back.*

V. R. P.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 278 OF 1914.

June 7, 1917.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

RAJENDRA PRASAD SAHU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GANGAN KOER AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution—Sale—Misdescription — Wrong khasra *plot No., whether vitiates sale.*

Khasra numbers are subordinate descriptions of a holding for the purposes of its identification. [p. 282, col. 2]

Where an entire holding is sold in execution of a rent-decree obtained in respect of the holding, a wrong description of the holding by giving wrong plot numbers does not vitiate the sale [p. 282, col. 2.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 28th February 1914.

Messrs. *Sudhansu S. Mukerji Harihar Prasad Sinha*, Rai *Tribhuan Nath Sahai* and *Chandra Sekhar Banerji*, for the Appellants.

Messrs. *Surendra K. Bose*, *Baikuutha Nath Mitter* and *Raghunath Singh*, for the Respondents.

JUDGMENT.—In this case the appellant is an auction-purchaser of the holding of the defendants in execution of a decree for rent. He has obtained a decree for three plots, which admittedly constitute a part of the holding. In regard to the first plot No. 23, he has been refused a decree for possession on the ground that the sale certificate shows that plot No 24 was sold and not plot No. 23. The whole question turns on the doctrine of *falsa demonstratio*, and the sole point we have to consider is what was in the sale certificate the paramount description and what the subordinate description. In *Karuppa Goundan* v. *Periathambi Goundan* (1) it was held that the plot numbers were subordinate descriptions. Another point of view from which the case may be approached is that set out in *Barhamdeo Singh* v. *Ram Narain Singh* (2). We must satisfy ourselves before we give the plaintiff a decree that the landlords intended to sell plot No. 23; that the defendant tenants were aware that plot No. 23 was up for sale, and that the bidders at the sale contemplated an acquisition of plot No. 23. It is suggested by Mr. Baikuntha Nath Mitter for the respondents that the burden of proof on the appellants is particularly heavy, for ordinarily where a sale proclamation is not sufficiently accurate to identify the property to be sold the sale must be held to be void. With that proposition, to a certain extent, we may assent, but it is certain from the passage in *Raja Thakur Barmha* v. *Jiban Ram* (3) that a property fully identified in the schedule may be in some respects misdescribed. The essential point is that the property should be by the paramount description fully identified. We may take it as common knowledge among the cultivating classes that when a *raiyat* fails to pay his rent, the inevitable consequence is the sale of the holding. We may take it as recognised that upon a decree for rent the holding of the defaulting *raiyat* will be brought to sale. We may take it that the legal advisers of the Maharani could not have been so stupendously foolish as to put up to sale, in execution of this rent-decree, three plots of the defaulting tenants' holding and one plot, the property of an entire stranger. We have no doubt whatever that the decree-holder, judgment-debtor, and the intending bidders were all fully aware that what was to

(1) 30 M. 397; 2 M. L. T. 336.

(2) 22 Ind. Cas. 280; 19 C. L. J. 182.

(3) 21 Ind. Cas 936; 41 C. 590 at p. 599; 18 C. W. N. 313; 15 M. L. T. 137; 12 A. L. J. 156; 19 C. L. J. 161; 26 M. L. J. 89; 16 Bom. L. R. 156; (1914) M. W. N. 118 (P. C.).

be sold was the holding of the defaulting tenants. We do not suppose that anybody stopped to consider whether the numbers in the *khasra* were correct. If they had stopped to consider this, they would have seen at once that there was no such field as *khasra* No. 24 having an area of 10 *bighas*, for *khasra* No. 24 has an area of 6 *bighas* and *khasra* No. 23 an area of 10 *bighas*. We hold that the paramount description in this case was the description given in the body of the application for attachment which runs:—

"The amount may be realised by the attachment and sale of the land, for which rent is claimed and which forms the *kast* of the judgment-debtors in this decree."

The appeal must, therefore, be decreed and the order of the learned Subordinate Judge discharged. The plaintiff's suit is decreed in full for the whole area claimed in the suit. It is to be noted that a settlement has been arrived at out of Court with the representatives-in-interest of the original defendants Nos. 2, 6 and 10 and the defendant No. 3 himself. These defendants have accepted the claim of the plaintiffs as to plot No. 23, and as against these parties the plaintiffs appellants will bear their own costs and have given up their claims for mesne profits.

The decree, therefore, will be, as against the remaining defendants, for recovery of possession of so much of plot No. 23 as may remain in the hands of the contesting defendants and mesne profits against them for so much of the property as may have been retained in their possession since the date of the execution sale with proportionate costs to this extent.

Appeal accepted.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 6 OF 1915.

June 3, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

SULTAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GHULLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Chundawand—Rindwanas *of Shahpur District*—Wajib-ul-arz, *entry in, presumption as to correctness of—Estoppel—Admission, value of.*

The custom of *chundawand* in the Shahpur District is exceedingly rare, and there is no trace of it amongst *Rindwanas* who form a sub-division of the *Mekan* tribe. [p. 285, col. 1.]

There is a strong presumption in favour of the correctness of an entry in a *wajib-ul-arz* in the absence of any real proof to the contrary. [p. 284, col. 1.]

A mere admission of the right of one party by the other in a previous case between them does not amount to an estoppel, but it affords a strong piece of evidence against the person making the admission. [p. 287, col. 1]

First appeal from the decree of the Senior Subordinate Judge, Sargodha, dated the 29th August 1914, dismissing plaintiffs' claim.

Mr. *Nanak Chand*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—Fattu, caste *Rindwana*, a resident of the village Dharima, had two wives *Musammat* Bibi and *Musammat* Bhagbhari. By *Musammat* Bibi he had one son Buti; by *Musammat* Bhagbhari he had six sons Chogatta, Palhu, Rehan, Taja, Kalu and Tahar, of whom Chogatta was the eldest. In about 1852 or 1853 according to the history of the village as given below the pedigree-table of *Mouza* Mitha Lok, "Buti, Chogatta, etc.... left the village of Dharima and founded the village" (of Mitha Lok) where they acquired a joint holding. At the first Settlement which took place in 1858, Buti was recorded as the owner of half of the holding with a corresponding share in the *shamilat*. The other half was recorded in the names of the sons of Chogatta, who was already dead, and of the other five sons of Fattu. The question involved in this case has arisen out of a dispute, which will be explained later, between the sons of Chogatta and the other descendants of *Musammat* Bhagbhari as to what their shares *inter se* should be.

There was no new Settlement until 1891-92 and it was not until 1902 that any question of partition arose. Then, however, there was a dispute between the descendants of Buti and the other sons of Fattu as to their shares in the village *shamilat*. Some of the descendants of *Musammat* Bhagbhari other than the sons of Chogatta urged that the *shamilat* ought to be partitioned according to ancestral shares and that the entries in the records were wrong. They were referred to a civil suit to establish the title which

they set up and the sons of Chogatta were subsequently joined as plaintiffs.

The descendants of Buti contended that partition should follow the shares as recorded in the Settlement Records and alleged that according to ancient custom the *chundawand* rule should be followed. The plaintiffs' suit was dismissed on the 11th September 1903. The plaintiffs appealed to the Divisional Judge, alleging *inter alia* that they had enjoyed possession according to ancestral shares and the rule of *pagwand*. The Divisional Judge dismissed the appeal and a further appeal was then filed in the Chief Court. The ground was that "it appears from all the circumstances of the case that partition ought to have been effected in accordance with ancestral shares." This appeal was filed on the 13th April 1904. The judgment of the Chief Court, which was not delivered until the 26th June 1911, contains no discussion of the various allegations concerning succession *per stirpes* or *per capita*. It had been laid down in the *wajib ul-arz* of 1858 that the partition of the *shamilat* when it takes place is to be in accordance with the shares specified in the *khewat* (*i.e.*, Settlement Record of 1858). It was held that there was a strong presumption in favour of the correctness of the entry and that it must be held to be correct in the absence of any real proof to the contrary. On these grounds the appeal was dismissed. Up to 1904 there is no trace of any dispute between the descendants of *Musammat* Bhagbhari concerning their shares *inter se*. As a result, however, of the partition proceedings which had been initiated it became necessary to determine those shares, and on the 18th April 1904, *i.e.*, a few days after the appeal had been filed in the Chief Court, the village *patwari* drew up a report from which it appears that there was a conflict in the various records regarding the shares of the descendants of *Musammat* Bhagbhari.

The facts are that in the *khatauni*, which was prepared as the basis of the *khewat* of the first Settlement, Chogatta was shown originally as owning one fourth and the other sons of *Musammat* Bhagbhari one-fourth between them. This entry was, however, corrected partly because Chogatta was dead and partly because it was said that all the sons of *Musammat* Bhagbhari were entitled to equal shares. This correction was followed in the *muntakhib asamiwar* and in the *khewat* itself.

The copy of the *khewat* which was made over to the village *patwari* continued to contain the uncorrected entries showing the sons of Chogatta as entitled to one-fourth of the whole holding. The *patwari's* copy of the *khewat* was destroyed in 1894 under the orders of the Settlement Officer, but the entry which it contained is established by a copy which was taken from it in 1887 before the second Settlement commenced, and the same entry was followed in the Settlement Record of 1891-92. Ultimately after considering the contents of the various records the Settlement Officer passed the following order:—"I think that the balance of proof is with the entry giving Chogatta one-fourth share. The Assistant Collector should carry out partition on this basis, allowing the parties to understand that the partition is tentative only. If the Chief Court decides on a *pugwand* partition, this tentative partition must, in any case, be altered. If it decides on the *chundawand* partition, the parties can then apply to the Assistant Collector as under section 117 of Revenue Act."

There the matter stood until the decision of the appeal to the Chief Court to which we have already referred. Then on the 17th December 1913, the present plaintiffs, who are the descendants of *Musammat* Bhagbhari other than the sons of Chogatta, instituted the present suit against the descendants of Chogatta for a declaration that they were entitled to five-sixths of onehalf of the whole holding, both proprietary land and *shamilat*. Their suit was dismissed by the Subordinate Judge and they, therefore, preferred the present appeal to this Court.

Counsel for the appellants has taken three main points. The first is that by reason of their pleadings in the former suit the sons of Chogatta are estopped from contesting the present claim. He refers in particular to the allegation made in the fourth ground of appeal in the former suit as filed in the Court of the Divisional Judge, in which it is stated that

the plaintiffs have "proved by strong evidence that they enjoyed possession according to ancestral shares and the *pugwand* rule." We have, however, no hesitation in holding that the plea involves no estoppel. It is quite plain that when the dispute between the sons of Buti and the other descendants of Fattu arose, the parties had no knowledge of the manner in which their ancestors had acquired the land. The custom of *chunda-wand* in the Shahpur District is exceedingly rare, *vide* section 5 of Wilson's Riwaj-i am, pages 42-43, where it is stated that the only instances found were amongst a few families of the *Khokars* and one case amongst *Hindus*. The parties to the present case are not *Khokhars* but *Rindwanas* who form a sub-division of the *Mekan* tribe. Having regard to the history of the village, it is evident that there was never any question of succession to a holding of Fattu and the probability is that the sons of Buti set up the rule of succession *per stirpes* merely as an easy way of accounting for the fact that Buti had been recorded as the owner of half of the whole. Whatever may have been the origin of the shares held by the various sons of Fattu it was not custom.

The second contention of the Counsel for the appellants is that the claim of his clients is supported by what is contained in the records regarding possession. It is no doubt true that in 1858 they were cultivating more than a quarter of the share of the whole, but that may have been due to their numerical superiority and the argument fails because although it is agreed that the sons of Buti are entitled to one-half, they were cultivating very much less than one-half of the cultivated area in 1858.

His third contention is that the *khewat* of 1858 is right and that the entry in the record of the second Settlement is wrong. The chief difficulty in his way here is that it is quite plain that the *muntakhib asamiwar* and the *khewat* of 1858 as originally drawn up showed the sons of Chogatta as holding one-quarter and the other descendants of *Musammat* Bhagbhari as holding one-fourth between them. Moreover, the new entries are the result not of ordinary corrections but of most careful erasures which were not initialled in the ordinary way. The old figures have been scratched out so far as was necessary and the new figures have been substituted. Counsel for the respondents urges that the substituted figures are the result of palpable forgeries, while Counsel for the appellants argues that they are the genuine result of an attestation of the *khewat*, and that the form of them is to be attributed to the laxity which prevailed in such matters in 1858. In order to resolve such doubts as we entertained, we have called for and examined the original *khatauni*. On 26th June 1857, *Pandit* Moti Lal, the Extra Assistant Commissioner, passed an order for the preparation of the *khewat* of Mitha Lok. The *khatauni* (then described as the "*chitha kami beshi*") and the *khewat* were prepared by a *munsarim* named Lachman Das. Holding slips were also issued through the Tahsildar. On 29th March 1858 another *munsarim* named Duni Parshad submitted the *khatauni* and *khewat* to *Pandit* Moti Lal, who ordered a proclamation to issue and then attested the *khewat* on 25th March 1898. There is, therefore, every reason to suppose that the *zemindars* were made acquainted with the entries concerning themselves.

The question remains whether the erasures in the *khewat* were made before or after this attestation. In our opinion they were undoubtedly made before it, and for this reason that the corrected entry in the *khatauni* which gives equal shares to all the descendants of *Musammat* Bhagbhari is clearly in the hand of the *munsarim* Lachman Das, whose connection with the record had ceased before the attestation by *Pandit* Moti Lal. What probably happened was that Lachman Das began preparing the *khewat* before he had completed his attestation, and then altered it when he discovered later that his original entry as to the shares *inter se* of the descendants of *Musammat* Bhagbhari was incorrect, but the *patwari's* copy which must also have been begun remained by some accident still uncorrected. If at that time any fraud proved was in contemplation for the benefit of the other five sons of Fattu, the *patwari's* copy of the *khewat* would have been made to correspond, and these five sons of Fattu would not have

waited for the best part of half a century before trying to reap the results of their fraud. Lastly, although the pleas in the former suit do not amount to an estoppel, they at least afford a strong indication that the sons of Chogatta believed up to 1904 that they were only entitled to share equally with the other descendants of *Musammat* Bhagbhari.

We hold that the plaintiffs are entitled to 5/6ths of half of the areas in dispute and accepting the appeal grant them a decree accordingly. But as the whole trouble has arisen from a conflict in the Revenue Records, we direct parties to bear their own costs throughout.

Appeal accepted.

MADRAS HIGH COURT.
CIVIL APPEAL No. 71 OF 1916.
February 19, 1917.
Present:—Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

DEVARAPALLI RAMALINGA REDDI AND OTHERS—DEFENDANTS NOS. 1 TO 7 AND 12—APPELLANTS

versus

SRIGIRIRAJU KOTAYYA AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 8 TO 11, 13 AND 14—RESPONDENTS.

Evidence Act (I of 1872), s. 35—Register of births and deaths kept by village official, entries in, admissibility of—Entry, whether evidence of actual date of death.

A village *karnam* or Reddi keeping a register of deaths acts as a public servant in the discharge of his official duty within the meaning of section 35 of the Evidence Act. It is not necessary that a public servant should be compellable by legislative enactment to discharge such a duty. [p. 287, col. 1.]

Ratcliffe v. *Ratcliffe and Anderson*, (1859) 1 Sw. and Tr. 467; 5 Jur. (N. S.) 714; 7 W. R. 726, followed.

Where death registers are kept under the directions of the Board of Revenue acting as agents of the Government, the entries therein are admissible in evidence under section 35 of the Evidence Act. [p. 287, col. 2.]

An entry in such a register is proof of the actual date of death. [p. 287, col. 2.]

Secretary of State v. *Kasturi Reddi*, 26 M. 268; 12 M. L. J. 453; *Wintle, In re*, (1870) 9 Eq. 373; 21 L. T. 781; 18 W. R. 394, dissented from.

Goodrich, In re, Payne v. *Bennett*, (1904) P. 138; 73 L. J. P. 33; 90 L. T. 170; 20 T. L. R. 203, followed.

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Original Suit No. 42 of 1914.

Messrs. *T. V. Venkatarama Aiyar* and *R. Rajagopala Aiyar*, for the Appellants.

Mr. *T. Prakasam*, for the Respondents.

JUDGMENT.—This is an appeal from a decree in a suit brought by a reversioner to recover possession of the properties belonging to one Pedda Venkatarayadu, the last male owner. His daughter Venkamma was in possession until she died. The first question argued before us related to the date of the death of this woman. The plaintiffs' allegation was that she died on the 9th January 1902. The 12th defendant stated that Venkamma died in 1899 and that the suit was barred by limitation. The Subordinate Judge came to the conclusion that the plaintiffs' suit was in time. The main argument against this conclusion was that Exhibit A, the public extract of the register of the death of Venkamma, was not receivable in evidence and that the judgment of the Subordinate Judge which is mainly based on that document should be reversed.

The learned Vakil for the appellants broadly contended that this document is not receivable in evidence under section 35 of the Indian Evidence Act. He argued that there is no legislative enactment making it compulsory upon village officers to maintain a register of this kind and that an extract from such a register is not covered by section 35. There are two answers to this contention. In the first place, Madras Act III of 1899 provides for village officers beyond Municipal towns keeping a register of births and deaths. Under section 5, the Collector may appoint any person either by name or by virtue of his office to be registrar of births and deaths in each village. There are provisions in the Act for such registers being sent up to the Taluk *cutcherry*.

Under section 17, the extracts given in the Taluk office are required to be certified as provided in section 76 of the

Indian Evidence Act. Such extracts may be produced in proof of the entries of which they purport to be copies. It is, therefore, clear that the record of death would be an entry made in a public register as required by the Evidence Act It is true that under section 2, the Local Government has to extend the operation of this Act to the Districts. On such a notification, section 4 would enable the Collector to proclaim that registration shall be compulsory. As the point has been taken for the first time in appeal and as the appellant denied the existence of any legislative enactment on the subject, the respondent has not been able to ascertain whether the Act has been extended to the District of Guntur and whether the registration has been made compulsory in that district. But even apart from this question, we see no reason for holding that the register would not be covered by the language of section 35 of the Evidence Act. The entry spoken of in the first part of the section must either (*a*) be made by a public servant in the discharge of his official duty or (*b*) by any other person in the performance of a duty specially enjoined by the law of the country. The second part alone relates to legislative enactments; the first part is general in its terms. A reference to the Standing Order No. 101 of the Board of Revenue shows that the system of registering births and deaths was inaugurated in 1865; by the Board's proceedings dated 5th February 1874, the duty of keeping such registers was cast upon the village officials. It is clear, therefore, that a village Karnam or a Reddi keeping a register of deaths will be acting as a public servant in the discharge of his official duty. It is not necessary that a public servant should be compellable by legislative enactment to discharge such a duty. In *Ratcliffe* v. *Ratcliffe and Anderson* (1) it was pointed out that a register of births and deaths kept under the orders of the East India Company was a public document of the description mentioned in section 35 of the Evidence Act. Lord Campbell in that judgment speaks of the register having been kept in obedience to directions given by the East India Company in its sovereign capacity. No legislation of the company is referred to as having authorised the keeping of such a register. We are, therefore, of opinion that even apart from Act III of 1899, the registers which are being kept under the directions of the Board of Revenue since the year 1865, do come under section 35 of the Evidence Act. It need hardly be stated that the Board of Revenue are the agents of the Executive Government of the Presidency [see *Secretary of State* v. *Kasturi Reddi* (2)].

One other argument of the learned Vakil for the appellants was that the extract is not evidence of the actual date of the death mentioned in it. Reliance was placed upon certain observations contained in *In re Wintle* (3). It is clear that these observations have not been accepted as good law in England. See *Goodrich, In re, Payne* v. *Bennett* (4). We are, therefore, of opinion that Exhibit A was rightly admitted in evidence, and that it is evidence of the actual date of the death.

Upon the facts, we have no hesitation in concurring with the conclusion of the Subordinate Judge that the plaintiff has proved that Venkamma died within twelve years of the date of suit. The evidence let in on behalf of the defandants is utterly worthless, having regard to the fact that the 12th defendant who professes to have known the date of the death all along did not state it in the written statement filed by him.

Another contention was that Chinna Venkatarayudu and Pedda Venkatarayudu were not divided; but the documentary evidence on the question is very clear. Exhibits L, N, and Z of the year 1860 show that by that time the two brothers had become divided in status. Then it was suggested that the family compromise evidenced by Exhibit D is binding upon the present plaintiffs. The contest in that case was between the widow of a co-parcener who claimed maintenance from the family and the 12th defendant's father. The 12th defendant's father claimed that he was entitled to the whole of the property; he entered into a compromise. The present plaintiffs were not parties to

(1) (1859) 1 Sw. & Tr. 467; 5 Jur. (N. S.) 714; 7 W. R. 726.

(2) 26 M. 268; 12 M. L. J. 453.

(3) (1870) 9 Eq. 373; 21 L. T. 781; 18 W. R. 394.

(4) (1904) P. 138; 73 L. J. P. 33; 90 L. T. 170; 20 T. L. R. 203.

the compromise and by no stretch of imagination can they be said to have been represented either by Bangaramma or by the 12th defendant's father. We hold that the compromise is not a family arrangement binding upon the plaintiffs. We must, therefore, for these reasons confirm the decree of the Subordinate Judge and dismiss the appeal with costs. We dismiss the memorandum of objections also with costs.

Appeal dismissed.

V. R. P.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 44 OF 1916.

December 14, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice and Justice Sir Asutosh Mookerjee, KT.

Re SITAL PROSAD AND OTHERS—INSOLVENTS.

BADRINARAIN AGARWALLA—

APPELLANT

versus

Raja BRIJNARAIN ROY AND ANOTHER—

RESPONDENTS.

Contract Act (IX of 1872), s 201—Principal and agent—Power-of-attorney granted by joint co-parceners—Death of some co-parceners, effect of—Termination of agency.

Where the paramount object of a power-of-attorney executed by three out of four brothers, living jointly in a Mitakshara family, in favour of the fourth was to facilitate the raising of joint loans by the latter on mortgages of the joint estate for their joint benefit:

Held, that the death of some of the executants did not put an end to the power but that so long as the object of the power continued to be capable of realisation, it retained its vitality. [p. 291, col. 2; p. 295, col. 1.]

Per *Mookerjee, J.*—It cannot be held as an inflexible rule of law that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the agent, not merely as regards the deceased, but also as regards the surviving principal. In each case the true intention of the parties to the contract must be determined from the terms thereof and from the surrounding circumstances. [p. 294, col. 2.]

Where two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, a severance of the joint interest by the death of one of the joint principals may operate to terminate the agent's authority, unless it is a power coupled with an interest. [p. 294, col. 1.]

Where, however, the principals are joint and several and the power given to the agent is both joint and several, the death of one of the principals does not terminate his authority as regards the surviving principal. [p. 294, col. 1.]

Appeal against the following judgment of Mr. Justice Greaves, dated the 25th February 1916:—

"Under the provisions of section 18 of the Second Schedule to the Presidency Towns Insolvency Act, liberty was given to sell certain mortgaged properties which are set out in schedule A to the petition of the applicants herein. The creditors of the insolvent hearing that an order for sale had been made under section 18 got a stay of the sale, and the matter now comes before me under and by virtue of the order of Mr. Justice Chowdhury of 15th April 1915 to investigate the mortgage, *i.e*, to ascertain whether under the circumstances, to which I shall refer in a moment, the three mortgages of these properties already mentioned are valid mortgages. There were four brothers, Raghubir, Raj Kumar Lall, Ram Sundar Lall and Sital Prosad, who were members of a Mitakshara family and they on 10th January 1907 executed a power-of attorney in favour of Raghubir. By the power these persons jointly nominated, constituted and appointed Raghubir their attorney for certain purposes named in the power, which include the power to execute mortgages on their behalf. Ram Sundar Lall died soon after the power-of-attorney was executed, and prior to the execution of the mortgage to which I will now refer. That mortgage is dated 21st June 1907, and it is executed by Raghubir and Raj Coomar Lall on their own behalf and by Raghubir as attroney for Sital Prosad. Subsequently, a second mortgage was executed of the same properties on 4th March 1908. This was executed by Raghubir on his own behalf and as attorney for Raj Coomar Lall and Sital Prosad. A third mortgage of the same properties was executed on 26th September 1908, and that was executed by Raghubir on his own behalf and as attorneyfor Sital Prosad. Raj Coomar Lall had died prior to the execution of this third mortgage leaving certain minor sons, and Raghubir also purports to execute the mortgage as guardian of these minor sons of Raj Coomar Lall. The point I have now got to decide is whether

by virtue of the death of Ram Sundar Lall prior to the execution of the first of these mortgages all the three mortgages are bad, because I do not think it can be really disputed, in view of the authority of *Sudaburt Pershad Sahoo* v. *Foolbash Koer* (1), that as the parties are members of a joint Mitakshara family, the mortgage is to stand or fall by the validity or otherwise of the power-of-attorney, at the time the first mortgage was executed. Now I have been referred to certain authorities. The first of these is a text-book on Powers-of-Attorney by Sinclair Mackenzie, where at page 141, it is stated that where there are two or more joint principals, the death of one of them will jointly revoke the powers of the other or others and that statement is founded upon two cases, the first of them being reported as *Gee* v. *Lane* (2) and the other as *Raw* v. *Alderson* 3). It is clear from a perusal of these cases that if the power had been allowed to be acted upon after the death of one of the joint principals, it would have been acted upon to the detriment of the principal who was dead, and I think that that is the principle one has got to bear in mind when considering whether the death of Ram Sundar Lall clearly invalidates the power-of-attorney. The conclusion I have come to is, that having regard to the fact that the family is governed by the Mitakshara School of Hindu Law, the death of Ram Sundar Lall did not affect the validity of the power-of-attorney, and that, as he died leaving, as it appears from the recital in the mortgage, no sons him surviving, his share in the property vested or rather passed upon his death to the other three members of the joint Mitakshara family, and, therefore, the death of Ram Suttar Lall, in my opinion, did not vitiate or bring to an end the power-of-attorney of 10th January 1907. The result is that, so far as that point is concerned, the three mortgages are valid mortgages. It remains for the mortgagees to formally establish their mortgages by proper proof and subject to their doing that and to their satisfying me by affidavit that Ram Sundar Lall left no sons or male heirs him surviving, I direct that the property be sold according to the original order for sale that was made."

"*Mr. Zorab.*—I submit my friend should pay the costs of this application.

BY THE COURT.—No, you can add your costs to your security."

FACTS material to the report will appear from the judgment.

The power of-attorney referred to in the judgment was as follows:—

POWER-OF-ATTORNEY.

Know all men by these presents that we, Sital Prasad, Raj Coomar Lall and Ram Sundar Lall, all sons of Mohan Lall deceased, inhabitants of *Kasba* Secunderpoor in District Balia, at present residing at No. 119/8, Old China Bazar Street, in the town of Calcutta, by caste Buruwal by occupation traders, do hereby jointly nominate, constitute and appoint our brother Raghubir Prosad by caste Buruwal by occupation trader and inhabitant of *Kasba* Secunderpore aforesaid our true and lawful attorney to look after and manage the *zemindari* affairs of our shares of *zemindaries* in district Balia; to represent us and appear on our behalf before the Courts of the Collector, Tehsildar, Munsif, Judge and Commissioner and other Civil Courts as well as before all Criminal Courts and the High Courts and also before the Offices of the Inspector-General of Police, the District Superintendent of Police, Collector of Stamps and the Sudder Board of Revenue and the Railway Offices, whether such Courts or Offices are situate in the United Provinces, Oudh or Bengal or in the Presidencies of Madras and Bombay or generally in any part of British India; to institute or defend law suits or judicial proceedings or to make or prefer appeal on our behalf as respondent in any appeal, and for the said purposes to make or present or file applications, petitions, plaints, grounds of appeal or written statements and subscribe and verify them on our behalf; to engage and appoint Pleaders, Muktears, Vakils or other lawyers and sign *vakalatnamas* on our behalf; to answer all material questions relating to such suits or appeals; to file or defend documents in Courts or Public Offices and to take them back; to deposit or pay

(1) 12 W. R. (F. B.) 1; 3 B. L. R. (F. B.) 31.
(2) (1812) 15 East 592; 104 E. R. 967; 13 R R. 534.
(3) (1817) 7 Taunt. 453; 1 Moore 145; 129 E. R. 182; 18 R. R. 535.

Re SITAL PROSAD.

moneys in Courts or draw moneys or cheques from them on our behalf; to execute decrees obtained by us by the attachment and sale of properties of the judgment-debtors and if necessary by their arrest or imprisonment; to refer any matter to arbitration and nominate and appoint arbitrators on our behalf, to make any compromise regarding any suit, appeal or decree. We do hereby further authorize and empower our said attorney to receive payment of debts due to us to borrow money if required on our behalf from any person and execute a bond if necessary for that purpose, to sell or mortgage lands belonging to us and receive the consideration money or the mortgage debt and to execute and sign the deed of sale or mortgage on our behalf, to appear on our behalf before the proper registering officer and present such deed of sale or mortgage for registration and admit the execution thereof, and do all needful acts on our behalf for the registration of the said deed, to purchase lands or other property on our behalf and pay the consideration money thereof to the vendor, to lend money on our behalf, to realise our dues from our *raiyats* and cultivators and suing them if necessary for such purpose in Courts of Justice to give or take receipts for money received or paid on our behalf; and in general to do all acts whether herein specified or not as may be needful to be done on our behalf and for our benefit for any of the purposes mentioned above. All the aforesaid acts of our said attorney shall be considered as our own acts and we do hereby agree to ratify and confirm them. Given under our hand the 10th day of January 1907.

Explained by me,
Jadub Krishna Roy Chowdhury,
Pleader.
Signatures of Sital Prosad Raj Coomar Lall and Ram Sunder Lall,
(in Nagri).

Mr. *D. N. Bose* (with him Mr. *N. Sircar*), for the Appellant.

Mr. *Zorab* (with him Mr. *S. K. Chakerbutty*), for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by Badrinarain Agarwalla, a creditor of the insolvents, from the judgment of Greaves, J., whereby he held that three mortgages, which the appellant alleged were void and inoperative, were valid mortgages.

An order for the sale of the mortgaged property had been obtained by the mortgagees under the provisions of the Presidency Towns Insolvency Act; the appellant succeeded in obtaining an order for stay of the sale from Chaudhuri, J., who directed that the matter of the mortgages should be investigated, *i. e.*, for the purpose of ascertaining whether the three mortgages were valid mortgages.

The facts are set out in the judgment of Greaves, J :—"There were four brothers, Raghubir, Raj Coomar Lall, Ram Sundar Lall and Sital Prosad who were members of a Mitakshara family, and they on 10th January 1907 executed a power-of-attorney in favour of Raghubir. By the power these persons jointly nominated, constituted and appointed Raghubir their attorney for certain purposes named in the power, which include the power to execute mortgages on their behalf. Ram Sundar Lall died soon after the power-of-attorney was executed, and prior to the execution of the mortgage to which I will now refer. That mortgage is dated 21st June 1907, and it is executed by Raghubir and Raj Coomar Lall on their own behalf and by Raghubir as attorney for Sital Prosad. Subsequently, a second mortgage was executed of the same properties on 4th March 1908. This was executed by Raghubir on his own behalf and as attorney for Raj Coomar Lall and Sital Prosad. A third mortgage of the same properties was executed on 26th September 1908, and that was executed by Raghubir on his own behalf and as attorney for Sital Prosad. Raj Coomar Lall had died prior to the execution of this third mortgage leaving certain minor sons, and Raghubir also purports to execute the mortgage as guardian of these minor sons of Raj Coomar Lall." The point relied upon by the appellant in his petition was as follows:—"Your petitioner is advised that the aforesaid power was void and inoperative inasmuch as Ram Sundar Lall, one of the executants of the said power-of-attorney, was dead at the time when the aforesaid mortgages were executed. Your petitioner is further advised that the mortgages executed under the aforesaid power were void and inoperative," and the

learned Judge states the point as follows:—"The point I have now got to decide is, whether by virtue of the death of Ram Sundar Lall prior to the execution of the first of these mortgages, all the three mortgages are bad, because I do not think it can be really disputed, in view of the authority of *Sudaburt Pershad Sahoo* v. *Foolbash Koer* (1), that as the parties are members of a joint Mitakshara family, the mortgage is to stand or fall by the validity or otherwise of the power-of-attorney at the time the first mortgage was executed."

The learned Judge decided that the death of Ram Sundar Lall did not vitiate or bring to an end the power-of-attorney of 10th January 1907, and consequently the mortgages were valid. It was argued on behalf of the appellant that the power-of-attorney was intended to last only during the lifetime of the four brothers and in respect of their joint property, and consequently as soon as Ram Sundar Lall died, the power-of-attorney came to an end and as a further consequence all the three mortgages were totally invalid, inasmuch as each of the said mortgages had been executed by Raghubir in pursuance of the powers contained in the power-of-attorney of the 10th January 1907, and that such mortgages were not even valid in respect of the shares of the individual brother or brothers who had executed the mortgages on his or their own behalf by reason of the decision of this Court in *Sudaburt Pershad Sahoo* v. *Foolbash Koer* (1).

The question whether the power-of-attorney came to end by reason of the death of Ram Sundar Lall, in my judgment, depends upon the construction which is to be put upon the terms of the power-of-attorney.

In coming to a conclusion as to the construction, it is necessary to consider the position of the parties to the power-of-attorney and the property which was thereby affected.

The brothers were members of a joint Hindu family under the Mitakshara Law and the property mortgaged was part of the joint and undivided estate. The three surviving brothers were engaged in a joint business and the money was borrowed for the purposes of the business, and regard must be paid to the well-known incidents of an undivided family living under the Mitakshara Law, one of which is that the undivided share of one of the brothers, if he died without male issue (as was the case with Ram Sundar Lall), would pass to the surviving members of the family.

Bearing these facts in mind and on a review of the terms of the power-of-attorney, I do not think the intention was that the power-of-attorney was to last only during the lifetime of the four brothers and in respect of their joint property. On the contrary, I think the intention was that the power-of-attorney should continue as long as the property retained the same character, *viz.*, that of undivided property which it bore at the date of the power-of-attorney and in respect of the undivided shares of the four brothers or the survivors of them.

Section 201 of the Contract Act of 1872 was relied upon by the appellant, but in my judgment that section would not apply to the above-mentioned circumstances of this case.

The English Law relating to a contract to serve as the agent of a firm of partners in the partnership business was referred to, in which case such a contract is impliedly subject to the continuance of the partnership and is, therefore, discharged by the death of one of the partners, which puts an end to the partnership.

I do not think that that principle is applicable to the circumstances of this case, having regard to the nature and incidents of a joint Hindu family living under the Mitakshara Law and the undivided estate thereof. For these reasons I agree with the learned Judge that the death of Ram Sundar Lall did not vitiate or bring to an end the power-of-attorney of 10th January 1907 and consequently the mortgages, by reason of his death, are not invalid.

A further point, however, was raised in the argument of the appeal which apparently was not argued before the learned Judge, *viz.*, that inasmuch as Raj Kumar Lall had died prior to the execution of the third mortgage, leaving certain minor sons, then at all events the circumstances differed from those existing at the date of the power-of-attorney to such an extent that it could not have been contemplated by the parties that it should continue after such a change.

Re SITAL PROSAD.

In my judgment this argument ought not to prevail: the character of the property remained unmodified, being joint and undivided estate, and it was vested in the two surviving brothers and the heirs of Raj Kumar Lall.

I assume for the purpose of this judgment that Raghubir was the duly appointed guardian of the minor sons of Raj Kumar Lall (which has not been disputed) and that the money was borrowed for the benefit of the joint business, and, under such circumstances, I think Raghubir would in such capacity be able to join in mortgaging the undivided estate for such a purpose, and inasmuch as the mortgage was also executed by Raghubir in his own behalf, and as attorney for Sital Prosad, in my judgment the third mortgage was a good and valid mortgage of the joint and undivided properties comprised therein. For these reasons I think the appeal should be dismissed with costs.

MOOKERJEE, J.—The facts material for the determination of the question raised before us lie in a narrow compass and may be briefly stated. Sital Prosad, Raghubir Prosad, Raj Kumar Lal and Ram Sundar Lal were four brothers and constituted a joint family governed by the Mitakshara Law. On the 10th January 1907 three of them executed a power-of-attorney in favour of the fourth (Raghubir Prosad) and thereby authorised him to borrow money on their behalf and as security for the loan, to mortgage their lands. Shortly after this, Ram Sundar Lall died without issue. Thereafter, on the 21st June 1907, Raj Kumar Lall, Raghubir Prosad on his own behalf and Raghubir Prosad as attorney for Sital Prosad executed a mortgage of their joint properties to secure a loan of Rs. 25,000. On the 4th March 1908 a second mortgage was executed for a sum of Rs. 5,000 by Raghubir Prosad for himself and as attorney for Sital Prosad and Raj Kumar Lall. Raj Kumar Lall died in May 1908 and left three infant sons Gouri Sanker Prosad, Jaggannath Prosad and Kedarnath Prosad. On the 24th September 1908 a third mortgage for Rs. 6,000 was executed by Raghubir Prosad for himself, as attorney for Sital Prosad and as guardian for the infant sons of Raj Kumar Lall. On the 22nd November 1911 Sital Prosad, Raghubir Prosad, Gouri Sanker Prosad, Jagannath Prosad and Kedarnath Prosad were all adjudged insolvents on their own petition under the provisions of the Presidency Towns Insolvency Act, and their estate vested in the Official Assignee. On the 27th August 1914 the mortgagees applied to the Official Assignee that steps might be taken to satisfy their dues by the sale of the mortgaged premises. The matter was referred to the Court, and on the 5th January 1915, an order for sale was made under rule 18 of the Second Schedule to the Presidency Towns Insolvency Act. On the 8th April 1915 the appellant Badri Narain Agarwalla, one of the creditors of the insolvents, applied to the Court to enquire into the validity of the alleged mortgages. His objection in substance was that the power-of-attorney became void and inoperative on the death of Ram Sundar Lall and that the mortgages executed on the strength of such power had no legal force whatever. Greaves, J., has overruled this contention and has directed that the properties be sold according to the original order for sale. On the present appeal, the propriety of this decision has been called in question. On behalf of the creditor appellant, it has been argued, on the authority of the decisions in *Gee* v *Lane* (2) *Raw* v. *Alderson* (3) and *Tasker* v. *Shepherd* (4), that upon the death of Ram Sundar Lall, the power-of-attorney ceased to be operative not merely in so far as his interest in the estate was concerned but also in respect of the other executants, and, that, in any event, upon the death of Raj Kumar Lall, the power lost all its vitality. It will be observed that this contention is of a more comprehensive character than the limited ground which formed the basis of the petition of objection of the creditor dated the 8th April 1915.

There is no room for controversy that as argued by the appellant, under section 201 of the Indian Contract Act, as under the Law of England [*Bladers* v. *Free* (5) and *Pool* v. *Pool* (6)], an agency is terminated

(4) (1861) 6 H. & N. 575; 30 L. J. Ex. 267; 4 L. T. 19; 9 W. R. 476; 123 R. R. 697; 158 E. R. 237.
(5) (1829) 9 B. & C. 167; 4 Man. & Ry. 282; 7 L. J. K. B. (o. s.) 211; 109 E. R. 63; 32 R. R. 620.
(6) (1889) 61 L. T. 401; 58 L. J. P. 67.

by the death of the principal, and this view is supported by the decision of the Judicial Committee in *Mujib-un nissa* v. *Abdur Rahim* (7). This proposition, however, is of no real assistance to the appellant, for it merely shows that if Ram Sundar Lall had left heirs, they would not have been bound by acts done by the agent on the strength of the power-of-attorney after his death. Here, the conditions are different. On the death of Ram Sundar Lall, his interest in the estate vested by survivorship in his three brothers. Consequently, when Raghubir Prosad acted on the basis of the power-of attorney, he dealt with property which had vested in himsef as also in Sital Prosad and Raj Kumar Lall; in essence, the death of Ram Sundar Lal did not in any way alter the constitution of the property but only enlarged the extent of the interest of the other members of the co-parcenary in their joint estate. The appellant is, consequently, constrained to maintain that the effect of the death of one of the executants of the power-of-attorney was to make the power void and inoperative in law. The contention has been broadly put forward that if *A* and *B* execute a power-of-attorney in favour of *C*, on the death of *A*, the power lapses in its entirety so as to make it impossible for *C* to bind thereafter by his act either *B* or the representatives of *A*. This proposition has been controverted by the mortgagees-respondents on the strength of the rule enunciated in *Bhagirath Samanta* v. *Prem Chand Pal* (8) This decision, however, is not an authority directly in favour of the respondents, for it merely decides that where there are two joint agents and one of them dies, upon his death the contract of agency terminates in so far as he is concerned but not as regards the surviving agent. The converse case of the death of one of two joint principals, which now requires consideration, did not arise in the case just mentioned, and must consequently be determined upon principle and upon the authorities.

It is plain to my mind that the cases of *Gee* v. *Lane* (2), *Raw* v. *Alderson* (3) and *Tasker* v. *Shepherd* (4) do not support the broad contention that where an agency has been created by two principals, the death of one of them terminates the agency not merely as regards himself but also as regards his joint principal. The first of these cases, *Gee* v. *Lane* (2), is an authority for the proposition that a joint warrant of attorney given to enter judgment "against us" upon a joint and several bond does not authorise the entering up judgment against the survivor only. Lord Ellenborough, C. J., based his decision on the ground that an action to be brought "against us" must mean a joint action, and distinguished the decision in *Gladwin* v. *Scot* (9), where the warrant of attorney executed by the two was to enter judgment "against me." Similarly *Raw* v. *Alderson* (3) is an authority for the proposition that if two warrant an attorney to confess judgment against them and one dies, judgment cannot be entered up against the other. Reference was made to the decision in *Todd* v. *Dodd* (10), which has not been uniformly reported by the different reporters. Reliance was also placed upon *Fendall* v. *May* (11), where the Court of King's Bench held that there might be a material distinction between a case in which the alteration in the state of parties is only in the persons charging and another in which the alteration is in the persons to be charged; in other words, that when a warrant to confess judgment is given by two, the death of one revokes the authority of the attorney; but that when a warrant to confess judgment is given by two, the decease of one does not revoke the authority. It is not necessary for our present purpose to consider whether this distinction is or is not well founded, but it is plain upon an examination of the decisions mentioned that they do not enunciate a principle of universal application and only turn upon the ascertainment of the true intention of the parties to the power-of-attorney. This is made amply clear from *Tasker* v. *Shepherd* (4), where a question arose as to the effect of the death of a member of a partnership

(7) 23 A. 233; 5 C. W. N. 177; 28 I. A. 15; 11 M. L. J. 58; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829 (P. C.).

(8) 16 Ind. Cas. 852; 17 C. L. J. 201.

(9) (1751) Barnes 53; 94 E. R. 802.

(10) (1781) 1 Wils. K. B. 312; 95 E. R. 636; Barnes 48; 94 E. R. 800; Sayer 5; 96 E. R. 784.

(11) (1813) 2 M. & S. 76; 105 E. R. 310; 14 R. R. 593.

which had appointed the plaintiff as their agent for a specified term. The Court held that the true question was – what did the parties contract should be done, and upon a consideration of the terms of the contract and the surrounding circumstances came to the conclusion that the contract had reference to a certain existing partnership business only. Baron Channel stated that after fully considering the contract and the probable intention of the parties to be collected from the various terms of the agreement, he came to the conclusion that the contract was intended to be for the period mentioned, subject to the condition that all the parties so long lived; the agreement of the parties had relation to the existing state of things which they presumed would continue for four years and in reference to which presumption alone they contracted [*Friend* v. *Friend*, *In re Friend* (12), *Phillips* v. *Alhambra Palace Co.* (13)]. Substantially the same view has been adopted in the Courts of the United States, where the question appears to have come up for consideration more frequently than either in this country or in the English Courts. It is there recognised that where authority is given to an agent by a partnership, the death of one of the partners, which operates as a dissolution of the partnership, also terminates the agent's authority, unless it is a power coupled with an interest. The same principle is held applicable where two principals jointly appoint an agent to take charge of some matter in which they are jointly interested and a severance of such interests afterwards occurs by the death of one of the joint principals [*MacNaughton* v. *Moore* (14), *Easton* v. *Ellis* (15), *Rowe* v. *Rand* (16)]. Where, however, the principals are joint and several, and the power given to the agent is both joint and several, the death of one of the principals does not terminate his authority [*Milson* v. *Stewart* (17)]. The dividing line between the two classes of cases is well illustrated by the decisions in *Marlett* v. *Jackman* (18) and *Martin* v. *Hunt* (19) [see also *Long* v. *Thayer* (20), *Weaver* v. *Richards* (21), *Grapel* v. *Hodges* (22) and *Graham* v. *Jackson* (23)]. We cannot consequently hold, as an inflexible rule of law, that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the agent, not merely as regards the deceased but also as regards the surviving principal. We have, in each case, to determine the true intention of the parties to the contract from the terms thereof and from the surrounding circumstances. This view is in accord with the decision in *Budh Singh Dudhuria* v. *Denendra Nath Sancul* (24). We must accordingly examine from this point of view the power-of-attorney in the case before us.

It is perfectly plain that the intention of the parties was to facilitate joint loans by the mortgage of the joint estate for their joint benefit. The terms used are as follows:— "To borrow money, if required, on *our* behalf from any person and execute a bond, if necessary, for that purpose, to sell or mortgage land belonging to *us* and receive the consideration money or the mortgage debt and to execute and sign the deed of sale or mortgage on *our* behalf, to appear on *our* behalf before the proper registering officer and present such deed of sale or mortgage for registration and admit the execution thereof and do all needful acts on *our* behalf for the registration of the said deed." Clearly it would not be right to hold that the power-of-attorney came to an end by reason of the death of one or other of the principals, even though such joint action continued to be possible, in the event which happened. The death of Ram Sundar Lall without heirs, in no way, affected the constitution of the

(12) (1897) 2 Ch. 421; 66 L. J. Ch. 737; 77 L. T. 50; 46 W. R. 139.
(13) (1901) 1 Q. B. 59; 70 L. J. Q. B. 26; 49 W. R. 223; 83 L. T. 431; 17 T. L. R. 40.
(14) 1 Hayward N. C. 189.
(15) 1 Handy (Ohio.) 70.
(16) (1887) 111 Ind. 206; Huffenth. cases on Agency 126.
(17) (1861) 5 Clarke Pa. L. J. 450.
(18) 3 Allen. (Mass.) 287.
(19) 1 Allen. (Mass) 418.
(20) 150 U. S. 520; 37 Law. Ed. 1167.
(21) 144 Mich 395; 6 L. R. A. (N. S.) 855; 108 N. W. 382.
(22) 112 N. Y. 419.
(23) (1845) 6 Q. B. 811; 14 L. J. Q. B. 129; 9 Jur. 275; 115 E. R. 306.
(24) 11 C. L. R. 323.

family or varied the incidents of the joint estate, though his interest vested by survivorship in his three brothers, with the consequence that the extent of their shares on a possible partition was enlarged. I feel no doubt whatever that in these circumstances, the death of Ram Sundar Lall did not affect the continued operation of the power-of-attorney. Consequently the validity of the first two mortgages cannot be impeached on any substantial ground. The question of the effect of the death of Raj Kumar Lall, however, seems at first sight to involve somewhat different considerations, as thereupon three new members (his three infant sons) were introduced into the family co parcenary. It is plain that they were not and could not be bound by the power-of-attorney. Indeed, in the third mortgage, Raghubir Prosad professed to hypothecate the interest of his infant nephews in the joint family estate, not by virtue of the authority vested in him under the power-of-attorney, but only as their guardian. We must for our present purpose proceed on the assumption that he was in fact their lawful guardian and was competent to act on their behalf in the matter of this transaction, as the truth of the recital in this respect was not questioned in the Court below. The question thus arises, whether, upon the death of Raj Kumar Lall, it was competent to Sital Prosad to contend that the power of-attorney had come necessarily to an end, even though it was still possible to raise a joint loan for the benefit of the entire family, by means of a mortgage of the joint properties, executed by Raghubir Prosad, on his own behalf, in his character as agent and in his capacity as guardian of his infant nephews. In my judgment, the answer must be in the negative, if we bear in mind the paramount object of the power-of-attorney; it is obviously reasonable to hold that so long as that object continued to be capable of realisation, the power also retained its vitality; to adopt the contrary view would plainly defeat the ends of justice. I hold accordingly that the validity of the third mortgage also cannot be successfully questioned. On these grounds I agree that the appeal must be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 48 OF 1916.

November 28, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

Seth DOOLY CHAND—PLAINTIFF—APPELLANT

versus

MAMUJI MUSAJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II. cls. 1, 15—*Arbitration and award—Reference by some only of the parties, validity of—Award, setting aside of.*

Before a Court can have jurisdiction to make an order of reference under clause 1 of Schedule II of the Civil Procedure Code, all the parties interested in the suit must agree; and if all the parties interested do not agree, then the Court has no jurisdiction to make the order of reference and the order of reference is invalid not only against those who have not agreed but also against those who have agreed. [p. 297, col. 2; p. 299, col. 1.]

Consequently, if there is no valid agreement to form the basis of a reference in the terms of clause 1 of the Second Schedule to the Code, there is no valid award whereon a decree can be based in accordance with clause 16. [p. 299, cols. 1 & 2.]

Clause 15 of the Second Schedule to the Civil Procedure Code assumes a valid reference to arbitration, and only contemplates cases where the propriety of an award on the basis of such a reference is in question. [p. 298, col. 2; p. 299, col. 2.]

Appeal against the order of Mr. Justice Fletcher sitting on the Original Side, dated the 31st January 1916.

FACTS material to the report are stated in the judgment of

FLETCHER, J.—This is an application by one Yusuf Musaji Saleji to set aside an award. The suit was instituted by the plaintiff against a large number of defendants for the purpose of recovering certain moneys. The present applicant Yusuf Musaji Saleji did not appear in the suit. On the 19th March 1915 on the application of the plaintiff and certain defendants, not including the present applicant, the matter was referred to arbitration in these terms:—"It is ordered that the said order be superseded and it is further ordered that all matters in difference between the parties in this suit, including the question of costs hereof, be referred to the final decision of the named arbitrator, who is to make his award in writing and submit the same to this Court together with all proceedings, depositions and exhibits in this suit within three months from the

date of service upon him of an office copy of this order or within such futher time as he may allow himself from time to time by endorsement on the said office copy of this order, provided that such extension does not exceed the period of three months." The award is sought to be set aside on two grounds:—(1) that the award was invalid as it did not comply with the terms of the said order, (2) on the ground that the reference was not made on the agreement of all the parties interested within the meaning of section 1, Second Schedule to the Code of Civil Procedure. The second point is the main point to be decided on the hearing of this motion. The words in the present section do materially differ from the words in the old Code, and the question is whether in this case all the parties interested joined in the application for a reference. The present applicant clearly did not. The suit was proceeding against him *ex parte*, and if the view of Mr. S. Ghose who appears for the plaintiff is right, then the suit might have proceeded to trial as an undefended suit against the defendant Yusuf Musaji Saleji, who was served but who did not appear. The authority on the point in this Court practically comes to nothing. The best case that has been cited by Mr. Ghose is the case of *Ishar Das* v. *Keshab Deo* (1). That decision, if it is rightly decided, carries Mr. Ghose's argument a long way. That decision, I do not think, is right. The case in the Allahabad Court has received a judicial notice, and that notice is not favourable The case of *Haswa* v. *Mahbub* (2) has been referred to. That was a decision on a second appeal. It is pointed out by the learned Judges in the Allahabad High Court that Knox and Banerjee, JJ., had adopted the same view in a regular appeal. The case as put forward by the learned Judges is this, that if we adopt the view that has been put forward, you would have two trials, (1) trial before the arbitrator, (2) trial of an undefended suit against the defendant who was not a party to the reference to arbitration. That, of course, was never intended by the Code of Civil Procedure. In the present case Yusuf Musaji Saleji was in fact a party interested (who did not agree to the reference to arbitration), and so much is he a person interested that the arbitrator has passed a decree against him with others. He obviously was a person interested. I think the reference to arbitration was not on the agreement of all the parties interested, and, therefore, the reference was invalid. The other point has been as to the award being made out of time. I think not only the fact that the award was filed before the Registrar on the 14th December, but also the evidence shows that the arbitrator submitted the award within time. That is a technical point, although it is taken by the present applicant. Then another point has been made that the present applicant is out of time, and Article 158 of the Limitation Act applies to this application. That depends, as to whether Article 158 does apply to this case. This is a case where the award is illegal. The order for reference was invalid, and, therefore, the award itself was not properly made. It is argued that in a case like this where Yusuf was ignorant of the fact of the reference to arbitration and knew nothing about it, he is bound according to Article 158 and must make his application to set aside the award within the ten days. I do not think that is the meaning of Article 158. The present application, therefore, ought to be assented to, and the Court ought to decide that the reference to arbitration was not made on the agreement of all parties interested and that the present application is made within time. The award must be set aside."

Messrs. *N. Sarkar* and *S. Ghose*, for the Appellant.

Messrs. *B. C. Mitter* and *S. C. Roy*, for the Defendants Nos. 1, 2 and 3, Respondents.

Mr. *B. L. Mitter*, for Defendant No. 5, Respondent.

Sir *S. P. Sinha* and Mr *C. C. Ghose*, for Defendants Nos. 6 and 8, Respondents.

JUDGMENT.

SANDERSON, C. J.—In this case the action was brought by the plaintiff against certain persons who were the members of a partnership, one of whom was called Yusuff

(1) 7 Ind. Cas. 68; 32 A. 657; 7 A. L. J. 807.
(2) 10 Ind. Cas. 559; 8 A. L. J. 645.

Musaji, for recovering certain moneys. Yusuff Musaji did not appear in the suit. During the course of the proceedings an order was made on the 19th of March 1915, "that all matters in difference between the parties in this suit including the question of costs thereof be referred to the final decision of Tribhuban Hira Chand of No. 9, Amratolla Street, in the town of Calcutta, who is to make his award in writing and submit the same to this Court together with all proceedings, depositions and exhibits in this suit within three months."

This order was made by the consent of the defendants with the exception of two, whose consent had not been obtained, and one of these two defendants was Yusuff Musaji Saleji. In pursuance of that order the arbitrator entered upon the arbitration and made his award, which was filed on the 22nd of December 1915. In that award he found and awarded that the plaintiff was entitled to a decree against the defendants for the sum of Rs. 6,900. It is to be noticed that in making his award, he awarded not only against those defendants who had consented to the order of reference being made, but also against the two defendants, one of whom was Yusuff Musaji, who had not consented to the order of reference. Yusuff made an application on the 12th of January 1916 to the learned Judge sitting on the original side, asking that the award should be set aside: and, the learned Judge after hearing the parties came to the conclusion that the award should be set aside, and the form of the decree which was drawn up in pursuance of his judgment was that the award should be taken off the file and that it should be set aside. The basis of the learned Judge's judgment was that inasmuch as this was an arbitration undertaken under the order of the Court, that order being made under the provisions contained in the Second Schedule of the Civil Procedure Code, it could not be a valid reference, unless all the parties interested had agreed to it.

Now, two main grounds have been argued before us. The learnd Counsel for the appellant has argued, *first*, that even if all the parties interested in the matter had not consented to the order, that did not make the reference invalid or illegal as regards those defendants who had consented to the reference. This is the first point I intend to deal with in my judgment.

Now, the words of the clause (clause 1 of section 1) in the Second Schedule are as follows: "Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference." In my judgment that clause means this—Before the Court can have jurisdiction to make an order of reference under that clause, all the parties interested must agree; and if all the parties interested do not agree, then the Court has no jurisdiction to make the order of reference and the order of reference is invalid not only against those who have not agreed but also against those who have agreed. Then the question arises whether the applicant in this case, Yusuff, was a party who was interested. As I have already said, it was an action brought against Yusuff and other defendants, who were members of this partnership. I do not think I am wronging the learned Counsel for the appellant when I say that he really did not attempt to argue that Yusuff was not an interested party. Yusuff obviously was one who was a defendant in the action and who was alleged to be a member of the firm: and, the fact that the arbitrator had included him in the award as one of the persons who was to pay the sum of Rs. 6,900 to the plaintiff is pretty cogent evidence that Yusuff was a party interested in the subject-matter of the dispute. Therefore, it is clear that all the parties interested within the meaning of this clause did not agree, and, therefore, the Court had no jurisdiction to make the order of reference under that clause. Therefore, the reference was invalid.

We have had our attention drawn to two cases: *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (3) and *Lal Mohan Pal* v. *Surya Kumar Das* (4), and I agree with the

(3) 9 C. W. N. 873.
(4) 11 C. W. N. 1152.

learned Counsel that those decisions are inconsistent: and, if it is necessary for me to express an opinion, I think that the decision which was arrived at in the earlier case, namely, *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (3), was a correct decision, and the later one was an incorrect decision. It is possible that the decision in the later case may have been based upon more than one ground, but certainly one of the grounds was inconsistent with the judgment in the case of *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (3). In point of principle, and having regard to the words of the clause, as I have already said, I have no doubt whatever that the conclusion we ought to come to is that inasmuch as all the parties did not agree, the Court had no jurisdiction to make the order of reference. But that does not conclude the matter, because the learned Counsel for the appellant with great ingenuity has argued that even if the order referring the matter was invalid, still the judgment of the learned Judge, in so far as it directed that the award should be set aside, was not a correct judgment, and that his judgment ought to be limited merely to the direction that the award should be taken off the file: and, his argument was based upon this consideration. He said that assuming for the sake of argument that the reference under the order made by the Court was invalid, still it may very well be that there was an agreement between the plaintiff and some of the defendants that the matters in dispute between them, at all events those parties who were parties to the petition, should be referred to arbitration, and quite independent of the Civil Procedure Code and the Schedule, that would be a good and valid reference to arbitration, and the parties would be left to enforce the rights which they may have, independently of the provisions of the Civil Procedure Code. That depends upon what the parties did agree to: Having heard the argument of the learned Counsel for the appellant and also for the respondent, I have come to the conclusion on the materials before us, the only agreement which was arrived at between the parties was an agreement that an application should be made to the Court for an order of reference: and, in pursuance of that order of reference, they should go to arbitration in respect of all matters in dispute. There is nothing before us upon which we can infer that there was an agreement to refer which was to be carried out independently of the application to Court. To my mind, the fact that there was an application to the Court based upon the petition to which our attention was drawn was cogent evidence that it was a material and essential part of the agreement that an application to the Court should be made for an order of reference. That being so, the result follows that the only agreement being that an application should be made for an order of reference and thereupon all the questions in dispute should be decided by the gentleman whose name was included in the order of reference, it was a reference under the Act and under the Act alone. As I have said before, by reason of the fact that all the parties did not join in the application or did not agree to it, this was an invalid reference. Therefore, the learned Judge was right in ordering that not only should the award be taken off the file but that it should be set aside.

Our attention has been drawn to section 15 of the Schedule, which is headed "Grounds for setting aside award." In that section there are mentioned three grounds which I need not refer to, and it was argued that the intention of the Act was that under the Act the award should be set aside upon one of those three grounds only and that the learned Judge not having one of those grounds proved before him had no jurisdiction to set aside the award, and that his jurisdiction was confined to ordering the award to be taken off the file. The observation I have to make is that section 15 obviously was intended to apply to the case where there has been a valid reference, and then, there having been a valid reference, if there is corruption or misconduct of the arbitrator or umpire, that is one of the grounds for setting aside the award: or, if either party has been guilty of fraudulent concealment of any matter which he ought to have disclosed or of wilfully misleading or deceiving the arbitrator or umpire, that is another ground for setting aside the award: or, if the award has been made after the issue of an order by the Court superseding the arbitration, and so on, that is the third ground for setting aside the award. All these grounds show that the Act was con-

templating in the first instance a valid reference. But as I have said in my judgment, there was no valid reference in this case.

For these reasons I think that the learned Judge's judgment was right and this appeal should be dismissed with costs.

MOOKERJEE, J.—I agree that the order made by Mr. Justice Fletcher should not be disturbed.

The substantial question for determination relates to the validity of an award made on a reference, in contravention of the provisions of paragraph 1 of the Second Schedule of the Civil Procedure Code, 1908. That paragraph is in these terms: "Where, in any suit, *all the parties interested* agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference." It is plain that before the jurisdiction of the Court to make an order of reference is invoked, there must be an agreement, between all the parties interested, that the matter in difference between them shall be referred to arbitration. Consequently, where there is no such agreement detween *all* the parties interested, the Court is not competent to make a valid order of reference. In this case, it is not disputed that two of the defendants were not parties to the agreement. This was apparently overlooked at the time the application was made to the Court; the reference was made and was followed by an award in due course. This award has been set aside in its entirety and not merely as regards the persons who were not parties to the agreement. It has not been seriously disputed that the award has no operation as against the parties who did not consent to the reference; the only substantial contention is that the award, though inoperative under the provisions of the Second Schedule to the Civil Procedure Code, may possibly have vitality independently thereof, and that, consequently, the Court should not have set aside the award in its entirety. In my opinion there is no foundation for this argument.

It is plain that if there is no valid agreement to form the basis of a reference in the terms of paragraph 1 of the Second Schedule to the Code, there is no valid award whereon a decree can be based in accordance with paragrah 16. Reference, however, has been made to paragraph 15 to show that this is not expressly mentioned as one of the grounds on which the Court can be invited to set aside the award. This may be conceded; but paragrah 15 obviously assumes a valid reference to arbitration, and only contemplates cases where the propriety of an award on the basis of such a reference is in question. Where, however, the jurisdiction of the Court is called in question, the Court has jurisdiction to decide that it has acted in contravention of the Statute and consequently without jurisdiction: [*Rashmoni Dasi* v. *Ganada Sundari Dasi* (5)]. The case before us is of that description. I am further of opinion that the intention of the parties to the reference in this case was that there should be a reference to arbitration through the intervention of the Court; they never intended that there should be an arbitration independently of the Court. Consequently there is no substance in the ingenious argument that the award should not have been set aside in its entirety but should only have been taken off the file. This conclusion is obvious upon a plain reading of the provisions of the Statute. The judicial decisions on the matter, however, are in a state of considerable confusion; and reliance has been placed on behalf of the appellant upon the case of *Lal Mohan Pal* v. *Surya Kumar Das* (4), which, if correctly decided, does assist his argument. This renders necessary a brief review of the authorities relevant to the point.

The earliest decisions in this Court, namely, *Shitanath Biswas* v. *Kishen Mohun Mokerjee* (6), *Ram Soondur Mookerjee* v. *Ram Shurun Mookerjee* (7), *Doorga Churn Thakoor* v. *Kally Doss Hazrah* (8) and *Bishoka Dasia* v. *Anunto Lall Pari* (9), support the proposition that on the basis of a reference to which all the parties to a litigation have not consented, an award may be made so as to be

(5) 26 Ind. Cas. 275; 20 C. L. J. 213 at p. 217; 19 C. W. N. 84.
(6) 5 W. R. 130.
(7) 6 W. R. 25.
(8) 10 W. R. 463.
(9) 4 C. L. R. 65.

valid and operative as between the parties to the submission. This view was questioned, and, in my opinion, was correctly questioned in *Joy Prokash Lall* v. *Sheo Golam Singh* (10), though the Court confirmed the award in that case notwithstanding that some of the parties to the suit did not join in the reference. Later on, in the case of *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (3), this Court, without reference to the earlier decisions, came to the conclusion that an award based on a reference made under such circumstances was invalid in its entirety. The question was next raised in the case of *Chairman of the Purnea Municipality* v. *Siva Sankar Ram* (11), but was left open for consideration. Subsequently, in *Lal Mohan Pal* v. *Surya Kumar Das* (4), the Court took a contrary view, although one member of the Bench was a party to the decision in *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (3). In my opinion, the view taken by this Court in the case of *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (3) is correct and is supported by the decision of the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan* (12). In that case, Lord Macnaghten analysed the provisions of Chapter XXXVII of the Code of Civil Procedure of 1882, which corresponds substantially with the Second Schedule of the present Code. He explained that the Code deals with arbitration under three heads: *first*, submission in pending suits through the intervention of the Court; *secondly*, submission while no suit is pending, but subsequently brought into Court; and, *thirdly*, submission and arbitration thereon without the intervention of the Court. As regards the first of these classes of cases, Lord Macnaghten pointed out that the Court makes an order of reference on an agreement *which must be the agreement of all the parties to the suit*, and fixes a time for the delivery of the award with power to enlarge the time. As regards the second and third classes of cases, Lord Macnaghten proceeded to observe that "there is a fundamental difference between these two classes and the first class which does not seem to have been always kept in view in the Courts in India. In the cases falling under the first head, the agreement to refer, and the application to the Court founded upon it, *must have the concurrence of all parties concerned* and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point." This distinction was emphasised in the case of *Jadunath Chowdhury* v. *Kailash Chandra Bhattacharya* (13), where an award was upheld, although all the persons interested were not parties to the submission, as the reference had been made without the intervention of the Court. In my opinion, there is no possible room for doubt as to the fundamental nature of the condition imposed by the Legislature in the first paragraph of the Second Schedule to the Code. This accords with the view adopted and applied by the Madras High Court in *Indur Subbarami Reddy* v. *Kandadai Rajamannar Ayyangar* (14) and *Rangaswami Aiyar* v. *Swami Aiya* (15). In the Allahabad High Court, however, there has been a remarkable absence of unanimity of opinion. As early as 1887, that Court decided, in the case of *Deo Nandan* v. *Bhirgu Rai* (16), that an award made on a reference through the intervention of a Court was invalid if all the parties interested did not join in the submission. This opinion was discarded in the case of *Pitam Mal* v. *Sadiq Ali* (17), and the expression "all the parties" was interpreted to mean "all the parties who had indicated their interests in the litigation by their presence in the Court." This view was, however, abandoned shortly afterwards in *Kaahu Singh* v. *Baljit Singh* (18). But there was a swing of the pendulum the other way in the case of *Ishar Das* v. *Keshab Deo* (1). Since then, the Allahabad High Court, in *Haswa* v. *Mahbub* 2), has adpoted the view taken in *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (3) and the latest decision in *Sabta Prasad* v. *Dharam Kirtisaran* (19) points to the same conclusion.

(10) 11 C. 37; 5 Ind. Dec. (N. S.) 782.
(11) 33 C. 899.
(12) 29 C. 167; 6 C.W.N. 626; 29 I. A. 51; 12 M.L.J. 77; 4 Bom. L. R. 161; 8 Sar. P.C.J. 154; 25 P. R. 1902.
(13) 2 Ind. Cas. 414; 10 C. L. J. 41; 14 C. W. N. 75; 37 C. 63
(14) 26 M. 47; 12 M. L. J. 396.
(15) 17 M. L. J. 394.
(16) A. W. N. (1887) 215.
(17) 24 A. 229; A. W. N. (1902) 19.
(18) 29 A. 423; 4 A. L. J. 347; A. W. N. (1907) 147.
(19) 18 Ind. Cas. 609; 35 A. 107; 11 A. L. J. 66.

GURDIT SINGH *v.* MUSA.

In this diversity of judicial opinion, I do not feel pressed by the cases which support the view contrary to what I take and I prefer to interpret the clear provisions of the Statute and to give effect to them. On such interpretation, there can be no doubt that the award in this case was inoperative because based on a reference not contemplated by the Code, and has been rightly set aside. The true view is that this is a case not of an improper award but of an invalid reference to arbitration. The entire foundation of the jurisdiction of the Court is removed, as soon as it is established that the parties have failed to comply with the fundamental requirement of the Statute embodied in the first paragraph of the Second Schedule of the Civil Procedure Code.

On this ground I agree that the order of Mr. Justice Fletcher should be affirmed and this appeal dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2543 OF 1916.

April 26, 1917.

Present:—Mr. Justice Chevis.

GURDIT SINGH—DEFENDANT—APPELLANT

versus

MUSA—PLAINTIFF, BULAQI AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 53, 56—Occupancy holding, joint, sale of, by one of several co-tenants to one of several co-landlords Reversioner of tenant, whether can contest transfer.

A sale by one only of several co-tenants to one only of several co-landlords, of a specific portion of a joint occupancy holding which has fallen to the vendor's share in a private partition, is valid and it cannot in any way be contested by his reversioners, but at the time of a regular partition of the holding either between the remaining joint-tenants or the landlords the vendee's position will be exactly the same as that of the vendor. [p. 301, col. 2; p. 302, col. 1.]

Didaru v. *Banna*, 31 P. R. 1896; *Nihal Singh* v. *Khazan Singh*, 24 P. R. 1902, followed.

Second appeal from the decree of the Additional District Judge, Ferozepur at Ludhiana, dated the 22nd August 1916, reversing that of the Subordinate Judge, second class, Ferozepur, dated the 7th December 1916, dismissing the claim.

Messrs. *Lal Chand Mehra* and *Brij Lal*, for the Appellant.

Mr. *Duni Chand*, for Mr. *Ganpat Rai*, for the Respondents.

JUDGMENT.—Bulaqi is one of joint occupancy tenants. Gurdit Singh is one of the landlords. Though the occupancy tenure is joint, the various tenants have divided possession for purposes of cultivation. Bulaqi has sold his share in the tenancy to Gurdit Singh. Bulaqi's son Mohna has signed the sale deed in token of acquiescence.

Bulaqi's nephew Musa sues for a declaration that the sale shall not affect his reversionary rights.

The sale is really one of the occupation of those fields which were in Bulaqi's possession. The first Court held that the sale being one to a landlord the reversioner could not contest, except that the reversioner was entitled to say that the landlord must share just as Bulaqi would have shared when it comes to partition.

The first Court, therefore, dismissed the suit, except that it declared that the vendee's possession would be that of a co-sharer and subject to the result of partition.

The District Judge on appeal decreed the claim, holding that as it was a case of a sale by one only of several co-tenants to one only of several co-landlords plaintiff could impugn the sale.

I cannot agree with the learned District Judge. That a reversioner cannot impugn a sale of occupancy rights to a landlord was established by *Didaru* v. *Banna* (1). That the same is the rule when the vendee is only one of several joint landlords was held by another Full Bench in *Nihal Singh* v. *Khazan Singh* (2).

What difference does it make that the vendor is one of several joint tenants? A joint tenant can sell his share of the joint tenancy, just as a sole tenant can sell his tenancy. Whether the reversioners can impugn the sale as an alienation of ancestral rights made without necessity depends on the question whether the sale is to a landlord. If it is to a landlord the reversioner cannot object.

It is of course conceivable that there may be a partition both of the joint landlordship, and also of the joint tenancy

(1) 31 P. R. 1896.
(2) 24 P. R. 1902.

and that the vendee Gurdit Singh may not in the end be the landlord of the specific fields of which he now gets possession and on the other hand he may not be the tenant of these fields. He may become landlord of one field and tenant of another. But the leading fact still remains that he was at time of sale (and for that matter still is) one of the landlords, and so a reversioner cannot object to a sale of occupancy rights to him.

It is unnecessary to discuss whether the plaintiff as a remote reversioner has any *locus standi* in the presence of the vendor's younger son and grandsons.

I accept this appeal. Reversing the lower Appellate Court's decision, I restore the decree of the first Court.

Plaintiff will pay costs in the District Court and in this Court. Costs in the first Court to be as ordered by that Court.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 568 OF 1914.

January 25, 1917.

Present:—Mr. Justice N. R. Chatterjea and and Mr. Justice Newbould.

AKIL CHANDRA SAHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

GIRISH CHANDRA SAHA, EXECUTOR TO THE ESTATE OF HARI MOHAN SAHA—PLAINTIFF—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 31—Mortgage by certificated guardian—Necessity—Order sanctioning mortgage—Creditor, duty of, to prove necessity—Fraud of plaintiff pleaded by defendant participating in fraud—Proof.

Where a District Judge satisfies himself as to the necessity for a loan by *ex parte* inquiries and sanctions a mortgage by the certificated guardian of a minor, the lender, if he acts *bona fide*, is not bound to go behind the order sanctioning the loan and is not bound to see to the application of the money, but is entitled to rely upon the order unless he is a party to a fraud for obtaining the sanction. [p. 304, col. 1.]

A defendant who wants to defeat the claim of a plaintiff on the ground of fraud, alleging that he himself participated in the fraud, must produce very strong evidence to establish the fraud, so as to enable him to extricate himself from the difficult situation in which he is placed. [p. 304, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Dacca, dated the 31st August 1914.

Babu *Gopal Chandra Dass* and Dr. *Sarat Chandra Basak*, for the Appellants.

Babu *Satis Chandra Chowdhury*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit to enforce a mortgage bond. The mortgage bond was executed by the defendant No. 1 and the defendant No. 3 as guardian of her minor son, the defendant No. 2, and another minor son since deceased. The execution of the bond is admitted but it is pleaded that no consideration passed under it. The defendants' case appears to be that on the death of Madhu Sudan the father of Akhil, the latter and his brothers were threatened with the liability for a large amount of money on account of some dealings that the deceased had with one Kishori Mohan and that in order to frighten the latter to reduce his claim, it was arranged with Hari Mohan, who was a friend of Madhu Sudan, that a bogus mortgage bond should be executed in his favour for Rs 4,000 and that some false and satisfied bonds should be shown as due and permission be taken by the defendant No. 3, who was the guardian of her minor sons, from the District Judge for raising the money on mortgage, that in furtherance of the design (as suggested by Hari Mohan himself) a sum of Rs. 2,000 was borrowed from one Hrishikesh Babu, and with that amount together with a sum of Rs. 1,000 raised on pledge of some ornaments of defendant No. 3 and some cash which they had, three currency notes for Rs. 1,000 each were purchased through the said Hari Mohan and that the said three currency notes were entered in the mortgage bond executed in favour of Hari Mohan as part of the consideration, namely, Rs. 4,000 but that as a matter of fact, no consideration passed under the mortgage. It is said that the defendants were enabled, on the strength of this mortgage bond, to have the claim of Kishori Babu settled on payment of rupees one thousand only. The Court below held that the plaintiff had proved that consideration of the bond was paid to the defendants. The latter have appealed to this Court.

The execution of the bond, as we have said, is admitted. It is also admitted that the defendants obtained these currency notes of Rs. 1,000 each from Hari Mohan the mortgagee, but as stated above, the defendants plead that the money with which the currency notes were purchased was their own. The plaintiff has examined the scribe of the deed and three witnesses to prove that three currency notes of Rs. 1,000 each and Rs. 1,000 in silver were paid to the defendants, and those witnesses have been believed by the Court below. The only evidence in support of the plea that the money with which the currency notes were purchased belonged to the defendants is that of defendant No. 1 himself. His statements on the point, however, are not corroborated by documentary evidence, and there does not appear to be any reason why the money was not changed to currency notes at Dacca and why Girish, the maternal uncle of the defendant No. 1, took the money to Hari Mohan to Calcutta. It appears that the defendants borrowed Rs. 2,000 from one Hrishikesh, and it is the case of both the parties that the debt was paid off on the day of the execution of the bond with two of the currency notes of Rs. 1,000 each. The plaintiff Girish, who is the executor of the estate of the mortgagee, says that he and Janaki the defendant No. 2 took Rs. 2,000 (in two currency notes of Rs. 1,000 each) for payment to Hrishikesh at Dacca after the execution of the bond and the payment of the money thereunder, whereas the defendants' case is that the currency notes were with them, and that before the execution of the mortgage bond Girish, the maternal uncle of the defendant No. 1, started for Dacca with two of the currency notes and paid the money to Hrishikesh on the 24th of *Ashar*. There is, however, no satisfactory evidence to show that the currency notes were with the defendants before the 24th of *Ashar* and the Court below has disbelieved the statement of defendant No. 2 that he did not accompany Girish to Dacca.

The evidence shows that the mortgage bond was executed at about 9 or 10 A. M. on 24th *Ashar* and that it takes about 13 or 14 hours to go from the village where the defendants reside to Dacca. It is contended that it was physically impossible for any person to start from the village after the execution of the bond and go to Dacca and make payment there on the same day to Hrishikesh Babu. Stress is laid upon the fact that the entry of the two currency notes appears in the account book of Hrishikesh Babu as the first entry on that day and that the notes were sold by the firm of Hrishikesh Babu to another firm on the very same day. There is positive evidence, however, that Girish arrived at Dacca at about 9 P. M. and that the firm was open for transacting business up to 11 P. M. and, if Girish started at 9 or 10 A. M. he might have arrived at Dacca at 9 or 10 P. M., if the tide and current were favourable. It was, therefore, not physically impossible for Girish to have made the payment on the 24th at Dacca even if he started after the money had been paid. There is no evidence that there was any entry earlier than 9 or 10 P. M. on that day, and in the face of the positive evidence on the point, we are unable to attach any importance to the fact that it was the first entry on that day.

The money borrowed from Hrishikesh, according to the plaintiff, was paid to one Brojonath to whom a sum of Rs. 2,500 was due by the defendants. The defendants say that Brojonath's debt was paid off with the money which they had, and not with the money borrowed from Hrishikesh.

The defendants' accounts, however, do not prove any such payment. It is pointed out that the *hundis* under which money was borrowed from Hrishikesh were executed more than a month after the date on which Brojonath's mortgage bond was paid off, and reliance is placed upon the endorsement on the mortgage bond and the entry in the account book of Brojonath. The account book, however, shows that only Rs. 1,225 was due on account of the mortgage bond and the Court below does not believe the endorsement upon the mortgage bond. We do not think that it has been satisfactorily proved that the mortgage bond was paid off on 14th *Chaitra* 1313.

As already stated, there is evidence of four witnesses to prove the passing of the consideration. The evidence shows that the bond was drafted and engrossed in the house

of Hari Mohan and taken to the house of the defendants for signature.

It is pointed out that although there were respectable people in the locality, the attesting witnesses to the deed were only the servants of Hari Mohan or persons connected with him; and it is contended that Hari Mohan was not likely to have advanced a sum of Rs. 4,000 to the defendants one of whom was a female and guardian of minors—without taking the precaution of having independent and respectable witnesses present at the execution of the bond and the passing of the consideration money. It is to be observed, however, that the lady herself had applied to the District Judge for sanction to raise a loan and that the draft of the mortgage was placed before the Judge. The applications for taking a certificate for guardianship and for sanction appear to have been made, and other proceedings connected with them to have been conducted, by a Pleader, Babu Mohini Mohan Das, who is a relation of the defendant No. 3. Under these circumstances, Hari Mohan might not have thought it necessary to take as much care as he would otherwise have taken in dealing with a *pardanashin* lady. We need not discuss the evidence of the plaintiff's witnesses. They were before the learned Subordinate Judge and were believed by him. He came to the conclusion that the case set up by the defendants was not true and we do not see any sufficient reason for differing from him.

It is contended that even if Hrishikesh was paid Rs. 2,000 out of the Rs. 4,000, there is no evidence to show that there was any necessity for the balance of the loan or that the balance was applied by the lady for the benefit of the minors. The District Judge appears to have made some enquiries, which of course were *ex parte*. But he appears to have been satisfied as to the necessity for the loan and sanctioned the mortgage. Under these circumstances, the lender was not bound to go behind the order, and was entitled to rely upon the order of the District Judge sanctioning the loan unless he was a party to the fraud. The defendants have failed to prove that Hari Mohan was a party to the fraud, and if he acted *bona fide*, he is not bound to see to the application of the money. It is to be remembered that it was the defendant No. 1 and the defendant No. 3 who themselves represented to the Judge the necessity for the loan and the creditor appears to have acted upon such representation. Having regard to the fact that Babu Mohini Mohan Das was the Pleader who conducted the proceeding for sanction and acted for the defendants in the present suit in its earlier stages and is a relation of the defendants, we do not think that the transaction was fraudulent as stated by the defendants. The defendant No. 3 was putting up in his house when giving her deposition and she admits that Mohini Babu is a well-wisher of, and knows the state of, the defendants' family. On reference to a letter, dated 22nd June 1911, written by Mohini Babu to the adopted son of Hari Mohan, it appears that Mohini Babu sent away the men who had come to Dacca to institute a suit on the mortgage bond and that he undertook to make arrangements to pay off the debts by selling certain properties of the defendants. It is impossible to hold that he was not aware of the real nature of the mortgage bond.

If the defendants' case is true they themselves are to blame for having entangled themselves in the elaborate fraud alleged by them, and it would require far better evidence than they have produced in order to establish the fraud and to enable them to extricate themselves from the difficult situation in which they are placed. On the whole, we are unable to differ from the findings of the Court below that the consideration passed under the mortgage bond and that the mortgage bond was not a *benami* one.

We see, however, no sufficient reason why the ordinary rule as to interest at the bond rate up to the date of grace and thereafter at six per cent. should not be followed in this case. The decree of the Court below will accordingly be varied by directing that interest at the bond rate will run up to three months from the date of the decree of the lower Court and that interest thereafter will be at the rate of six per cent. With this variation, the appeal is dismissed with costs.

Appeal dismissed; Decree varied.

NALLASIVAN PILLAI *v.* RAMALINGAM PILLAI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1111 OF 1916.

February 23, 1917.

Present:—Mr. Justice Sadasiva Aiyar.

NALLASIVAN PILLAI—PETITIONER

versus

N. RAMALINGAM PILLAI—RESPONDENT—COUNTER-PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 476—Judicial proceeding—Enquiry by Court without jurisdiction, effect of—Perjury during enquiry, prosecution for, legality of—Penal Code (Act XLV of 1860), s. 193—Legal Practitioners Act (XVIII of 1879), ss. 13, 14—Enquiry by Court into conduct of Pleader not entitled to practise before it, legality of.

Dubitante—A Court making an enquiry without jurisdiction is not competent to pass an order, under section 476, Criminal Procedure Code, for the prosecution of a witness for perjury committed during the course of such enquiry, even though the Court honestly believed it had jurisdiction and the parties did not object to it, inasmuch as the proceedings in the enquiry are not 'judicial proceedings'. [p. 307, col. 1.]

A proceeding before a Court of Justice acting in the administration of justice is a 'judicial proceeding'. [p. 306, col. 1.]

A Court taking evidence in a proceeding of which it is entitled to take cognizance under the Legal Practitioners Act, is a 'Court' within the meaning of section 476, Criminal Procedure Code, and the proceeding is a 'judicial proceeding'. [p. 306, col. 1.]

A charge of unprofessional conduct in the discharge of professional duty made against a Pleader can be enquired into only by the presiding officer of the Court in which the Pleader practises. [p. 305, col. 2.]

Where a District Judge, in an enquiry into the conduct of a second grade Pleader in the matter of an execution proceeding in a Subordinate Judge's Court, sent a witness to a Magistrate under section 476, Criminal Procedure Code, to be prosecuted for perjury:

Held, that the proceeding was *ultra vires* as the District Court had no jurisdiction to enquire into the Pleader's conduct. [p. 307, cols. 1 & 2.]

Petition, under section 115 of Act V of 1908, and section 107 of the Government of India Act, 1915, praying the High Court to revise the order passed under section 476 of the Code of Criminal Procedure by the District Court of Tinnevelly, directing that the petitioner in O P. No. 391 of 1915 on its file be sent to the District Magistrate of Tinnevelly in order that he may be tried for an offence under section 193 of the Indian Penal Code.

Mr. *M. D. Devadoss*, for the Petitioner.

Mr. *E. R. Osborne* (Public Prosecutor), for the Crown.

Messrs. *E. R. Chidambaram Pillai* and *P. N. Marthandam Pillai*, for the Respondents.

JUDGMENT.—The petitioner, Nallasivan Pillai, presented an application under section 13 of the Legal Practitioners Act, XVIII of 1879, against a second grade Pleader, Ramalingam Pillai, to the District Court of Tinnevelly on the ground that the said Vakil, whom he had engaged to conduct an execution, was guilty of improper conduct in the discharge of his professional duty in the matter of that execution.

Section 13 relates to the *power of the High Court* to suspenda Pleader or Mukhtar and has clearly no application. Taking it that section 13 is a mistake for section 14, even then, a charge of unprofessional conduct in the discharge of professional duty made against a Pleader can be enquired into only by the presiding officer of the Court in which the Pleader practises. The second grade Pleader, Ramalingam Pillai, having no right to practise in the District Court and the execution matter in which the alleged misconduct took place relating to a decree of the Tinnevelly Sub-Court on its Small Cause Side, the charge should not have been made to the District Court and could not be taken cognizance of or enquired into by the District Judge.

The District Judge, however, overlooked this point, went elaborately into the matter, examined the petitioner Nallasivan Pillai on solemn affirmation as petitioner's witness, found his allegations against the Vakil to be wholly false and dismissed the petition on the 2nd September 916. It goes without saying that the learned District Judge quite honestly believed himself to have jurisdiction to make that enquiry, neither the petitioner, Nallasivan Pillai, nor the second grade Pleader, Ramalingam Pillai (who was represented in the enquiry by another Vakil Arumugam Pillai) having evidently brought to the notice of the District Judge that the District Judge had no jurisdiction to make such enquiry.

On that same date, 2nd September 19 6, the learned District Judge sent the petitioner, Nallasivan Pillai, under section 476, Criminal Procedure Code, to the nearest 1st Class Magistrate in order that he might be tried for offence under section 193,

Indian Penal Code, in that the petitioner made false statements as his own witness in the enquiry held under the Legal Practitioners Act in the matter of a receipt, Exhibit I, and in two or three other matters.

Against this order under section 476, Criminal Procedure Code, the present civil revision petition has been filed and the petition contains six grounds. The last two of the six grounds relate to the merits. I need not say that this Court will interfere under section 115, Civil Procedure Code, or under section 107 of the Government of India Act, 1915, with an order passed under section 476 of the Criminal Procedure Code by a lower Court, only in very exceptional cases. The other four grounds of the revision petition raised the two following points: (1) the enquiry under the Legal Practitioners Act by the District Judge is not a judicial proceeding, (2) it was not in this matter a Court within the meaning of section 476, Criminal Procedure Code. It will be seen that neither of these points expressly raises the contention that the District Judge had no jurisdiction under the Legal Practitioners Act to conduct the enquiry which he did. An enquiry under the Legal Practitioners Act by a Court is, in my opinion, a judicial proceeding. [See *Kotha Subba Chetti* v. *Queen* (1).] The expression "judicial proceeding" is not directly defined in the Indian Penal Code. Explanation 2 to section 193, Indian Penal Code, however, makes it clear that a "proceeding before a Court of Justice" acting in the administration of justice is a judicial proceeding. The Criminal Procedure Code, section 4, clause (*m*), defines "judicial proceeding" as *including* any proceeding in the course of which evidence may be legally taken on "oath" (which includes "solemn affirmation"). I cannot, therefore, accept the contention that a District Judge taking evidence in a proceeding of which he is entitled to take cognizance under the Legal Practitioners Act is not "a Court" or that the enquiry is not a "judicial proceeding".

I am of opinion, therefore, that the grounds mentioned in the memorandum of civil revision petition have not been established as valid. But Mr. Devadoss argued that as the District Judge had no jurisdiction to entertain the petition or to enquire into it, the whole enquiry was *ultra vires* and, for false statements made in such an enquiry by the petitioner as a witness, he cannot be punished under section 193, Indian Penal Code, as the petitioner was not legally bound (see section 191, Indian Penal Code) to state the truth before the District Judge in that enquiry and as the proceeding before the District Judge was not a "judicial proceeding" within the first paragraph of section 193. This latter contention, however, cannot wholly absolve the petitioner from punishment, as the giving of false evidence, though it was not done in a judicial proceeding, is also punishable under the second paragraph of section 193, Indian Penal Code. However, proceedings under section 476 Criminal Procedure Code, can be taken only where the offence is committed or is brought to the notice of the Court in a "judicial proceeding."

It is, no doubt, a very startling proposition that though everybody is morally bound to state the truth, he may not in certain cases be legally bound to state the truth, even after an oath of solemn affirmation has been administered to him by a Court which honestly believes itself to have jurisdiction to conduct certain proceedings in which that man is a witness and when the person giving evidence (or for whom the evidence is given, if he is not the person giving evidence) has not objected to the jurisdiction of the Court to take the evidence.

It has been held that where a Court had no power to put a particular person upon oath, (say an accused person) he was not legally bound by the oath and, therefore, cannot be punished for giving false evidence. This seems clearly equitable [see *Kotha Suhba Chetti* v. *Queen* (1) and *Queen-Empress* v. *Subbayya* (2)].

It was held in *Queen-Empress* v. *Bharma* (3) that where the Court had no power *to enter upon an enquiry* at all, the proceedings in that enquiry are not judicial proceed-

(1) 6 M. 252; 7 Ind. Jur. 247; 1 Weir 116; 2 Ind. Dec. (N. S.) 454.

(2) 12 M. 451; 1 Weir 113; 4 Ind. Dec. (N. S.) 664.
(3) 11 B. 702; 6 Ind. Dec. (N. S.) 462.

ings and a witness in that enquiry, though solemnly affirmed, was not legally bound to state the truth. The same view was taken in 1891 by Muthusami Aiyar, J., in the case reported as *Poosia Naicken, In re* (4). [See also *Queen-Empress* v. *Venkataramanna* (5) and *Abdul Rahman* v. *Emperor* (6).] I might be permitted to express my regret that the highly technical view that a person is not legally bound to state the truth before a Court of Justice which has bound him by an oath or solemn affirmation, when that Court of Justice had no jurisdiction to enter upon the enquiry though it honestly believed itself to have such power and though no objection had been taken to its jurisdiction, has been adopted by the Indian High Courts following the English cases on this point. See *Reg.* v. *Pearce* (7), where Cockburn, C. J., says when quashing the conviction for perjury: "I regret that a man, who has been convicted upon the merits, should escape from punishment upon a technical point of this sort, but we administer the law according to the established rules". I might be further permitted to express a hope that an explanation may be added to sections 191 and 193, Indian Penal Code, to the effect that a person is legally bound in a Court of Justice as witness in any enquiry to state the truth and that such an enquiry is one in a judicial proceeding even if the Court had no jurisdiction to enter upon the enquiry, provided (1) that the enquiry was not into an offence alleged to have been committed by the witness, (2) that the Court honestly believed that it had jurisdiction and (3) that an objection (to the enquiry or to the examination of the witness therein) on the ground of jurisdiction had not been brought to the notice of the Court before the evidence was taken.

In the result, I feel myself bound to set aside the proceedings under section 476, Criminal Procedure Code, owing to the District Judge's want of jurisdiction to enter upon the enquiry under the Legal Practitioners Act.

Appeal allowed; Order set aside.

V.R.P.

(4) 1 Weir 151.
(5) 23 M. 223; 1 Weir 152; 8 Ind. Dec. (N. S.) 558.
(6) 3 Ind. Cas. 952; 32 A. 30; 6 A. L. J. 963; 10 Cr. L. J. 424.
(7) (1863) 3 B. & S. 531; 32 L. J. M. C. 75; 9 Jur. (N. S.) 647; 7 L. T. 597; 11 W. R. 235; 9 Cox. C. C. 258; 122 E. R. 200; 129 R. R. 447.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 503 OF 1917.

June 7, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Richardson.

DEBENDRA NATH DAS GUPTA—PETITIONER

versus

REGISTRAR, JOINT STOCK COMPANIES, BENGAL—OPPOSITE PARTY.

Companies Act (VII of 1913), s. 134 (4)—Default of Director in filing balance-sheet—General meeting not held—Offence—Jurisdiction, teritorial, to try offence under s. 134.

In answer to a charge under section 134 (4) of the Indian Companies Act in respect of default made in filing with the Registrar the balance-sheet for a certain year, it is not open to a Director of a Joint Stock Company to plead that as no general meeting was called in that year and no balance sheet was laid before the Company at any such general meeting, it was impossible for him or his Company to comply with the requirements of section 134. [p. 308, col. 2.]

The Presidency Magistrates in Calcutta possess jurisdiction to try charges under section 134 of the Indian Companies Act even where the Company is situate outside Calcutta, as the office of the Registrar with whom the balance-sheet should be filed is in Calcutta. [p. 308, col. 2.]

FACTS of the case appear from the judgment.

Mr. *I. B. Gupta* (with him Babn *Probodh Kumar Das*), for the Petitioner.—The petitioner, who was one of the Directors of the Darjeeling Press Company, Limited, has been convicted under section 134 of the Indian Companies Act, VII of 1913. My submission is that no offence under section 134 has been committed by the petitioner and that no offence has been committed within the local jurisdiction of the Presidency Magistrate of Calcutta. The petitioner cannot be convicted for an offence which he has not committed, and by a Magistrate who had no jurisdiction to try the case. The offence, if any, has been committed under section 76 or 131 and that at Darjeeling. He could not be convicted under section 134 (4) as no

general meeting having been held, it was impossible for him to file the balance sheet with the Registrar.

[TEUNON, J.—If the offence has been committed, how has he been prejudiced by being tried by the Presidency Magistrate of Calcutta?]

For any act or omission committed outside the town of Calcutta a man cannot be convicted by the Presidency Magistrate of Calcutta. Apart from the question of prejudice, if a case is inquired into or tried by a Magistrate who has got no jurisdiction under the law to enquire into or try the case the whole proceeding will be a nullity, and so the conviction cannot stand.

Mr. *Camell*, Deputy Legal Remembrancer, for the Crown.—The office of the Registrar with whom the balance-sheet should be filed being in fact in Calcutta, the Presidency Magistrate of Calcutta has got jurisdiction. The petitioner has been rightly convicted under section 134. See *Park* v. *Lawton* (1).

JUDGMENT.—In this case it appears that the petitioner was one of the Directors of a Joint Stock Company, known as the Darjeeling Press Company, Limited. He has been convicted under section 134 (4) of the Indian Companies Act, VII of 1913, in respect of a default made in filing with the Registrar the balance-sheet for the year 1914-15.

It is not disputed that as a matter of fact in respect of the filing of the balance-sheet with the Registrar of Companies a default was made, and the defence of the petitioner as placed before us is that in fact in that year there was no general meeting and that being so, no balance-sheet was laid before the Company at any such general meeting. His contention then is that these preliminaries not having been fulfilled it was impossible for him or his Company to comply with the requirements of section 134 and that he should have been convicted, if at all, not under section 134 but under section 76 or 131. But it is not disputed, and in fact it is admitted, that as one of the Directors the petitioner himself was responsible for ensuring that all the necessary preliminaries to be observed prior to the filing of the balance-sheet with the Registrar had been duly observed and that being so, on the principles laid down in the case of *Park* v. *Lawton* (1), we are of opinion that we ought to hold that it is not open to the petitioner to plead in answer to a charge under section 134 his prior default in respect of the calling of the prescribed general meeting and of placing before the Company at such meeting a duly prepared and audited balance sheet.

The second contention on behalf of the petitioner is that if he had been prosecuted under section 76 or section 131 of the Act the Presidency Magistrate in Calcutta, before whom his conviction has been had, would have had no jurisdiction to try the offences charged under those sections and that the jurisdiction would have lain exclusively with the Magistrates in Darjeeling. However that may be, that does not take away the jurisdiction which the Presidency Magistrates in Calcutta clearly possess in respect of charges under section 134, the office of the Registrar with whom the balance-sheet should be filed being in fact in Calcutta.

For these reasons we discharge this Rule.

Rule discharged.

(1) (1911) 1 K. B. 588; 80 L. J. K. B. 396; 104 L. T. 184; 75 J. P. 163; 18 Manson 151; 27 T. L. R. 192.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 433 OF 1917.

June 15, 1917.

Present:—Sir George Knox, KT., Acting Chief Justice.

KATWARU RAI AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 71, 147, 323—Rioting and causing hurt—Joinder of charges, legality of—Criminal Procedure Code (Act V of 1898), ss. 35, 235.

Where the members of an unlawful assembly cause hurt to one person and by a separate act hurt is caused to another person, the offences of rioting and causing hurt under sections 147 and 323 of the Penal Code are not distinct offences and can be tried jointly. [p. 309, col. 2.]

Criminal revision from an order of the Sessions Judge, Ghazipur.

Mr. *M. L. Agarwala*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

KATWARU RAI *v.* EMPEROR.

JUDGMENT.—Katwaru Rai and six other persons have been convicted of an offence of rioting under section 147 of the Indian Penal Code, and for that offence have been sentenced to varying terms of rigorous imprisonment. They went in appeal to the Sessions Judge of Ghazipur and that Court confirmed the sentences passed, dismissing the appeals. They have now come here in revision. Of the four grounds taken in the application for revision only two have been argued before me, and those two are—(1) that separate convictions and punishments under sections 147 and 323 are not warranted by law, and (2) that the sentences are too severe. The main contention before me is that whatever may have been the case before the year 1898 and whatever conflict the rulings of various High Courts may have had, the alteration introduced by Act V of 1898 into the Criminal Procedure Code makes it illegal now to convict and sentence accused persons of offences which are separable offences coming within the provisions of section 71 of the Indian Penal Code, inasmuch as they are no longer distinct offences within the meaning of section 35 of the Criminal Procedure Code. The question, therfore, which I have to consider is whether, in the light of the explanation added by Act V of 1898 to section 35 of the Criminal Procedure Code, the offences of rioting and of voluntarily causing hurt are or are not distinct offences.

The argument is that an offence under section 143 of the Indian Penal Code does not reach the stage of rioting until force or violence has been used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly. A definition has been given to the word "force" in section 349 of the Indian Penal Code. Violence, so far as I know, has not been made the subject of a definition in the same Code. If we adopt the definition given in section 349 of the Indian Penal Code, members of an unlawful assembly would be guilty of the offence of rioting as soon as any member of the unlawful assembly in prosecution of the common object of the assembly caused motion to any person against whom that assembly was acting. To turn this into simpler language, the offence of rioting would be complete if any member of the unlawful assembly in prosecution of a common object of the assembly pushed any person against whom that assembly was acting; but no offence would have been caused under section 323 unless that act of pushing caused bodily pain, disease, or infirmity to the person so pushed. In the case before me the finding, which I take in revision as the finding of the lower Court, is that (1) hurt was caused to one Raghunandan Rai, and (2) hurt was also caused by a separate act to Sakal Rai. There is evidence as to various other acts which might amount to force as defined in section 349. But the finding regarding them is rather vague, and I take it that by one of the acts complained of, *viz.*, that to Raghunandan Rai rioting was committed, while by the act committed on the body of Sakal Rai hurt was caused. Turning to section 235 of the Code of Criminal Procedure it will be found in illustration (*g*) of section 235 that where *A* with six others commits the offence of rioting, grievous hurt, and assaulting a public servant, etc. *A* may be separately charged with and convicted of offences under sections 147 and 325, etc., of the Indian Penal Code. Perhaps the more remarkable case is to be found in the illustration (*i*) which stands in the same section, in which *A* wrongfully strikes *B* with a cane, *A* may be separately charged with and convicted of offences under sections 352 and 323 of the Indian Penal Code. But it may be urged that clause (4) of section 235 says that nothing contained in this section shall affect the Indian Penal Code, section 71. It is hardly to be conceived that with that clause staring them in the face the Legislature would have gone on to give illustrations which would be ruled out by clause (4). But when section 71 is read and carefully compared, it seems to me that it in no way conflicts with the illustrations which I have alluded to. Offences falling under section 323 and under section 147 of the Indian Penal Code need not be separable, but distinct offences. In the present case the offence of causing hurt to Sakal Rai is distinct and apart from the offence under section 147. This view is in conformity with both Full Bench decisions arrived at before the explanation was added to section 35 of the Criminal Procedure Code and with one case of later

date of this Court which is before me now, namely the case of *Anup Singh and others* (Criminal Revision No. 689 of 1911 decided on the lst of February 1912).

Looking to the injuries inflicted I am not prepared to say that the sentences passed erred on the side of severity. The more salutary provision would probably have been to take action binding down the applicants to keep the peace and in that case a substantive sentence might have been, without danger to the public, lighter. The application is dismissed.

Application dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 287 OF 1917.
June 7, 1917.
Present:—Mr. Justice Piggott.
HIRA NAND—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 236—Doubt as to offence committed—Conviction, alternative—Procedure—Penal Code (Act XLV of 1860), ss. 420, 489A.

Where a Court is satisfied that the accused has committed one of two offences, either that of counterfeiting a currency note under section 489A of the Penal Code, or that of attempting to cheat under section 420 read with section 511, a conviction should be recorded in the alternative under those sections, and the question of sentence should be considered from the point of view of the maximum sentence provided for the lesser of the two alternative offences. [p. 311, col. 2.]

Criminal appeal from an order of the Sessions Judge, Benares.

Mr. *Satya Chandra Mukerji*, for the Appellant.

Mr. *Lalit Mohan Banerji*, (Government Pleader), for the Crown.

JUDGMENT.—In this case one Hira Nand was tried by the learned Sessions Judge of Benares on two charges, one framed under section 489A and another under section 420 of the Indian Penal Code. He was acquitted on the latter charge but convicted on the former, and a sentence of three years' rigorous imprisonment was passed upon him. As regards the broad facts of the case there is very little room for doubt. Hira Nand was a stranger in Benares, where he put up first at a certain *dharmshala* and later on at a hotel kept by the witness, Hari Ram. Negotiations passed between the said Hari Ram and the appellant, about which it may be said with reasonable confidence that Hari Ram has not told the entire truth. I am disposed so far to believe his evidence where it is corroborated by facts disclosed in the course of the inquiry, namely, that Hira Nand represented himself to Hari Ram as capable of producing forged currency notes and that he endeavoured to induce Hari Ram to provide him with a currency note of high value, Rs. 100 or more, for him to experiment on. Beyond this the evidence of Hari Ram is not trustworthy, and I do not say that the charge of cheating as framed under section 420 of the Indian Penal Code is established by the evidence. Whatever may or may not have passed between the two men, it is at any rate certain that Hari Ram finally took alarm and gave information to the Police. The inquiry resulted in the discovery in the possession of the accused of sensitized paper, such as is used by photographers, cut to the size of Rs. 10 and Rs. 5 notes, of certain sheets of glass by means of which it was obviously possible to obtain a photographic print of a currency note upon the paper above mentioned and of an actual photograph of a Rs. 10 note upon sensitized paper cut to the proper size which had, no doubt, been taken in the manner suggested. I do not think it is material to the determination of the case whether this photographic reproduction was found in the accused's pocket or between sheets of glass under the mattress of his bed. In either case it was recovered from the possession of the accused. I agree also with the learned Sessions Judge that it is proved that Hira Nand himself had taken this photograph.

In doing so Hira Nand had undoubtedly either counterfeited or performed part of the process of counterfeiting a currency note, provided the Court is prepared to hold that he had made this reproduction, intending by means thereof to practise deception or knowing it to be likely that deception would thereby be practised. The Sessions Judge has rightly referred, not only to the definition of the word counterfeit quoted above from section 28 of

the Indian Penal Code, but also to Explanation 2 of the aforesaid section. The point urged upon me in appeal, and taken also in the Court below, is that the resemblance between these photographic reproductions and a genuine currency note was so slight that it should not be held to be such that a person might be deceived thereby. On this point I have the opinion of the learned Sessions Judge and that of the assessors, who agreed in finding Hira Nand guilty on this charge. Sitting, however, as a Court of Appeal, and requiring to be satisfied of the propriety of the conviction recorded by the Court below, I feel that the appellant is entitled to ask me to form my personal opinion on this question. This it is unfortunately impossible for me to do. The conviction in the Court below was recorded on the 8th of February 1917. An appeal against that conviction was presented in this Court on the 10th of April 1917, and according to the office report the appeal was within time up to 16th April 1917. There was a delay of three days before any action was taken on the petition of appeal, because it was presented in the first instance without a *vakalatnama* and this defect had to be supplied. It may have been in consequence of this delay, but it was more probably due, as the learned Sessions Judge remarks in a letter of explanation which he has submitted to this Court, to an error of judgment on the part of a subordinate official, but in any case the alleged counterfeit Rs. 10 note had in the interval been destroyed, under a mistaken belief that no appeal had been filed against the conviction and sentence. I regard this as an unfortunate accident, and I accept the assurance of the learned Sessions Judge that he has taken effective steps to prevent its recurrence. The result is that I am unable to form any opinion of my own on the most crucial question raised by this appeal.

There is another difficulty in the case which was obviously present to the mind of the learned Sessions Judge. There are features about the evidence for the prosecution, and particularly about the statement of the hotel-keeper Hari Ram, which are calculated to raise a doubt in the mind of the Court whether Hira Nand ever intended to place in circulation counterfeit currency notes for the deception of the public. The question is whether his intention throughout his entire proceedings may not have been simply to deceive Hari Ram and obtain from the latter some currency note or notes of higher value and disappear with the same. But for the unfortunate accident to which I have referred, it is quite possible that an inspection of the missing exhibit might have removed my doubts as to the propriety of the conviction as it stands. I must, however, deal with the matter on the materials available, and feeling as I do a certain doubt about the facts which, to a limited extent, is in favour of the appellant, I am bound to give effect to that doubt. The case seems to me to be precisely covered by the provisions of section 236 of the Criminal Procedure Code. On the facts proved against him I am satisfied that Hira Nand committed one of two offences, either that of counterfeiting a currency note punishable under section 489A of the Indian Penal Code, or that of attempting to cheat Hari Ram, punishable under section 420, read with section 511 of the Indian Penal Code. In place, therefore, of the conviction recorded in the Court below, I direct a conviction to be recorded in the alternative under the sections above referred to. Having done this, I feel bound to reconsider the question of sentence from the point of view of the maximum sentence provided for the lesser of the two alternative charges on which I have directed a conviction to be recorded. On this ground, and on this ground alone, I direct that the sentence passed upon Hira Nand be reduced to one of rigorous imprisonment for two years. The sentence will include three months' solitary confinement.

Conviction and sentence altered.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 8 OF 1917.

May 7, 1917.

Present:—Mr. Justice Teunon and
Mr. Justice Richardson.

NIBARAN CHANDRA CHAKRAVARTY AND OTHERS—PETITIONERS

versus

AKSHOY KUMAR BANERJEE—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Provincial Small Cause Court, whether subordinate to District Judge.

NIBARAN CHANDRA *v.* AKSHOY KUMAR BANERJEE.

A Provincial Small Cause Court is under sub-clause (*c*) of clause (7) of section 195, Criminal Procedure Code, to be deemed subordinate, for the purposes of that section, to the Court of the District Judge and the latter has, therefore, jurisdiction to entertain an appeal or application under clause (6) of section 195 against an order of a Provincial Small Cause Court granting or refusing sanction for prosecution. [p. 312, col. 2.]

Babu *Taradas Chatterjee*, for the Petitioners.

Babu *Khetra Mohan Ghose*, for the Opposite Party.

JUDGMENT.—The short question which arises upon this Rule is whether a Provincial Small Cause Court is, under sub-clause (*c*) of clause (7) of section 195 of the Criminal Procedure Code, to be deemed to be subordinate for the purposes of that section to the Court of the District Judge.

Our attention was drawn to three cases in which this question was answered in the negative, the case of *Ajodhia Parshad* v. *Ram Lal* (1) decided by the Allahabad High Court and the cases of *Ambica Tewari* v. *Emperor* (2) and *Sukhdeo Singh* v. *District Magistrate of Muzoffarpur* (3) decided by the Patna High Court. The last two cases depend upon the first mentioned case, in which it was held that the words "Where no appeal lies" in clause 7 (*c*) refer to cases, in which no appeal lies, decided by a Court from which appeals ordinarily lie to some other Court and not to Courts from which no appeal lies in any case. There the original proceedings were in a Revenue Court, the Court of an Assistant Collector, but in the course of his judgment, Chamier, J., incidentally observed (pages 201 and 202)*. "The result of this construction is possibly that the Legislature has made no provision in section 195 for an appeal against an order of a Small Cause Court giving or refusing sanction and it may be that the only Court which can interfere with such an order is the High Court. The result may not have been contemplated..." In *Ambica's* case (2) where the original proceedings were in a Small Cause Court, Chamier, C. J., adhered to this expression of opinion and the Court held that the District Judge had no jurisdiction to entertain an appeal or application under clause (6) of section 195.

The construction so adopted is founded upon the fact that sub-clause (*c*) must be read, not as a separate clause, but along with the opening words of clause (7), which runs: "For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie," that is to say:— When these words are read with sub-clause (*c*), undoubtedly a difficulty does arise. Nevertheless, where there are Presidency Towns, the accepted view seems to be that a Presidency Small Cause Court is subordinate to the High Court within the limits of whose original jurisdiction it is situate, *Ramdin Bania* v. *Sew Baksh Singh* (4), *Jamna Das* v. *Sabapathy Chetti* (5), and if that be so, it would appear to follow that a Provincial Small Cause Court is similarly subordinate for the purposes of section 195 to the Court of the District Judge. This view, moreover, is in accordance with the prevailing practice in this Province, where the jurisdiction of the Dstrict Judge in such cases has never been doubted [*cf. Ram Prosad Malla* v. *Raghubar Malla* (6)]. I am not prepared to say that that practice ought now to be disturbed or that the language is incapable of a construction consistent therewith.

During the course of the argument it was pointed out that under section 24 of the Provincial Small Courts Act certain appeals do lie to the District Court. Though this provision may not be sufficient to make the latter Court the Court to which appeals from a Small Cause Court ordinarily lie, it is not perhaps without a bearing on the construction of section 195 (7) of the Criminal Procedure Code.

In the view indicated this Rule must be made absolute. The application in question, which the learned District Judge, following *Ambica's* case (2), has held that he had no jurisdiction to entertain, will be heard and determined by him as an application under section 195 (6) of the Criminal Procedure Code.

Rule made absolute.

(1) 13 Ind. Cas. 284; 34 A. 197; 9 A. L. J. 124; 13 Cr. L. J. 44.

(2) 34 Ind. Cas. 320; 1 P. L. J. 206; 17 Cr. L. J. 208.

(3) 38 Ind Cas. 754; 2 P. L. J. 1; 18 Cr. L. J. 370.

(4) 6 Ind. Cas. 473; 37 C. 714 at p. 721; 14 C. W. N. 806; 11 Cr. L. J. 357.

(5) 12 Ind. Cas. 521; 36 M. 138; 10 M. L. T. 278; (1911) 2 M. W. N. 259; 21 M. L. J. 1074; 12 Cr. L. J. 545.

(6) 4 Ind. Cas. 6; 37 C. 13; 13 C. W. N. 1038; 10 Cr. L. J. 454

*Pages of 34 A.—*Ed.*

CALCUTTA HIGH COURT.

IN THE MATTER OF PRESIDENCY SMALL CAUSE SUIT NO. 15292 OF 1913.

February 28, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Chaudhuri.

BUDHU LALL—APPLICANT

versus

CHOTU GOPE—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—High Courts Act, 1861 (24 & 25 Vict. c. 104), s. 15—Revision—Presidency Small Cause Court refusing sanction for prosecution—Vakil's right to appear—Legal Practitioners Act (XVIII of 1879), s. 4—Sanction to prosecute granted or refused by Civil Court—Original Side of High Court, history and power of—Practice—Criminal Procedure Code (Act V of 1898), s. 195—Judicial proceeding—Application for leave to sue.

Per *Curiam*.—Where an order granting or refusing sanction for prosecution under section 195 or section 476, Criminal Procedure Code, made by a Civil Court is sought to be set aside by an application to the High Court, the High Court can exercise the powers vested in it by section 115 of the Civil Procedure Code or section 15 of the High Courts Act, and the Criminal Bench as such has no jurisdiction to deal with the matter on revision. [p. 316, col. 1; p. 318, col. 2.]

Per *Teunon, J.*—The Judges of the High Court appointed by the Chief Justice from time to time to exercise the Ordinary Original Civil Jurisdiction of the High Court do not constitute a separate and independent Court. [p. 314, col. 2.]

The practice of a Court must give way to the law and to the rights conferred by law. [p. 315, col. 1.]

Per *Teunon, J.* (*Chaudhuri, J.*, dissenting)—The Presidency Small Cause Court is no part or branch of the High Court but is an inferior subordinate Court, and in dealing with its judgments and orders the High Court is a superior Court exercising not original but appellate or revisional jurisdiction. Therefore, under the provisions of section 4 of the Legal Practitioners Act, a Vakil enrolled and ordinarily practising in the High Court is entitled to be heard on behalf of a party in such matters. [p. 315, col. 1.]

Per *Chaudhuri, J.*—The Original Side of the High Court is in no sense a Court subordinate to the Appellate Bench of the High Court which hears appeals therefrom, and an application by way of appeal to the former under section 195, Criminal Procedure Code, does not appear to be competent. [p. 316, col. 1.]

The revisional powers of the High Court under section 115, Civil Procedure Code, or its power of superintendence under clause 15 of the High Courts Act have not been cut down by section 195, Criminal Procedure Code. [p. 316, col. 2.]

A Bench constituted by the Chief Justice to deal with orders and judgments of the Presidency Small Cause Court forms a principal Court of Original Jurisdiction situate in Calcutta, and, therefore, a Vakil enrolled and ordinarily practising in the High Court has no right of audience before such a Bench. [p. 316, col. 2; 322, col. 1.]

A question relating to the rival claims of different sections of Legal Practitioners of the High Court cannot be settled by the opinion of a single Judge or of a Division Bench of the Court. [p. 317, col. 1.]

The history of the Original Side and its powers traced. [p. 319, cols. 1 & 2.]

The Appellate Divisional Benches of the High Court as such have no power of superintendence over the Presidency Small Cause Court. [p. 320, col. 2.]

The practice of the Court forms the law of the Court and the Court should be loth to depart from the established practice, unless convinced that it has not the sanction of law and is grossly erroneous. [p. 321, col. 2.]

Per *Curiam*.—An application for leave to sue is a stage in a judicial proceeding. [p. 322, col. 2.]

For previous stages see 36 Ind. Cas. 472 and 39 Ind. Cas. 465.

Mr. *B. C. Mitter* (Advocate-General), on behalf of the Bar.

Mr. *Buckland*, on behalf of the Incorporated Law Society.

Babu *Ram Charan Mitter*, Senior Government Pleader (with him Babus *Basanta Kumar Bose*, *Manmatha Nath Mukerji* and *Ramdoyal Dey*), on behalf of the Vakils' Association.

JUDGMENT.

TEUNON, J.—These are six applications made to this Court under the provisions of section 115 of the Civil Procedure Code and of section 195 (6) read with section 195 (7) (*c*) of the Code of Criminal Procedure.

In each case the applicant was the defendant and the opposite party the plaintiff in a suit brought in the Court of Small Causes, Calcutta. The suit having been dismissed, the defendants applied to the Trial Judge for sanction to prosecute the plaintiffs under sections 209 and 193 of the Indian Penal Code. Sanction having been refused, in these applications, for the hearing of which I and Chaudhuri, J., have been constituted a Divisional Bench by his Lordship the Chief Justice, we are invited to revise and set aside the order of the Judge of the Court of Small Causes and to grant the sanction for which application was, and is, made.

At the hearing Babu Manmatha Nath Mukerjee, a Vakil enrolled and ordinarily practising in this Court, was authorised by the plaintiffs-opposite parties to appear and plead on their behalf and the question, therefore, arose whether in these matters he as a Vakil was entitled to be heard,

On this question we have heard on the one side the learned Advocate-General on behalf of the Bar, and also learned Counsel appearing on behalf of the Incorporated Law Society and of the Attorney on the record, and on the other side the learned Government Pleader Mr. Ram Charan Mitter, appearing on behalf of the Vakil Bar. I have now to give my reasons for holding, as differing from my learned colleague I did, that in the matters now before us the Vakil claiming the right of audience was entitled to be heard. As, however, the question is to be determined only incidentally to and for the purposes of the hearing before us, I need not set out my reasons at any great length.

It is not disputed that as the order sought to be set aside is one made by a Civil Court, we are sitting as a Divisional Bench in the exercise of the civil and not of the criminal jurisdiction of this Court. That question, though there arising in connection with an order under section 476 and not as here an order under section 195 of the Code of Criminal Procedure, has been decided by a Full Bench in the case of *Har Prasad Das* v. *Emperor* (1). In this connection I may refer also to the case of *Ram Prosad Malla* v. *Raghubar Malla* (2).

The question then in effect is whether we are sitting in a matter appertaining to the ordinary original civil jurisdiction, or, as the learned Advocate General apparently prefers to put it, to the original side of this Court.

Now, the Court of Small Causes, Calcutta, is no doubt within, and the local limits of its jurisdiction are co-terminous with, the local limits of our ordinary original civil jurisdiction.

The learned Advocate-General's contention then is that it is the 'original side' of this Court that has inherited the jurisdiction formerly exercised by the Supreme Court over the Court of Small Causes (then known as the Court of Requests), and in support of this contention he has relied mainly on Article 21 of the Charter establishing the Supreme Court sections 9 and 13 of the Indian High Courts Act, 1861, clause 12 of the Letters Patent 1865, the decisions of Sale, J., in *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (3), in *Ramdin Bania* v. *Sew Baksh Singh* (4) and of Pugh, J., on the hitherto prevailing practice of the Court, and on the observations on questions of jurisdiction to be found in *Rodricks* v. *Secretary of State* (5). He has further made reference to rule 9 (also rule 4) of Chapter XXXIV of the Rules and Orders of the High Court (Original Side) 1914 and to the case of *Mahomed Ali* v. *Emperor* (6).

On the other hand, Mr. Ram Charan Mitter has relied mainly on section 4 of the Legal Practitioners Act, XVIII of 1879, and the proviso inserted in that section by Act I of 1908, section 6 and the 1st Schedule of the Presidency Small Cause Courts Act, XV of 1882, the definition of the term 'High Court' to be found in the Criminal Procedure Code, and in the General Clauses Act, X of 1897, on the cases reported as *Toolsee Doss Seal, In re* (7), *Halashir Maiti* v. *Choytonna Maiti* (8) and *Jamna Das* v. *Sabapathy Chetti* (9) and on the observations of Mookerjee, J., in his appellate judgment in the present applications.*

Having carefully considered all the arguments advanced on either side, I am satisfied that the learned Advocate General's contention cannot be supported. It appears to be based on the erroneous assumption that the Judges appointed by the Chief Justice from time to time to exercise the ordinary original civil jurisdiction constitute in some mysterious way a separate and independent Court. It also appears to confound or fails to distinguish between 'jurisdiction' and the area over or the local limits within which that jurisdiction is exercised.

The rule of Court to which we have been referred (Original Side, Chapter XXXIV, rule 4) framed in 1903, no doubt, indicates

(1) 19 Ind. Cas. 197; 40 C. 477; 17 C. L. J. 245; 14 Cr. L. J. 197; 17 C. W. N. 647.

(2) 4 Ind. Cas. 6; 37 C. 13; 13 C. W. N. 1038; 10 Cr. L. J. 454.

(3) 30 C. 986.

(4) 6 Ind. Cas. 473; 37 C. 714; 14 C. W. N. 806; 11 Cr. L. J. 357.

(5) 21 Ind. Cas. 1; 40 C. 308.

(6) 20 Ind. Cas. 977; 41 C. 466; 18 C. W. N. 1; 14 Cr. L. J. 497.

(7) 7 W. R. 228.

(8) 30 C. 588; 7 C. W. N. 547.

(9) 12 Ind. Cas. 521; 36 M. 138; 10 M. L. T. 278; (1911) 2 M. W. N. 259; 21 M. L. J. 1074; 12 Cr. L. J. 545.

*See *Budhu Lal* v. *Chattu Gope*, 39 Ind. Cas. 465.—*Ed.*

the Judge to whom, in accordance with the order of the Chief Justice, applications such as the present must be made, but no such rule or order judicially determines or can determine what jurisdiction the Judge entertaining the application will then proceed to exercise.

In *Rodricks* v. *Secretary of State* (5), the learned Judges followed an authoritative decision of a Divisional Bench, while the decisions of Sale, J., in *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (3) and Pugh, J., in *Ramdin Bania* v. *Sew Bakhsh Singh* (4), though entitled to great respect, are the decisions of single Judges and appear to be based merely on practice. But practice and, I may perhaps add, prejudice must give way to law and to the rights conferred by law.

In the present matters, original jurisdiction has been exercised and exhausted by the Court of Small Causes. That Court is no part or branch of this Court but is an inferior or subordinate Court and in dealing with its judgments or orders this Court, in my view, is a superior Court exercising not original but appellate or revisional jurisdiction. From this and the provisions of section 4 of the Legal Practitioners Act, it follows that in these matters the Vakil who has claimed the right of audience is entitled to be heard.

CHAUDHURI, J.—I am sorry I am unable to agree with my learned colleague on the preliminary point argued in connection with these applications, namely, as to the right of audience claimed by the learned Vakil for the opposite party, whose contention is that the Vakils of this Court have such right under rule 4, Chapter II, Original Side, read with section 4 of the Legal Practitioners Act, namely, to appear and plead in all cases "except before a Judge of the High Court, Division Bench or High Court exercising original jurisdiction in a Presidency town." He contends that our rule only restricts their right when the original side exercises its original jurisdiction. He further contends that if rule 9, Chapter XXXIV, Original Side, corresponding to appellate side, rule 5, Chapter II, which provides for the hearing of applications under section 115, Civil Procedure Code, by a single Judge on the original side, stands in the way of Vakils appearing in such applications, it is *ultra vires*. The learned Government Pleader has been heard on behalf of the Vakils and the Advocate-General on behalf of the Bar and the Incorporated Law Society for the Attorneys of the Court, who contest the right so claimed.

The question has arisen in these circumstances. Six applications were made to me, when I was sitting on the original side, on behalf of the defendauts in the above-mentioned Small Cause Courts suits, against an order passed by a learned Judge of the Presidency Small Cause Court refusing sanction to prosecute the plaintiffs. The applications were headed: "In the matter of section 115, Civil Procedure Code." I issued a Rule on the plaintiffs to show cause why that order should not be set aside. They appeared by Counsel and I held that the learned Judge had wrongly declined jurisdiction, having erred in holding that an application for leave to sue in the Small Cause Court was not a stage in a judicial proceeding. I also held he had erred in refusing the applications on the ground of delay. I held that the delay had been satisfactorily accounted for. As he had not dealt with the merits of the applications, but had thrown them out on preliminary points, I remanded them, directing an enquiry on the materials which had been placed before him. In the course of argument it was suggested that the applications before me did not come under section 115, Civil Procedure Code. I held it was unnecessary to consider the question, as it was practically conceded by learned Counsel for the plaintiffs (opposite party) that the Court over which I then presided, as the superior Court of the Presidency Small Cause Court, had power to deal with the applications under section 195, Criminal Procedure Code. I said that, if necessary, the heading of the applications would be amended.

The plaintiffs appealed against my judgment, under section 15 of the Letters Patent, to the Bench hearing appeals from the original side. That Bench consisted of the Chief Justice and Mookerjee, J. They held that I was right on both the points decided by me, but were of opinion

that my order of remand was wrong, and the learned Chief Justice "remitted" the applications to Teunon, J., and myself as a Special Bench for disposal on their merits. The order does not specify the jurisdictions in which we are sitting as a Special Bench. Clearly the Appellate Bench, as such, had no jurisdiction to remand the applications to any other Bench of this Court, than to the Court on the original side. It is also to be noticed that the original side is in no sense a Court subordinate to the Appellate Bench of the same Court which hears appeals thereform, and an application by way of appeal to it under section 195, Criminal Procedure Code, does not appear to me to be competent: *Than Pe* v. *Ba Than* (10). The Appellate Bench, however, dealt with the matter under section 15 of the Letters Patent. Whatever my views may be about the power of the superior Court to remand when the Subordinate Court declines jurisdiction on a preliminary point and does not deal with the merits of a matter, especially in cases like these, when the superior Court by dealing with them may deprive the opposite party of the right of appeal, we are bound to deal with these applications as having been rightly remitted to us as a Bench specially constituted by the learned Chief Justice, although it strikes me that if I had no power to remand to the Small Cause Court under section 195, Criminal Procedure Code, the Appellate Court similarly had no such power. This Bench has been constituted by him not as a member of the Court of Appeal, but by virtue of his statutory power as Chief Justice under section 14 of the High Courts Act (24 & 25 Vict. C. 104). As I have pointed out he has not mentioned the jurisdiction. He has "remitted" the applications to us, which to my mind implies that he has sent them back to the Court where they were originally made, namely, to the original side. It has been argued that as Mookerjee, J., has held that section 195, Criminal Procedure Code, creates a "special jurisdiction," these applications must be taken as made to us not in the exercise of the original jurisdiction of this Court. This seems to me to be based upon a confusion as to the meaning to be attached to the word "jurisdiction". The learned Judge says: "The true view is that section 195 creates a special jurisdiction, as explained in *Bapu* v. *Bapu* (11)." Reference to that case shows that the learned Judges do not use the expression "jurisdiction", and, if I may say so with respect, correctly use the words "special power." They held that the power conferred by section 195 (6), Criminal Procedure Code, was not a part of the Appellate and Revisional Jurisdiction of the Court under Chapters XXXI and XXXII, Criminal Procedure Code, but that it was a special power.

One of the questions before us appears to be whether section 195, Criminal Procedure Code, cuts down the power which the High Court has under section 115, Civil Procedure Code, or its power of superintendence under clause 15 of the High Courts Act. I understood my learned colleague to agree with me that our revisional powers have not been so cut down. Argument at the Bar proceeded upon the same basis: Section 195 (6) and (7) seem to me to deal with a special case of revision. The power is in the High Court, it has not been newly created. It is covered by clause 15, and section 115, Civil Procedure Code, and section 195 (6), Criminal Procedure Code, are specific instances where we can exercise our revisional powers. It does not seem to me that a new power has been conferred upon us by section 195 (6), nor has it created a special jurisdiction. The dependent question is, are we sitting on the Original Side? Are we hearing these applications as the principal Court of original jurisdiction situate in Calcutta? That we undoubtedly are. At the conclusion of the argument my learned colleague was of opinion that the Vakils had the right to appear in such applications, and claimed that under clause 36 of the Letters Patent (1865) his opinion as that of the Senior Judge of this Bench should prevail. Although I was not quite prepared to accede to it, I had no desire to discuss the matter, as it seemed doubtful

(10) 11 Ind. Cas. 1005; 4 Bur. L. T. 206; 12 Cr L. J. 469; 6 L. B. R. 25.

(11) 14 Ind. Cas. 305; 22 M. L. J. 419; 11 M. L. T. 367; (1912) 1 M.W.N. 499; 13 Cr. L. J. 209; 39 M. 750.

to me at the time, if the difference between us could be referred to a third Judge or a Full Bench of this Court. I thought that time and trouble would be saved by my hearing the learned Vakil for the opposite party on the merits of the applications and I accordingly heard him, specially as it is always a pleasure to hear him, and also because it was clear to me that an instance of this nature could not be looked upon as establishing a precedent against other decisions of this Court. It strikes me that a question relating to the rival claims of different sections of legal practitioners of this Court involving rules framed by the Full Court cannot be determined in this way. Such questions are not settled by the opinion of a single Judge or of a Division Bench of this Court. I venture to think that discussions which tend to disturb the well-established practice of this Court, or create a feeling of uncertainty about it should not be encouraged. Such discussions sometimes cause irritation between different branches of the profession, which is always unfortunate. Applications under section 195, Criminal Procedure Code, are so rare that the right, if conceded, is not likely to be of much practical value. I did not, therefore, think it right to dissent from my learned colleague and bring matters to a deadlock for the time being. We then heard the learned Vakil. I think it unnecessary in the circumstances to give reasons for my views in detail. Having, however, been associated with the original side of this Court for over thirty years as Advocate and Judge and claiming knowledge of the practice of the Court, I think it may be useful to record my view that the statement made by Pugh, J., in *Ramdin Bania* v. *Sew Baksh Singh* (4), about the practice of this Court in respect of applications under section 622, now section 115, Civil Procedure Code, in matters arising out of proceedings in the Presidency Small Cause Court, is entirely correct. He says: "There has been a well-established practice for at least 50 years that these applications under section 622 should be made on the original side of this Court, and it was considered settled that these applications should be made on the original side by Counsel." Sale, J., said the same thing in *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (3): "It is a remarkable fact that the jurisditicon of a Judge sitting on the original side to exercise revisional powers over the Presidency Small Cause Court, which is now challenged for the first time, has been exercised ever since the establishment of the High Court, over 40 years ago, as its records abundantly show. Within this period innumerable applications have been heard and de'ermined by single Judges sitting on the original side of this Court." I am aware that in *Haladhar Maiti* v. *Choytonna Maiti* (8), Maclean, C. J., said: "Applications have invariably been made to the Chief Justice, who can appoint, and who does then and there appoint, himself and the Judge who may be sitting with him to be the Bench to hear the application." The learned Chief Justice appears to have been misled into making such a statement. It should be remembered that both Sale and Pugh, JJ., were for many years practising members of the Calcutta Bar before they became Judges of the Court. The uniform practice of this Court was sought to be varied for the first time in 1901. Pugh, J., correctly says: "For some short time prior to 1902, similar applications were successfully made on the Appellate Side by Vakils." This, however, was put an end to by a decision of Rampini and Pratt, JJ., in *Shamsher Mundul* v. *Ganendra Narain Mitter* (12), who held that the Bench taking the Presidency group had no jurisdiction in Calcutta, and, therefore, no jurisdiction over the Calcutta Small Cause Court. This question turned on the order of the Chief Justice allocating business to the various Benches, and while this order gave the Presidency group jurisdiction over cases from the 24-Pergannahs—the 24-Pergannahs is not Calcutta. However, another application was made by a Vakil in the case of *Haladhar Maiti* v. *Choytonna Maiti* (8) to the Chief Justice Sir Francis Maclean and Mr. Justice Mitra. A preliminary objection was taken based on the last case, but it was overruled on the ground that the learned Judges were not dealing with the matter as the Judges taking the Presidency group, but as a Bench constituted by the Chief Justice to deal with the case, and there could be no question but that the Chief Justice had the power to constitute such a Bench and deal

(12) 29 C. 495.

with the application. This correctly states the facts. As against the prevailing practice, the following cases only of applications made to Appellate Divisional Benches of this Court by Vakils have been referred to by the learned Government Pleader (I) *Toolsee Doss Seal, In re* (7), (II) *Ananta Coomari Dassi* v. *Radharani Dassi* (13), (III) *Jadu Mani Boistabee* v. *Ram Kumar Chakravarti* (14), (IV) *Shamsher Mundul* v. *Ganendra Narain Mitter* (12) and (V) *Haladhar Maiti* v. *Choytonna Maiti* (8). It will be noticed that between 1867 and 1901 not a single case can be found in our Law Reports to show that such applications were made by Vakils on the Appellate side of this Court. In the case of *Ananta Coomari Dassi* v. *Radharani Dassi* (13) the learned Judges referred to the case of *Pursonchund Golacha* v *Kanooram* (15), which was an application on the original side of the Court. The Judges in the case of *Jadu Mani Boistabee* v. *Ram Kumar Chakravarti* (14) were Rampini and Pratt, JJ. The same Judges held in *Shamsher Mundul* v. *Ganendra Narain Mitter* (12) that the Bench taking the cases of the Presidency group had no jurisdiction over the Court of Small Causes at Calcutta. The statement of the Chief Justice in *Haladhar Maiti* v. *Choytonna Maiti* (8) as to the practice is not correct, as I have already pointed out. The case of *Toolsee Das Seal, In re* (7) related to an application made by a Vakil of this Court, that he had a right to be heard in the Presidency Small Cause Court, where he had been refused audience. This Court did not issue a Rule on the Presidency Small Cause Court, as the learned Vakil's client had succeeded in the suit in that Court. That case therefore, gives us no help, and the other cases, between 1901 and 1903 above referred to only show the attempt which was made during that period to unsettle the established practice of this Court. The matter was eventually set at rest in 1903 by rule 9, Chapter XXXIV, Original Side, which confirmed the prevailing practice. The Index Book of the original side of this Court relating to such applications shows that hundreds of these applications have been made on that Side since 1883. In the earlier Index Book all miscellaneous matters have been mixed up and it is difficult to separate the applications in revision. I may state that such applications are almost daily made on the original side on motion days.

It is well established in this Court, after the Full Bench ruling in *Har Prasad Das* v. *Emperor* (1), that section 439 of the Criminal Procedure Code has no application to an order passed under section 476, Criminal Procedure Code, but the High Court can exercise the powers vested in it by section 115 of the Civil Procedure Code or section 15 of the High Courts Act, and that the Criminal Bench as such has no jurisdiction to deal with the matter in revision. The ruling in *Salig Ram* v. *Ramji Lal* (16) is that the High Court has no jurisdiction, in the exercise of its revisional powers on the criminal side, to interfere with orders relating to sanction under section 195, Criminal Procedure Code. The same view had been accepted by this Court. Although we two now constitute the Criminal Bench of this Court, these applications have not come up before us in our criminal jurisdiction. The Civil Appellate Division Benches of this Court, which deal with particular provincial Courts, or groups of such Courts, have no jurisdiction as such over the Presidency Small Cause Court. The local jurisdiction of the Presidency Small Cause Court coincides with that of the original side of this Court (section 17, Act XV of 1882). The law administered by that Court has to be dealt with it and determined according to the law for the time being administered by the Original Side of our Court (section 16, Act XV of 1882). The Presidency Small Cause Court is subordinate to the High Court. The original side is a Court within the meaning of the Civil Procedure Code and is a portion of the High Court. Without any more it would be natural and logical to hold that the Presidency Small Cause Court is subordinate to the original side of the High Court.

The question historically looked at leads to the same conclusion. The present Presidency Small Cause Court has taken the place of the Court of Requests, which was placed under the order and control

(13) 3 C. L. J. 199.
(14) 29 C. 239.
(15) 10 B. L. R. 355; 19 W. R. 203.
(16) 28 A. 554; 3 A. L. J. 394; A. W. N. (1906) 103; 3 Cr. L. J. 400; 1 M. L. T. 219.

of the Supreme Court by the Charter of Justice and Proclamations in the same manner as the inferior Courts in England were then subject to the order and control of the Court of Queen's Bench—see section 21 of the Charter of the Supreme Court (14 Geo. III, 1774). In the Proclamation of the Governor-General-in-Council, dated 18th March 1802, declaring the jurisdiction powers and practice of the Court of Commissioners for the recovery of small debts, it was provided that the said Court and its proceedings were subject to the control of His Majesty's Supreme Court in as full and ample a manner, to all intents and purposes, as the former Court of Requests (see the Proclamation in Sm. and Ryan's Rules and Orders, Vol. II, App. XVI, Act IX of 1850) constituted the Presidency Small Cause Court the Judges of the Supreme Court *virtute officii*, as such Judges exercised control over that Court. The Supreme Court possessed no appellate jurisdiction, but had local jurisdiction, the same as the original side of this Court now has. By the High Courts Act (24 and 25 Vict. C. 104), Her Majesty was empowered to erect a High Court at Fort William in Bengal. It was provided that upon the establishment of such High Court, the Supreme Court and Sudder Dewany and Sudder Nizamut Courts should be abolished. Section 9 enacted as follows:—"Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate and Matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as Her Majesty may by such Letters Patent as aforesaid grant and direct subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby, and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts." In 1862 the Letters Patent were granted. By these the High Court was vested with civil and criminal jurisdiction, both original and appellate. By the Letters Patent of the 28th December 1865, the earlier Letters Patent of 1862 were revoked. Thus then the High Court inherited all jurisdiction and every power in any manner vested in the Supreme Court and the Sudder Dewany and Sudder Nizamut Courts. This High Court was thus the successor of the Supreme Court with territorial jurisdiction confined to the Presidency Town of Calcutta and as the Supreme Court was not a Court which had power of superintenence over the Mofussil Courts, the original side did not and does not possess such power, and similarly as the appellate side dealing with appeals from Provincial Courts has no jurisdiction over the Presidency Small Cause Court, the power of superintendence over it, which the Supreme Court had, remained in the original side of the High Court. There are some large powers which still remain in the original side of the High Court as the successor of the Supreme Court which do not belong to the appellate side of the Court, although it is correct to say that they belong to the High Court, taking the two sides collectively. Take the jurisdiction of the High Court in matters of contempt. The question was elaborately discussed in the matter of *Governor of Bengal* v. *Moti Lal* (17), where it was held by Sir Lawerence Jenkins, C. J., that in case of interference with the due administration of justice by a Division Bench of this Court in relation to a criminal appeal pending before it, if such interference amounted to an offence under the Common Law, this Court has power to deal with it on its Crown Side, that is to say, in its original criminal jurisdiction, that power having been inherited by it from the Supreme Court.

(17) 20 Ind. Cas. 81; 17 C. W. N. 1253; 18 C. L. J. 452; 41 C. 173; 14 Cr. L. J. 321.

It is unnecessary to multiply instances as to the special powers inherited by the High Court from the Supreme Court, which are exercised on its original side. Historically, therefore, the power of superintendence, direction and control which was possessed by the Supreme Court over the Presidency Small Cause Court appertains to the original side of this Court. It seems clear to me that all such powers, when exercised by the original side, are exercised in its original jurisdiction within the meaning of section 4 of the Legal Practitioners Act. It is not, as was suggested during argument, an exercise of its extraordinary original jurisdiction which is defined by clause 13 of the Letters Patent (1865). The original side has, of course, no appellate jurisdiction and the appellate jurisdiction of the Divisional Benches of this Court is not available in respect of proceedings in connection with the Presidency Small Cause Court. Broadly speaking, the revisional power which is invoked in respect of such proceedings appertains, as I have tried to show, to the original side, logically, historically and as a matter of practice. It has not been doubted that the High Court in its original side has power to issue a writ of *certiorari*, which is a writ to an inferior Court to call up the records of a cause therein depending, that conscionable justice may be therein administered. In 1884 an application was made to Pigot, J., who was then sitting on the original side of this Court, for such a writ to bring up certain proceedings relating to an assessment before the Commissioner of the Calcutta Corporation. He granted the Rule, but eventually discharged it on its merits. The appeal from it was entertained as an appeal from original civil jurisdiction [see *Nundo Lal Bose* v. *Corporation of Calcutta* (18)]. Garth, C. J., held: "The authority of this Court to remove the proceedings of inferior Courts, in the exercise of their judicial functions, is undoubted. It is an authority derived from the old Supreme Court, and is similar to that which was exercised by the Court of Queen's Bench in England, and, if the Commissioners in this case were exceeding their jurisdiction in making the assessment, it seems clear that we have the power to quash it upon *certiorari*, notwithstanding the provision in section 17 in the Calcutta Municipal Consolidation Act, 1876," but as it appeared that the Commissioner had acted within their powers the appeal was dismissed. Wilson, J., took the same view. The right of a single Judge sitting on the original side of this Court to issue such a writ was not questioned in that case, although eminent Counsel appeared and contested that matter. Such a power is in its nature revisional. It is conceded that applications under section 115, Civil Procedure Code, in respect of the Presidency Small Cause Court appertain to the original side, under our rules. It seems to me necessarily to follow that the ordinary incidents of the procedure of that Court attach to such applications. Clause (21) of the Supreme Court Charter has no doubt been repealed by section 2 of the present Presidency Small Cause Courts Act (XV of 1382) and the power of superintendence is now given by section 6 of that Act. To my mind it makes no difference, as the Appellate Divisional Benches of this Court as such have no power of superintendence over the Presidency Small Cause Court in the same way as the original Court has no jurisdiction over the Provincial Small Cause Courts. Act XI of 1865 consolidated and amended the law relating to the Courts of Small Causes established beyond the local limits of the ordinary original civil jurisdiction of the High Court of Judicature. Section 4 of that Act provides that these Courts are subject to the general control and order of the High Court, which is defined in section 1 as the highest Civil Court of Appeal, which is practically the same definition as we find in the General Clauses Acts of 1868 and 1897. Act IX of 1887 has taken the place of Act I of 1865, which also excludes the ordinary original civil jurisdiction of this Court. Section 25 gives revisional jurisdiction to the High Court, which is exercised by our Appellate Division Benches and section 28 gives administrative control and superintendence to the High Court, in the same way as section 6 of the Presidency Small Court Act gives it to the High Court. The

(18) 11 C. 275; 5 Ind. Dec. (N. S.) 943.

Presidency and the Provincial Small Cause Courts have been deliberately kept separate. The law, the practice and procedure in each of them are different. References from the former are heard by that Bench of our Court which deals with appeals from the original side, and those from the latter by the Appellate Division Benches. To hold that the Revisional Jurisdiction of this Court over the Presidency Small Cause Court cannot be exercised except by a Special Bench constituted for the purpose in my opinion unnecessarily multiplies the machinery by which the powers of this Court are exercised. Section 13 of the High Courts Act gives power to the High Court to make its own rules for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the Court, of the original and appellate jurisdictions vested in the Court, in such manner as may appear to the Court to be convenient for the due administration of justice. Section 14 gives the Chief Justice the authority to determine what Judges shall sit alone or in Division Courts. Why in rare applications relating to sanctions of the character now before us, the ordinary Benches of our Court should not be held sufficient, I candidly confess, I fail to understand. It seems to me unnecessary to disturb the established practice of this Court for such applications. Even as late as 1913, such an application as is now before us, was made to Chitty, J., exercising original jurisdiction. See *In the matter of section* 115, *Civil Procedure Code and* 15 *of the Charter and in the matter of sanction to prosecute Awood Narain Panday*, unreported, decided on 15th December 1913. Although I have stated some of the grounds for my decision, in the view that our respective judgments in a matter of this nature are not likely to have any binding effect I refrain from elaborating them. I think, however, I ought to point out that the practice as to applications by way of appeal under section 195, so far as Madras was concerned was changed in 1902 after the decision of that eminent Judge Sir Bhashyam Iyenger, in *In re Chennanagoud* (19). In Madras they have since been dealt with under section 622 now section 115, Civil Procedure Code, and the present practice there has been looked upon as its settled practice for the last 14 years. Since 1902 also the Allahabad Court changed its views—see the judgment of Burkitt, J., in *Emperor* v. *Muhammad Khan* (20) and *In the matter of the Petition of Bhup Kunwar* (21). The observation of Banerjee, J., in the case last cited is worthy of note, namely that the Court should be loath to depart from the established practice unless convinced that it has not the sanction of law and is grossly erroneous. The practice of the Court forms the law of the Court. The original side has, as I have shown, always exercised revisional powers over the Presidency Small Court under section 115, Civil Procedure Code, and 15 of the Letters Patent Why it should not exercise similar power in respect of proceedings under section 195 of the Criminal Procedure Code I do not understand. In *Ex parte Cox* (22) Lord Esher said that when a Judge had thought it necessary for the purpose of a case to make a deliberate examination of the practice of his work and to state such practice such statement was entitled to great weight. In connection with the question of practice now before us we have at least two learned Judges of this Court who made such an examination. In *Attorney-General* v. *Marquis of Ailesbury* (23), Lord Halsbury, L. C., said a Judge was not at liberty to assume against a well-established practice of the Court followed by eminent Judges that the Court or they were in error as to their powers and jurisdiction. In *Liverpool Bread Company* v. *Firth* (24), Stirling, J., said that it was much better to adhere to what had been the practice than that a single Judge should attempt to set up what he considers as better practice. In this case there is no question of any fundamental principles of justice being in danger and it seems to me that no case has been made out for making a departure, for introducing a novelty for the sake of

(19) 26 M. 139; 2 Weir 197.

(20) A. W. N. (1902) 202.

(21) 26 A. 249; A. W. N. (1904) 15; 1 Cr. L. J. 73.

(22) (1888) 20 Q. B. D. 1; 57 L. J. Q. B. 98; 58 L. T. 323; 36 W. R. 209; 52 J. P. 484.

(23) (1887) 12 A. C. 672; 57 L. J. Q. B. 83; 58 L. T. 192; 36 W. R. 737.

(24) (1891) 1 Ch. 367; 60 L. J. Ch. 153; 63 L. T. 677; 39 W. R. 269.

novelty. I hold that we are now sitting on the original side of the Court, exercising such jurisdiction as is ordinarily exercised on that side.

The division of work in the Madras High Court is entirely different from that of our Court. The appellate work of the Madras Court is assigned to Benches constituted for the disposal of particular classes of work and not according to groups of districts. Applications under section 195, Criminal Procedure Code, are treated there as Civil Miscellaneous Appeals or as Appeals from Orders, and recently, so far as I have been able to ascertain, the Madras High Court has assigned all cases under section 195, Criminal Procedure Code, whether on the criminal or civil Side, to the Judges doing the criminal work of the Court, who also deal with a Civil Miscellaneous List. In Madras, Vakils have the right to appear on the original side and, therefore, the practice of that Court or its rulings with reference thereto do not give us any help and I need not, therefore, discuss them.

On the merits of the case their Lordships delivered the final judgment as follows:—

TEUNON, J.—In these six matters it appears that two plaintiffs Budhu Lal and Raghunath Lall brought respectively 7 suits and 22 suits against different defendants in the Presidency Small Cause Court. The defendants being resident beyond the jurisdiction, in each case the plaintiff applied for leave to sue, and in support of his application swore that the money for the recovery of which the suit was brought had been lent in Calcutta.

On the 23rd of March 1914, all the 29 suits were dismissed, in each case on the special oath of the defendant.

Thereafter on the 21st December 1914, in each case application was made on behalf of the defendant for a sanction to prosecute the plaintiff under section 209 of the Indian Penal Code in respect of the claim and under section 193 in respect of the statement made in the application for leave to sue. Of the 29 applications, only the 6 now before us were proceeded with and these were eventually dismissed by the Judge of the Court of Small Causes on the 14th of June 1915. The dismissal was on two grounds, namely that an application for leave to sue is not a stage of a judicial proceeding and that there had been undue delay in making the application for sanction.

Against the orders refusing sanction, applications were then made to this Court under section 115 of the Civil Procedure Code and section 195 (6) read with section 195 (7) (c) of the Code of Criminal Procedure. These applications were made to Chaudhuri, J., then sitting in the exercise of the original jurisdiction of this Court and at the hearing of the Rules then issued that learned Judge directed that the Judge of the Small Cause Court should make further inquiry and thereafter dispose of the applications.

Against his orders appeals were preferred and the Appellate Court has held that under the provisions of section 195 (6) the superior Court though competent to act upon evidence taken before itself or taken by the Subordinate Court under its direction is not competent to make a remand to the Subordinate Court for further inquiry and decision.

The orders of Chaudhuri, J., were accordingly set aside and the applications remitted for re-hearing and his Lordship the Chief Justice has constituted us a Divisional Bench for the purposes of this re-hearing.

When the application came on for hearing a question arose whether Babu Manmatha Nath Mukerjee through whom the plaintiffs opposite parties desired to be heard was entitled as a Vakil to appear and plead on behalf of his clients. In accordance with the opinion of the Senior Judge on this question we have heard Babu Manmatha Nath Mukerjee and now proceed to determine the question whether with or without further inquiry sanction should be given to the several applicants for the prosecution of the plaintiffs opposite parties.

It is not now contended that an application for leave to sue is not a stage in a judicial proceeding and in view of the opinions expressed by Chaudhuri, J., and by the Appellate Court the learned Vakil appearing for the opposite parties has wisely refrained from contending further that the delay has not been sufficiently explained.

SAMPAT *v.* EMPEROR.

The further materials before us in each case are an affidavit by the applicant defendant and an affidavit by the plaintiff. No doubt the verification by the defendant's application is faulty but he does therein swear that the suit brought against him is wholly false and that he had never been in Calcutta prior to its institution. Having considered this affidavit, having regard also to the decision in all six suits, and to the fact that even now though the plaintiff says he has independent evidence, there is no affidavit in support of his own, we think that it is unnecessary to take further evidence at this stage and that a case for the grant of sanction has been made out. In each case we, therefore, set aside the order of the Small Cause Court and grant to the petitioner sanction to prosecute the plaintiff opposite party under section 209 of the Indian Penal Code in respect of his claim, and under section 193, Indian Penal Code, in respect of the statement made and in support of the plaintiff's application for leave to sue, namely the statement that the principal money claimed was lent in Calcutta.

CHAUDHURI, J.—I agree that sanction should be granted to prosecute the plaintiffs as applied for; I have nothing to add to the judgment delivered by my learned colleague.

Order of the Small Cause Court Judge set aside: Sanction granted.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 325 OF 1917.

May 22, 1917.

Present:—Mr. Justice Piggott.

SAMPAT AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 96 to 106, 333—Private defence, right of, commencement of—Public servant, assault upon—Offence—Proof.

In order to set up the right of private defence it is incumbent upon the accused to begin by showing that at the time of their interference an offence affecting the human body was being committed on the person on whose behalf they interfered. [p. 326, col. 2.]

A public servant does not cease to be a private citizen, and the law will take cognizance of an assault committed upon him, independently altogether of his position as a public servant. If, however, it is desired to invoke on his behalf the provisions of section 334, Indian Penal Code and other similar sections, it is for the prosecution to satisfy the Court that the facts of the case were such as to fulfill the requirements of those sections. [p. 326, cols. 1 & 2.]

Criminal appeal from an order of the Sessions Judge, Mirzapur.

Mr. *A. P. Dube*, for the Appellants.

Mr. *L. M. Banerji*, Government Pleader, for the Crown.

JUDGMENT.—In this case seven persons were tried before the Court of Session at Mirzapur on charges framed under sections 147 and 333 of the Indian Penal Code. The prosecution story in its essentials may be stated thus:—A Revenue Officer named Abdul Raoof had been despatched, under the orders of his superiors, on a tour in the course of which it was his duty to realize loans which had been advanced to agriculturists, presumably under the provisions of Act XII of 1884. In the neighbourhood of a village called Baskop he was attacked by the seven appellants and one other man, alleged to be absconding. The assault was committed because of the efforts which Abdul Raof was making, in the discharge of his duty, to realize a loan of Rs. 3 which had been advanced to the appellant, Sampat. Abdul Raoof himself and two peons, Mansab Ali and Lakhmir Khan, who were attending on him, received a fairly severe beating. In the case of Abdul Raoof himself there were a large number of contusions and abrasions found on various parts of his body, and the matter was rendered more serious by the discovery that one of the blows inflicted on the left forearm had caused a fracture of the bone. Abdul Raoof's own account of the matter may be examined in a little further detail. He reached the neighbourhood of Baskop on the 3rd of December 1916, and camped in a grove near the village. In the course of the 4th of December he realized certain arrears of advances which had been made to various persons, including one of the present appellants and the father of another. On the morning of December the 5th he sent Mansab Ali into the village to call the appellant, Sampat. It is admitted that Sampat had received advances from Government for agricultural purposes and that

he had repaid the major portion of those advances It is, however, also admitted by Sampat himself that on the 5th of December last a sum of Rs. 3 was due from him on account of an advance which he had taken in the year 1912. Mansab Ali came back and reported to Abdul Raoof that Sampat was refusing to pay or to accompany him to the grove where Abdul Raoof was staying. Thereupon the latter went into the village, saw Sampat and persuaded him to accompany him to the grove, telling him that when he got there he would explain the accounts, presumably with a view to satisfying Sampat that the money, claimed was really due. According to Abdul Raoof, Sampat's neighbours were unnecessarily alarmed and jumped to the erroneous conclusion that Sampat had been wrongfully arrested and was being detained in the grove without lawful authority. A body of men, consisting of the remaining six appellants and one Mannu, alleged to be absconding, came to the grove from the village, armed with *lathis*. They demanded that Sampat should be let off; by which I suppose the witness means that he should be let off the payment of the Rs. 3 due from him. When Abdul Raoof explained that it was a Government due which he had no power to remit, he and the two peons were assaulted by the seven men from Baskop, and Sampat himself joined in the attack upon them. The beating continued until Abdul Raoof, Mansab Ali, and Lakhmir Khan had been laid out helpless on the ground. Their assailants then went away. In support of this story we have the evidence of three persons, Sheo Mangal, the village watchmar, Rupnarain Lal, *patwari*, and one Bholi, a resident of a village close by. He says that he happened to be present at the time because he had himself come to pay up certain arrears due from him.

In considering the defence it is necessary to divide the appellants into three classes:—The first consists of Sampat and his cousin, Ram Sumer. The second consists of the appellants, Babban, Ram Partab, and Mata Saran, who were all residents of Baskop. In the third class I place the appellants Manmohan and Sheo Mangal who are residents of a village called Pura Bandi situated some six miles off, across the border of the Allahabad District. These two last say that they were not in or near Baskop at the time of the occurrence, that they had never been to the place and had no motive for going there. They ascribe the charge against them to enmity on the part of one Mahabir Prasad, who is a subordinate official employed at the same Tahsil as Abdul Raoof. The appellants placed in the second class admit that they are residents of Baskop, but say that they happened to be absent elsewhere at the time of the occurrence. I may say at once that such evidence as they produced on this point was flimsy and altogether unreliable. Sampat and Ram Sumer have a very definite story to tell which they have attempted to support by evidence. They say that Sampat had been supplying milk to Abdul Raoof and his camp followers during the time that the latter was staying in camp near Baskop. On the morning of December the 5th, the peon Mansab Ali demanded more milk and Sampat refused to supply it. Thereupon Abdul Raoof came to Sampat's house armed with a sword, and bringing Mansab Ali, Lakhmir Khan and another peon with him. These renewed their demand for milk, and on being refused assaulted Sampat. The latter cried for help and brought up Ram Sumer and others. Two of them assaulted Abdul Raoof and his followers. One of the peons ran away. Abdul Raoof drew his sword, and he himself along with Mansab Ali and Lakhmir Khan put up some sort of a fight, but they were knocked down by the two appellants. The medical evidence so far supports this story that Ram Sumer was found to have two slight cuts on his left wrist and left forearm. The first of these was only skin deep and the second about one sixth of an inch deep. Sampat on the other hand showed two distinct contused wounds, apparently inflicted by some blunt weapon, both on the right hand or wrist and two slight abrasions on another part of his person. In this connection it may be said at once that Abdul Raoof in his own account of the affair admits having drawn his sword and used it in self-defence. He puts forward as his immediate reason for bringing this weapon into play the assertion that Sampat was trying to carry off

a bag of rupees containing money which the witness had realized on behalf of the Government. This assertion finds practically no corroboration in the rest of the prosecution evidence and has been rejected by the learned Sessions Judge. In the case as argued before me no stress has been laid on the separate defence set up by the appellants Babban, Ram Partab and Mata Saran. That there was an affray between Abdul Raoof and the villagers of Baskop, in the course of which Sampat and Ram Sumer received the slight injuries already noticed while Abdul Raoof and his two attendants got a good deal the worst of the scuffle and suffered a fairly severe beating, is fully established by the evidence. That Abdul Raoof's assailants were five or more in number is a statement so corroborated by the medical evidence, and by the general probabilities of the case, that it may be accepted with confidence. That the residents of Baskop who thus assaulted Abdul Raoof included the appellants Babban, Ram Partab and Mata Saran, as well as Sampat and Ram Sumer, I hold to be also clearly established. No reason is suggested why these men in particular should have been implicated in place of other residents of Baskop concerned in the affair, and I have no doubt that the prosecution evidence may safely be accepted as to the presence on the scene of these five appellants and as to their having taken part in the assault. This was the view taken by the assessors who heard the evidence, as well as by the learned Sessions Judge.

The defence as argued before me raises two points. One is that the appellants Manmohan and Sheo Mangal were not there at all and have been falsely implicated for the reason already suggested The other is that the remaining five appellants can be shown from the prosecution evidence itself to have acted in the lawful exercise of their right of private defence, as that right is defined by sections 96 to 106 inclusive of the Indian Penal Code. In connection with this defence must be taken a further contention that, in any event, the prosecution cannot be held to have proved affirmatively the ingredients necessary to a conviction under section 333, Indian Penal Code, namely, (in this instance) that the assault committed upon Abdul Raoof took place while the latter was in the discharge of his duty as a public servant, or with intent to prevent him from discharging his duty as such, or in consequence of anything done or attempted to be done by Abdul Raoof in the lawful discharge of his duty as a public servant.

In taking up first the points argued on behalf of the main body of five appellants, I am bound at the outset to remark that this is not quite the defence which was set up in the Trial Court. It may be that sometime or other I shall yet come across a case in which an uneducated villager, on his trial upon a criminal charge, has realized the advantages of telling the Court exactly what had occurred, even though it may be impossible for him to do this without admitting some degree of culpability on his own part; but I cannot remember to have yet come across such a case in the course of my experience. In the present instance the accused have complicated the matter, and damaged their own case, by refusing to admit that the affray took place in the grove outside the village of Baskop and not in front of Sampat's door, as alleged by the latter. That the prosecution story is so far true I am quite satisfied on an examination of the evidence, and I do not think it necessary to labour the point any further. By refusing to admit this fact, Sampat has made it impossible for himself to explain to the Court how he came to be brought to the grove and what was being done to him there. This is unfortunate; but I do not think it is altogether impossible to arrive at a fairly accurate decision. The sum of money due from Sampat was a small one and it represented an old standing debt. I have no doubt that Abdul Raoof felt that he could not return to the Tahsil after his visit to Baskop, with this small sum unrealized, except at the risk of laying himself open to not undeserved rebuke. At the same time, I find it very difficult to believe that Sampat could not have paid the paltry sum of Rs. 3 without serious inconvenience to himself. Yet it is quite clear upon the evidence that he stubbornly refused to do so. The only possible explanation of this is that there is some substratum of truth in Sampat's story about this supply of milk taken from him for the Naib Tahsil-

dar's camp. In saying this I am not throwing any discredit upon Abdul Racof himself. The most probable explanation is that one or other of that officer's underlings had made the task of collecting supplies easier for himself by throwing out a suggestion that the price of the milk supplied would be taken into account in liquidation of the debt due. In Abdul Raoof's own evidence there seem to me two details which corroborate this view. His statement that he induced Sampat to accompany him to the grove in order that the accounts might be explained to him seems absolutely futile, if it is intended to refer to the accounts of *taqavi* advances, seeing that Sampat has all along admitted that this particular advance of Rs. 3 had been made to him and had not yet been repaid. It becomes quite intelligible if one supposes that it referred to the account of milk supplied. There is further Abdul Raoof's statement that the villagers who came up from Baskop demanded that Sampat should be let off. The average villager is shrewd and instructed enough about matters which immediately concern his daily affairs; and I have no doubt that the villagers knew as well as I do that the Naib Tahsildar had no power to remit a debt due to Government. I think it quite probable that Abdul Raoof did not know what had passed in the matter of obtaining supplies of milk for his camp, and that he was altogether taken by surprise when he realized, on the morning of December the 5th, that this small item was still outsanding and received a message from his subordinate that Sampat was flatly refusing to pay. Examining the evidence from this point of view, I have to determine first of all, whether it is proved that Abdul Raoof was assaulted under such circumstances as to bring the case within the operation of section 333, Indian Penal Code. A public servant does not cease to be a private citizen, and the law will take cognizance of an assault committed upon him, independently altogether of his position as a public servant. If, however, it is desired to invoke on his behalf the provisions of sections, 333, Indian Penal Code and other similar sections, it is for the prosecution to satisfy the Court that the facts of the case were such as to fulfill the requirements of those sections. In the present case I am content to say that I am not so satisfied, and I think the learned Sessions Judge, who has otherwise tried the case very carefully, has overlooked the importance of this point and the significance of some portions of the prosecution evidence. Without going so far as to hold that it is proved by the evidence that Sampat was wrongfully confined within the limits of the grove at the time when the assault upon Abdul Raoof was committed, I find it sufficient to say that I am not satisfied that the assault was committed in order to prevent that officer from discharging his duty in collecting this paltry sum of Rs. 3, or in order to punish him for attempting to do so. The immediate cause of the assault was in all probability what I have suggested, namely, some dispute about the supply of milk furnished by Sampat to the Naib Tahsildar's camp. I propose to set aside the conviction under section 333, Indian Penal Code.

I have now to go on and consider the question whether the five appellants whose case I am immediately considering have or have not been properly convicted of the offence of causing grievous hurt under section 325, Indian Penal Code, read with section 149, Indian Penal Code, in respect of the assault committed upon the Naib Tahsildar. On facts which I have found it is obvious that these five persons, acting in concert and with a common object, did assault Abdul Raoof, Mansab Ali and Lakhmir Khan and did between them cause grievous hurt to Abdul Raoof. The question is whether their action is covered by the provisions of the Indian Penal Code relating to the right of private defence. In order to set up this right it is incumbent upon the accused to begin by showing that an offence affecting the human body was being committed on the person of Sampat at the time when the accused persons interfered on his behalf. The only offence which can reasonably be suggested is that of wrongful confinement as defined in section 340 of the Indian Penal Code. Here the defence find themselves entangled in the difficulty which I have already pointed out, namely, that they have elected not to lay the whole of their defence truly before the Court and have re-

fused to admit that the transactions alleged against them took place in the grove where the Naib Tahsildar was in camp. I do not deny to them the right to make out their defence, if they can do so, out of the mouths of the prosecution witnesses. In this connection I am bound to note that two at least of the prosecution witnesses, Sheo Mangal *chaukidar* and the witness Bholi, stated that, when the villagers came up, they were informed that Sampat would not be allowed to leave the grove without first paying up the sum of Rs. 3 due from him. It must be remembered that it is no part of the prosecution case that Abdul Raoof had arrested Sampat for non-payment of the arrears of Government advances and from the evidence of Abdul Raoof himself I take it that he was not invested with any such power of arrest at the same time. Although I am prepared to believe from the evidence of the witnesses Sheo Mangal and Bholi that some such expression as that attributed to him was in fact used by Abdul Raoof, I think the evidence falls short of what would warrant a clear finding that Sampat was being wrongfully confined. Evidence given as to words used in the course of an altercation requires to be received with caution and cannot be acted upon without some reservation. It is quite possible that Abdul Raoof may have used some such expression as is suggested and that he intended, if possible, to realize this small sum before Sampat left the spot, without the Court being thereby driven to the conclusion that Abdul Raoof was holding the man in wrongful confinement. Moreover, so far as the question of the right of private defence goes, I must say that I entirely agree with the learned Sessions Judge that, if such right ever came into existence in favour of any of the appellants, it was grossly exceeded. If it was a mere question of getting Sampat away from the grove. I have no doubt that the object could have been accomplished without inflicting upon Abdul Raoof and his two subordinates the long list of injuries disclosed by the medical evidence. Abdul Raoof himself was undoubtebly thrashed after he had been disabled and knocked down. I think, therefore, that a conviction under sections 147 and 325 read with section 149 of the Indian Penal Code must be recorded against the appellants Sampat, Ram Sumer, Babban, Ram Partab and Mata Saran.

To the appellants Sheo Mangal and Manmohan I have decided to extend the benefit of the doubt. I think their defence evidence is sufficient to show that there was some sort of feud between themselves and the *qurq amin*, Mahabir Prasad. A very curious point in the case is that, while an inquiry into this matter was pending, Mahabir Prasad, or one of his brothers, seems to have invoked the interference of the Police and caused the houses of Sheo Mangal and Manmohan to be searched on the allegation that they had been concerned in a burglary at his house. I should not have attached as much weight as I do to this defence, if it were not for a very definite and glaring discrepancy in the prosecution evidence as it affects these two men. They were undoubtedly mentioned in the first report made by Sheo Mangal *chaukidar*. The latter deposes positively that the eight men named by him in that report had been mentioned to him by name by Abdul Raoof. On the other hand Abdul Raoof deposes that he had never seen Sheo Mangal and Manmohan accused before, and could not have possibly have given their names to any one. This seems to me to be true; and I find it difficult to understand why Sheo Mangal *chaukidar* should have asserted the contrary. If the implication of these two accused persons in the affair was perfectly straightforward, and if they are really guilty, they have been fortunate in escaping by reason of the folly of this prosecution witness. On the whole, I am inclined to doubt whether they were in the village of Baskop on the morning in question, or whether, being there, they would have taken it upon themselves to meddle in this affair. The result is that I accept the appeals of Sheo Mangal and Manmohan, I set aside the convictions and sentences against these two men and I acquit them of the offences charged. As they have been released on bail it is sufficient for me to direct that their sureties be discharged.

As regards the remaining five appellants, I set aside the conviction under section

In the matter of TWO PLEADERS.

333 of the Indian Penal Code and in lieu thereof record a conviction under sections 325 and 149 of the Indian Panal Code. I affirm the conviction under section 147 of the Indian Penal Code against all these five men.

The learned Sessions Judge has passed more lenient sentences against Sampat and Babban, as compared with the other three, and I propose to accept the discrimination which he has himself laid down Accordingly, as regards Sampat and Babban, I leave undisturbed the sentence of three months' rigorous imprisonment passed under section 147, Indian Penal Code. I record a sentence of six months' rigorous imprisonment under sections 325 and 149 of the Indian Panal Code and direct that the two sentences do run concurrently. As regards Ram Sumer, Ram Partab and Mata Saran I leave undisturbed the sentences of six months' rigorous imprisonment under section 147 of the Indian Penal Code and I record sentences of rigorous imprisonment for nine months each under section 325 read with section 149 of the Indian Penal Code and direct that these sentences do run concurrently. These accused persons must surrender to their bail to undergo the unexpired portion of their sentences.

PATNA HIGH COURT.

REFERENCES NOS. 2 TO 15 OF 1917.

March 12, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Sharfuddin and Mr. Justice Chapman.

In the matter of TWO PLEADERS.

Legal Practitioners Act (XVIII of 1879*)*, *s.* 14—*Professional misconduct*—Vakalatnama, *acceptance of, whether should be endorsed by Pleader acting under its authority—Civil Procedure Code (Act V of* 1908*)*, *O. III, r.* 4 (2)—*Pleader, appointment of, termination of.*

In miscellaneous proceedings arising out of a suit a Pleader is entitled to act on the authority of a *vakalatnama* obtained by him in the principal suit. [p. 329, col. 1.]

A Pleader ought to endorse his aceptance on the *vakalatnama* under which he acts as required by the rules of the High Court, and if he does not accept the authority in writing, he should not be allowed by the Judge to be heard or to act in any manner on behalf of the party. [p. 329, col. 1.]

Under Order III, rule 4 (2), Civil Procedure Code, after a Pleader has once been appointed by a party his employment cannot be determined except (1) by a writing signed by the client or the Pleader and filed in Court with the leave of the Court, or (2) by the termination of the proceedings in the suit. This rule should be strictly observed. [p. 329, col. 2; p. 330, col. 1.]

Where a Pleader who had been engaged by the plaintiff withdrew on behalf of the defendant money which he knew was rightly payable to the plaintiff, and took a conspicuous part as an arbitrator in a matter in which he was seriously and personally concerned:

Held, that he was guilty of serious professional misconduct. [p. 331, col. 2.]

References were made by the District Judge, Darbhanga, on the reports of the Subordinate Judge, Darbhanga, and the Munsif of Samastipore.

Sir *Ali Imam* and Messrs. *Hasan Imam, Kulvant Sahay, Purnendu Narayan Sinha, Rajendra Prasad, Baidyanath Narayan Sinha, Murari Prasad* and Rai *Tribhuanath Sahay*, for the Pleaders.

Mr. *Sultan Ahmad* (Government Advocate), for the Crown.

JUDGMENT.—These cases came before us upon references made through the District Judge of Darbhanga under section 14 of the Legal Practitioners Act, 1879.

Two Pleaders practising at S. are involved. Numerous items of misconduct are charged against each. The proceedings were originally commenced in respect of the majority of the items by the Munsif of S. Upon the motion of one of the Pleaders the cases were transferred to the Subordinate Judge of Darbhanga and a report against the two Pleaders was eventually submitted by him to the District Judge. Thereafter proceedings were commenced in respect of a few supplementary items by the Munsif. A second enquiry was made and a report submitted by him to the District Judge. We are not concerned with the question whether the District Judge had jurisdiction to transfer the first set of proceedings as the learned Counsel who appeared for the Pleaders before us waived all questions of jurisdiction.

The Pleader against whom proceedings were first initiated is named Girwar Dhar. The charges against him fall under three heads. Under the first head fall two cases, a rent suit and a miscellaneous case in which he appeared without a *vakalatnama*. Under the second head fall a considerable number

of cases in which the *vakalatnama* upon which he acted contained no written acceptance as required by the High Court rules. Under the third head fall five cases in which he is said to have acted for both parties

In regard to the first head it is sufficient to say that in the miscellaneous case the Pleader rightly acted upon the *vakalatnama* which he had obtained in the principal suit, and in the rent suit the explanation that it was by an oversight that the Pleader omitted to obtain a *vakalatnama* in the suit which was one of several analogous suits may be accepted. He will no doubt be more careful in future.

In regard to the second head there have been a considerable number of instances in which the Pleader acted upon a *vakalatnama* which contained his name but upon which there was no written acceptance as required by the High Court rules. Until the decision of the Calcutta High Court *In the matter of Jogesh Chandra Gupta* (1) there was some difference of opinion as to whether a Pleader could appear upon a *vakalatnama* which he had not accepted in writing. That decision was published in the Calcutta Weekly Notes on the 24th of January 1916. The appearances charged all occurred prior to that date. We do not, therefore, think it necessary to do more than to express our displeasure at the systematic disregard of the rule of this Court which requires that the acceptance of a *vakalatnama* should be in writing. We concur with the judgment of Richardson, J., in the case to which we have referred and of Beachcroft, J., in the case of *Mohesh Chandra Addy* v. *Panchu Mudali* (2). We are of opinion that a Pleader who does not comply with the rule of this Court on the subject of the acceptance of *vakalatnama* should not be permitted by the Judge to be heard, or to act in any manner on behalf of the party.

Under the third head there are cases in which the Pleader has acted for both parties. The first case is Rent Suit No. 1690 of 1912. In this case the Pleader appeared for the defendant after the case came back on remand in June 1914. The clerk of the plaintiff's Pleader obtained his signature upon the list of the plaintiff's witnesses in attendance on the 9th June 1915. The Pleader when he discovered his mistake on the 21st September 1915 (the date of hearing) retired with the permission of the Court. The second case is Title Suit No. 517 of 1914. In this case he was Pleader for the plaintiff. He signed a written statement on behalf of the defendants Nos. 1 to 4 who were formal defendants. He did not, however, take any part in the preparation of the written statement and the defendant's case was in fact in the hands of a *Mukhtar*. The third case is Title Suit No. 55 of 1915. In this case he was the Pleader for the plaintiff, yet on the 16th July 1915 he signed the list of witnesses in attendance on behalf of the defendants Nos. 1 to 3 the defendants' Pleader being absent on that day on account of illness. He took no other part in the case on behalf of the defendants. The next case is Miscellaneous Case No. 50 of 1915. In this case he was one of the Pleaders for the decree-holder. On the 5th June 1915 in the absence of the Pleader for the judgment-debtor he signed a petition for time in the latter's behalf, no other work was done by him on behalf of the judgment-debtor. The last case is Title Suit No. 252 of 1915. He was the Pleader for the plaintiff and signed the plaint. Subsequently he withdrew from the plaintiff's side with the consent of the plaintiff and the plaintiff scored through his signature in the plaint. Thereafter he appeared for the defendant.

We accept the findings of the Court that on none of these occasions was there any improper motive but we are of opinion that there was very serious carelessness which merits our censure and which, if it continues, will bring the Pleader into serious trouble.

In this connection we desire to advert to sub-rule 2 of rule 4, Order III of the First Schedule of the Code of Civil Procedure which requires that after a Pleader has been once appointed by a party his employment cannot be determined except (1) by a writing signed by the client or the Pleader and filed in Court with the

(1) 33 Ind. Cas. 831; 20 C. W. N. 283; 17 Cr. L. J. 191.

(2) 32 Ind. Cas. 395; 20 C W. N. 287; 23 C. L. J. 297; 43 C. 884.

In the matter of TWO PLEADERS.

leave of the Court, or (2) by the termination of the proceedings in the suit. He appears to have thought it sufficient on one occasion to obtain the verbal permission of the Court and upon another to act upon the consent of the party without any reference to the Court whatever. We desire that the rule should be strictly observed in future.

So far as Girwar Dhur is concerned we are of opinion that the Court was quite right in bringing the laxity, which prevails in these matters to our notice. But, while it has been abundantly shown that the Pleader has been very reprehensively careless and has systematically disregarded the rules of this Court and of the Code of Civil Procedure, we do not think it necessary to do more than to express our displeasure and to convey a warning that on the next occasion it will not be possible to take such a lenient view as we propose to do in the present case. We are of opinion that what we have said will operate as a sufficient deterrent and that no order of suspension or other specific penalty is required.

We come now to the case of the second Pleader. The first group of charges against him consists of cases in which he appeared for both parties. The first is Miscellaneous Case No. 9 of 1902 in which he was Pleader for the defendant and yet he initialled a petition for time on behalf of the plaintiff. The next is an Execution Case No. 354 of 1914 in which, after appearing for the mortgagee on the date of the mortgage decree, he appeared for the judgment-debtor in a proceeding for the setting aside the sale two years after the decree. We accept the finding that this was done with the consent of the decree holder, but we observe that the leave of the Court to retire from the employment of the decree-holder was not obtained under sub rule 2 of rule 4 above referred to.

The next charge relates to four analogous rent suits in which the Pleader accepted a *vakalatnama* on behalf of the plaintiffs and some months later accepted a *vakalatnama* on behalf of the defendants. He did not, however, do any act for the defendants except the signing of a list of witnesses in attendance and the signing of a petition for time. He received no instructions to conduct the case for the plaintiffs. It appears to be true that these mistakes were made at a time when thousands of rent suits were being filed, and it was a case of carelessness and not impropriety of motive.

The next case is Rent Suit No. 1345 of 1914 in which the Pleader had been engaged by the defendants and on one day initialled a list of witnesses in attendance filed by the plaintiff. As soon as he discovered his mistake he retired and presented a petition in Court for leave to do so. There is also a mortgage suit in which the Pleader made an application for the deposit of the mortgage money on behalf of the mortgagor and about a year after was engaged by the mortgagee to defend a suit brought by the mortgagor for recovery of possession of the mortgaged properties but on discovering his mistake he retired from the case. There is also a Small Cause Court Suit No. 526 of 1914 in which the Pleader accepted a *vakalatnama* from the plaintiff and thereafter acted for the defendant with the consent of the plaintiff and after scoring through his signature to the plaintiff's *vakalatnama*.

The next case is Title Suit No. 190 of 1915 in which the defendant anticipating the institution of a suit, had before the institution of the suit obtained the Pleader's acceptance on the back of a *vakalatnama*. Twenty days later the Pleader accepted a *vakalatnama* from the plaintiff and signed the plaint. Thereafter with the consent of the defendant he erased his signature of acceptance on the defendant's *vakalatnama*.

The next case is Small Cause Court Suit No. 52 of 915 in which the Pleader appeared for the defendants Nos. 3 to 9 and then subsequently withdrew from their case and appeared for the defendants Nos. 1 and 2. The finding, however, is that he never did any actual work for the defendants Nos. 1 and 2 and obtained no instructions from them.

In Small Cause Court Suit No. 701 of 1915 the Pleader signed a plaint and *vakalatnama* with a list of documents and thereafter a *vakalatnama* on behalf of the defendant and a petition for time to file the written statement. The written state-

ment, and list of witnesses were all signed also by the same Pleader. The Pleader's explanation is that he signed the plaintiff's papers by a mistake but there is no suggestion of impropriety of motive. The instances to which we have referred indicate gross carelessness which is deserving of very severe reprobation. His offence is aggravated by the fact that he had received a warning from the Court in 1913. His carelessness was likely to prejudice the interests of his clients and to bring himself into serious trouble and this has actually resulted in the case against him to which I propose now to refer.

The facts of the case are as follows:—

Leku Singh obtained a mortgage decree against Shib Sahai. The mortgaged property had been sold in execution of a rent decree obtained by a third party against Shib Sahai—before the decree was executed. After the sale in execution of this rent decree there remained in deposit, to the credit of Shib Sahai, the surplus sale proceeds. Leku Singh instituted a Title Suit No 134 of 1915 for the purpose of enforcing his charge against these surplus sale proceeds. The Pleader was engaged. He was instructed to move for an attachment before judgment but did not carry out his client's instructions. The suit for declaration of a charge on the surplus sale proceeds was decreed *ex parte* on the 15th June 1915. On the 11th June 1915, only four days before the decree, the Pleader accepted a *vakalatnama* from Shib Sahai for the purpose of obtaining a payment-order in respect of the sale proceeds. And, under this *vakalatnama*, on the very date on which his client Leku Singh obtained a decree, the Pleader took out the payment-order for the surplus sale proceeds standing to the credit of Shib Sahai and cashed the payment-order at the treasury. On the 30th June 1915, the Pleader on behalf of Leku Singh applied for execution of his decree praying for the issue of a payment order. It was then discovered that it had already been withdrawn by the Pleader himself on behalf of the defendant Shib Sahai. Thereafter Leku Singh instituted a suit against Shib Sahai to which the Pleader was also made a defendant alleging fraud and collusion. This suit was settled by an arbitration. The Pleader himself took a conspicuous part as an arbitrator and the arbitration took place in his house. It is significant that at the conclusion of the Pleader's examination upon this matter in the course of these proceedings he put in a petition tendering his resignation from practice which resignation he subsequently withdrew. It is possible that the Pleader throughout these discreditable proceedings was not actuated by improper motives but the carelessness and disregard of the rules of the profession were so gross that it cannot be overlooked. It was grossly careless to permit himself to withdraw on behalf of the defendant Shib Sahai money which he must have known was rightly payable to his client Leku Singh. It is also clear that no person who was not content with a very low standard of principle would consent as he did to take a conspicuous part as an arbitrator in a matter in which he was seriously and personally concerned.

We are of opinion that his misconduct cannot be condoned. We direct that he be suspended for a period of one year, the period to commence from the 1st January 1917.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1494 OF 1916.

November 13, 1916.

Present:—Mr. Justice Broadway.

SARDAR MUHAMMAD—COMPLAINANT

versus

NUR MUHAMMAD—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance for son—Past neglect, effect of—Magistrate, duty of.

When an application is made under section 488, Criminal Procedure Code, by a child, it is the duty of the Magistrate to enquire, *first*, as to whether the child is unable to maintain itself, *secondly*, if the father is in a position to support his child, and *thirdly* whether the father is neglecting to maintain his child. Past neglect of his duty to support his child may be a cogent factor in coming to a finding that at the time of the application the father is neglecting or refusing to support his off-spring. [p. 334, col. 1.]

The object of maintenance proceedings, however, is not to punish a parent for his past neglect but to prevent vagrancy by compelling those who

can do so to support those who are unable to support themselves and have a moral claim to support. If, therefore, a father offers to maintain his son on condition that he lives with him the Magistrate should refrain from passing an order against the father until he has had an opportunity at least of proving that the offer is made in good faith. [p. 334, col. 2; p. 335, col. 1.]

The fact that, in the past, he has neglected to support his son should not be considered as sufficient, by itself, to hold that the offer is not made in good faith. [p. 335, col. 1.]

Man Singh v. *Musammat Dharmon*, 18 P. R. 1894 Cr., followed and explained.

Musammat Mehtao Bibi v. *Alla Bakhsh*, 17 P. R. 1885 Cr.; *Emperor* v. *Ayshabai*, 6 Bom. L. R. 536; 1 Cr. L. J. 599; *Kariyadan Pokkar* v. *Kayat Beeran Kutti*, 19 M. 461; 2 Weir 621; 6 Ind. Dec. N. S.) 1027; *In re Parathy Valappil Moideen*, 21 Ind. Cas. 469; 14 M. L. T. 223; 25 M. L. J. 355; (1913) M. W. N. 997; 14 Cr. L. J. 597 and *Ma Shwe Hmyin* v. *Mg. Po Chit*, 27 Ind. Cas. 841; 16 Cr. L. J. 217; 8 L. B R. 105, distinguished from.

Mi Saw v. *S.*, 7 Ind. Cas. 460; 11 Cr. L J. 488; U. B. R. (1910 I. 1; *Mi Thein* v. *Nga Po Nyun*, 23 Ind. Cas. 486; 7 Bur. L. T. 34; 15 Cr. L. J. 278, dissented from.

Case reported by the Sessions Judge, Jullundur, with his No. 188-J, of 25th August 1915.

FACTS.—The complainant, Sardar Muhammad, a minor, aged about nine years, sued his father, Nur Muhammad, accused, for maintenance under section 488 of the Code of Criminal Procedure.

Complainant's mother, *Musammat* Karm Bibi, was divorced by the accused on 8th September 1908, but was allowed to keep her son. The accused married another wife by whom he has two daughters.

The accused denied that he had neglected the boy and offered to maintain him if he came and lived with him.

The Magistrate was of opinion that the present offer by the accused to maintain the complainant was, in view of his past behaviour, a mere farce, and consequently decided that an order should be passed directing the accused to maintain the complainant.

The accused, on conviction by M. Nazir Ahmad, exercising the powers of a Magistrate of the first class, in the Jullundur District, was directed by order dated 4th July 1916, under section 488 of the Criminal Procedure Code, to pay a monthly allowance of Rs. 5 to the complainant till he became of age. The order has been suspended.

GROUNDS.—*Man Singh* v. *Musammat Dharmon* (1) shows that it is only under very exceptional circumstances that a child can refuse to live with his father and still claim maintenance. The father, in the present case, has doubtless neglected his own son in the past. There is, however, nothing to show that he is inimically disposed towards him. As he has only daughters by his second wife, he will probably be only too anxious to treat his only son well, and to protect him from the possible jealousy of the stepmother.

In the circumstances I report the case for the order of the Chief Court, recommending that the order of maintenance be set aside.

Mr. *Fazl i Hussain*, for the Complainant.

Mr. *Kanwar Narain*, for the Accused.

JUDGMENT.—*Musammat* Karm Bibi was married to Nur Muhammad and by him had a son, Sardar Muhammad.

Nur Muhammad apparently was desirous of marrying a second wife—the woman he proposed to marry, however, would have nothing to do with him so long as *Musammat* Karm Bibi lived with him. Nur Muhammad thereupon proceeded to divorce *Musammat* Karm Bibi and executed a deed of divorce on the 8th September 1908. In this deed was a clause to the effect that the son, Sardar Muhammad, then aged two years was made over to his mother who would maintain him.

The boy from that time lived with his mother and was maintained and cared for by her and her relatives. Finding themselves reduced in their means, an uncle of the boy has now applied, on his behalf, under section 488, Criminal Procedure Code, asking for an order fixing an allowance for his maintenance payable by Nur Muhammad.

Nur Muhammad objected to this, and urged that he had all along been assisting in the maintenance of his son, and that he had neither neglected nor refused to support him. He finally urged that in any event he was willing to support Sardar Muhammad so long as he continued to live with him.

The Magistrate after a careful enquiry into

(1) 18 P. R. 1894 Cr.

the allegations made found (*i*) that since the divorce of *Musammat* Karm Bibi the boy has been maintained by his mother, without any assistance from Nur Muhammad ; (*ii*) that Nur Muhammad is completely under the influence of his present wife, and that it is by no means improbable that the boy would be subjected to ill-treatment if he was forced to live with his father and step-mother ; and (*iii*) that the boy is intelligent and does not wish to go and live with his father. He distinguished *Man Singh* v. *Musammat Dharmon* (1), *Abdulla* v. *Musammat Zainab* (2) and *Ralli* v. *Musammat Atti* (3), on the ground that in this case Nur Muhammad renounced his son by a written agreement, and had neglected him deliberately ever since, until this application was made, and that his present offer to maintain him on condition that he came to live with him is only made with a view to defeat the application.

He accordingly held that Sardar Muhammad was entitled to maintenance while living apart from his father, and fixed the maintenance at Rs. 5 per mensem payable from the 24th July 1916, the date of the order.

Against this order Nur Muhammad preferred an application to the learned Sessions Judge, Jullundur, under section 438, Criminal Procedure Code, and that officer has reported the case to this Court with the recommendation that the order passed by the Magistrate should be set aside.

The report and recommendation is based on *Man Singh* v. *Musammat Dharmon* (1), and the learned Sessions Judge is of opinion that although Nur Muhammad had neglected his son in the past, the son was not entitled to claim maintenance while living apart from his father.

He also seems to think that because Nur Muhammad has had only daughters by his second wife, he is more likely to be well disposed to his son, and "to protect him from the possible jealousy of the step-mother." From the above it will be seen that the Courts below have consistently found :—

(*i*). That Nur Muhammad deliberately abandoned his son when he was two years of age, and made him over to his mother, *Musammat* Karm Bibi, at the time of her divorce.

(*ii*). That ever since then Nur Muhammad has neglected to maintain his son.

Mr. Fazl-i-Hussain has emphasised these findings and has contended that the true construction to be placed on section 488 (1), Criminal Procedure Code, is that once it has been *proved* that a child has been neglected by the father, the Magistrate has jurisdiction to pass an order of maintenance and that the father cannot oust this jurisdiction by offering to maintain the child if the child is made over to him.

He has referred me to *Musammat Mehtab Bibi* v. *Alla Bakhsh* (4) and *Emperor* v. *Ayshabai* (5), but they do not deal with the point now under consideration and cannot assist in its decision. He urged that *Man Singh* v. *Musammat Dharmon* (1) is bad law and that the two rulings cited from the Punjab Law Reporter merely follow *Man Singh* v. *Musammat Dharmon* (1) without any discussion of the point at issue.

Mr. Kanwar Narain, for Nur Muhammad, supported the opinion of the learned Sessions Judge and contended that the matter is really concluded by the decision of this Court referred to above. He has, however, very fairly and properly drawn my attention to certain rulings which seemed to support Mr. Fazl-i-Hussain's contention.

These rulings are *Mi Saw* v. *S.* (6), *Mi Thein* v. *Nga Po Nyun* (7), *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (8), *Parathy Valappil Moideen, In re* (9) and *Ma Shwe Hmyin* v. *Mg. Po Chat* (10).

Of these (1), *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (8), does not afford much assist-

(2) 5 P. L. R. 1904; 1 Cr. L. J. 39.
(3) 24 Ind. Cas. 841; 11 5 P. L. R. 1914; 21 P. W. R. 1914 Cr.; 15 Cr. L. J. 529.
(4) 17 P. R. 1885 Cr.
(5) 6 Bom. L. R. 536; 1 Cr. L. J. 599.
(6) 7 Ind. Cas. 460; 11 Cr. L. J. 488; U. B. R. (1910) I, 1.
(7) 23 Ind. Cas. 486; 7 Bur. L. T. 34; 15 Cr. L. J. 278.
(8) 19 M. 461; 2 Weir 621; 6 Ind. Dec. (N. S.) 1027.
(9) 21 Ind. Cas. 469; 14 M. L. T. 223; 25 M. L. J. 355; (1913) M. W. N. 997; 14 Cr. L. J. 597.
(10) 27 Ind. Cas. 841; 16 Cr. L. J. 217; 8 L. B. R. 105.

ance. That was a case of *moplahs*, and a question arose as to whether the father was bound to maintain the children.

(2) *Parathy Valappil Moideen, In re* (9), was also a case relating to *moplahs*, and it was held that when a child was living with his or her "lawful guardian," section 488 (4), Criminal Procedure Code, did not disentitle him or her to claim maintenance from the father.

(3). In *Mi Saw* v. *S.* (6) it was held by the Judicial Commissioner of Upper Burma that "a father cannot justly refuse to maintain his children on the plea that they will not live with him. If he wishes them to live with him, his obvious course is to get an order from the proper authority giving him the custody of them."

(4). In *Mi Thein* v. *Nga Po Nyun* (7) the above case was followed by the same Court, though it would seem that it was doubtful whether the offer to support the child if he would live with the father was a *bona fide* one.

(5). *Ma Shwe Hmyin* v. *Mg. Po Chit* (10) does not afford much assistance as it was held that the father was the lawful guardian and that the children had been living with him until they had gone on a visit to their divorced mother, who apparently had induced them to live with her in order that she could claim maintenance for them. In these circumstances the father was held to be justified in refusing to maintain them unless they returned to his custody.

It will be seen from the above decisions that the only ones that have an immediate bearing on the point under consideration are the two Burma decisions; *Mi Saw* v. *S.* (6) and *Mi Thein* v. *Nga Po Nyun* (7). According to these decisions a father is bound to support his children in spite of their refusal to live with him, but he has his remedy inasmuch as he can apply in the proper Court to be appointed their guardian and to have them placed in his custody.

In *Man Singh* v. *Musammat Dharmon* (1) it was held by Plowden and Roe, JJ., that though by the express provisions of section 488, Criminal Procedure Code, an order of maintenance may be made by a Magistrate in favour of a wife, notwithstanding an offer by the husband to support her if she lived with him, there is no similar provision as to children. The father is, said the learned Judges, "within his right when he offers, in answer to an application by a wife or child, under section 488, to maintain them on condition that they live with him. When he does that it cannot be said that he refuses to maintain them."

The decision was, however, based on the facts of that particular case and the learned Judges went on to say at page 65:

"We do not say that there may not be circumstances which would justify a finding that the father neglects to maintain his children, notwithstanding such an offer, and an order for separate maintenance, notwithstanding that the father offered to maintain them if they would live with him."

And Mr. Fazl-i-Hussain contends that the Magistrate is right, in the present case, in holding that the father's offer is not a *bona fide* one but merely intended to defeat the boy's application. *Man Singh* v. *Musammat Dharmon* (1) was followed in *Abdulla* v. *Musammat Zainab* (2) and *Ralla* v. *Musammat Atti* (3) and in the latter case at any rate it cannot be said that *Man Singh* v. *Musammat Dharmon* (1) was not considered, although it was not elaborately discussed.

It seems to me that when an application is made under section 488, Criminal Procedure Code, by a child, it is the duty of the Magistrate to enquire, *first*, as to whether the child is unable to maintain itself, *secondly*, if the father is in a position to support his child, and *thirdly*, whether the father is neglecting to maintain his child. Past neglect of his duty to support his child may be a cogent factor in coming to a finding that at the time of the application the father is neglecting or refusing to support his off-spring.

The object of maintenance proceedings, however, is not to punish a parent for his past neglect, but to "prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and have a moral claim to support." It

is the future support of the child by the father that has to be considered and ensured. If then a father offers to maintain his son on condition that he lives with him, it seems to me that the Magistrate should refrain from passing an order against the father, until he has had an opportunity at least of proving that his offer is made in good faith.

The fact that, in the past, he has neglected to support his son should not be considered as sufficient, by itself, to hold that the offer is not made in good faith. That I think is the true construction to be placed on *Man Singh* v. *Musammat Dharmon* (1) and in the face of this decision I am not prepared to follow the Burma decisions quoted above.

Nur Muhammad's conduct in getting rid of his wife and child in 1908 and his reason for so doing may not be commendable, but it is quite possible that it was then considered by both parents that he would be better looked after by the mother who undertook to maintain him. There is nothing to show that *Musammat* Karm Bibi or any one else on behalf of Sardar Muhammad ever asked Nur Muhammad for assistance until this application was filed, and there is no reason why he should now be compelled to pay for his son's maintenance while living separately from him. The friends of the minor can move the proper Courts for an order appointing some one, other than Nur Muhammad, guardian of the boy, and if they succeed they would then be entitled to claim maintenance from Nur Muhammad on his behalf. In the circumstances I accept the recommendation of the learned Sessions Judge and set aside the order of the Magistrate.

Revision accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 399 OF 1917.

May 26, 1917.

Present:—Mr. Justice Piggott.

TAPTI PRASAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s 304A—Railways Act (IX of 1890), s. 101—Rash and negligent act causing death—Station Master giving "line clear" with knowledge that another train is standing in the way of the incoming train—Offence.

An Assistant Station Master gave a "line clear' to an incoming passenger train on a foggy night with the knowledge that a goods train was stand-' ing at a particular point where the passenger train might collide with it, but hoping to remove the goods train to a siding before the arrival of the passenger train. The goods train was not removed in time and a collision occurred which was attended with loss of life:

Held, that the Assistant Station Master was guilty of a rash and negligent act in giving the "line clear" and was, therefore, punishable under section 304 A of the Penal Code and section 101 of the Railways Act. [p. 336, col 2.]

Criminal revision from an order of the Sessions Judge, Allahabad.

Mr. *Satya Chandra Mukerje*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The applicant Tapti Prasad was Assistant Station Master at a Railway Station called Bharwari. While he was on duty a collision took place, within the limits of that station between a down passenger train and an up goods train. The latter train was standing within the station limits but beyond the starting signal at the moment when Tapti Prasad gave the "*line clear*" which permitted the passenger train to leave the next station on the line. The collision which followed was attended with loss of life, and the immediate cause of the collision was the action of Tapti Prasad in giving the "*line clear*" for the passenger train under the circumstances stated. In doing so he contravened rules laid down for his observance, both general and special. The Magistrate who tried the case has written an admirable judgment in which he has set forth all the evidence and discussed it in an exceedingly fair and convincing manner. He found Tapti Prasad guilty and convicted him under section 304 A of the Indian Penal Code and section 101 of the Indian Railways

Act IX of 1890. The convictions were affirmed and the appeal of Tapti Prasad was dismissed by the learned Sessions Judge. I have had to consider in the main two points. The less important of the two is a plea as to the severity of the sentence. This rests mainly upon Tapti Prasad's assertion that in giving "line clear" at the moment when he did, and under the circumstances in which he did, he was acting under direct orders received from a superior officer named Dhani Ram, the "controller" at Allahabad. The Magistrate and the Sessions Judge have alike pointed out that this plea would in no case amount to a complete defence to the charge. It has, however, an important bearing on the question of sentence, and in view of the manner in which the Courts below have expressed themselves on the point, I thought it incumbent upon me to examine the evidence and to decide whether there was any reasonable basis for the plea taken. I am quite satisfied that there was not, and that the Courts below were right in holding, as they did in substance, that Tapti Prasad gave the "line clear" on his own responsibility and without express orders from the controller.

The other point taken, and the one which goes to the root of the case, is that there was neither rashness nor negligence in the accused's action, so as to bring it within the purview of section 304A of the Indian Penal Code and that there was no disobedience to any rule, nor any rash or negligent act on his part, to make the provisions of section 101 of the Railways Act applicable. I am satisfied that there was a distinct breach of the rules in giving the "line clear" while the goods train was standing at the particular point where to the accused's own knowledge it was standing. Putting that matter on one side, I am also satisfied that the giving of the "line clear" under the circumstances stated was a rash act. The plea to the contrary is based upon the fact that the approaching passenger train had to run past the distant signal of Bharwari Railway Station before it could collide with the goods train, and that the aforesaid signal was at "danger." The collision took place at night and it was a foggy night. I mention these circumstances rather as explaining how the collision occurred, and as bearing on the degree of culpability attaching to the accused's act, than as material in themselves on the question of law involved. The possibility of an incoming train passing a danger signal, either through some failure in the mechanism of the signal itself, or through some error or oversight on the part of the driver, is a matter which is taken into consideration by the rules, and the interposition of a danger signal cannot be permitted, with any reasonable regard for the safety of the travelling public, to relieve an officer in the position of a Station Master, or Assistant Station Master on duty, from the obligation of observing strictly the rules laid down on the subject of granting or withholding the "line clear". Danger signal or no danger signal, it was a rash act on the part of the accused to have granted the "line clear" under the circumstances stated. It is true that when he granted it he hoped that the goods train would be safely backed into a siding out of the way, before the incoming passenger train reached the station limits, and that within the time available this could have been done. To say this, however, is only equivalent to saying that the accused did not deliberately plot the bringing about of an accident involving imminent risk of life to his fellow creatures. In taking upon himself the responsibility of granting "line clear," when he knew that the line was not actually "clear," and taking it for granted that he would succeed in getting the line cleared within the time available, he displayed precisely that quality of mind which is indicated by the word 'rashness." I cannot see my way to interfere either with the conviction or the sentence. The application is dismissed.

Application dismissed.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 44 OF 1917.

July 3, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Chapman and Mr. Justice Jwala Prasad.

BARA ESTATE, LTD.—DEFENDANT—APPELLANT

versus

ANUP CHANDRA—PLAINTIFF—RESPONDENT.

Letters Patent (Patna)—Order of Single Judge remitting issue for trial—Appeal, whether lies—Contract prima facie *unconscionable—Undue influence—Burden of proof.*

There is no right of appeal under the Letters Patent against the order of a Single Judge of the High Court directing the trial of a certain issue. [p. 340, col. 2.]

Where a contract is on the face of it unconscionable it is the duty of the party seeking to enforce it to prove that the contract was not induced by undue influence. [p. 341, col. 1.]

Letters Patent Appeal from a decision of Mr. Justice Atkinson in Second Appeal No. 2309 of 1915.

FACTS material to the report will appear from the following judgment of

ATKINSON, J.—This second appeal comes before me consequential on an order of remand made by Mr. Justice Kingsford when sitting in this Court alone on the 25th of July 1916. This case was pending in second appeal before him then from the decision of Mr. Scroope, District Judge of Muzafferpore, affirming the decree granted by the Munsif in favour of the plaintiff. It is necessary shortly to state the facts of the case. The plaintiff is a *raiyat* occupying a small quantity of land in the District of Motihari, and it appears that he was induced to enter into a contract with the defendant company undertaking to sow sugarcane on his lands. He was a tenant of the defendant company, and he alleges that the contract, which was made on the 28th of September 1913, was a contract which he was induced to execute under circumstances which constituted undue influence and coercion in point of law; and he alleges that at the time he made the contract he was not a free agent. It is well to note that he was absolutely alone, dealing with the defendant company and their servants, and that he had no independent legal advice whatsoever: and that being a man of the *raiyati* class he was more or less, having regard to the position in which he stood towards the defendant company, in an embarrassed position. He alleges in paragraph 2 of the plaint that on the 28th September 1913 when the plaintiff went to the bungalow of the *Saheb*, Bireswar Lal the Munshi of the Factory told the *Saheb* that the plaintiff was not willing to pay the damages of sugarcane, upon which the *Saheb* asked the plaintiff to make his thumb impression upon stamped paper; the plaintiff refused to do so, upon which the *Saheb* threatened and chid him and said that he would cite the plaintiff's wife and daughter as witnesses on behalf of the Choudhury and would call on them to attend Court. The plaintiff was then alone and the *amlas* of the Factory and the *Saheb* began to threaten the plaintiff and under the undue influence so exercised the plaintiff made his thumb-impression on a blank stamp and also on a printed stamp and upon this the *Saheb* released the plaintiff on taking Rs. 6 as fine. In paragraph 3 he repeats more or less the same allegations and he contends that the agreement is not binding upon him, as it was executed under circumstance which amount in law to undue influence and coercion. The learned Munsif found in favour of the plaintiff and held that the contract which had been made by the plaintiff with the defendant company was a contract executed under circumstances of duress and coercion. The learned Judge Mr. Scroope on appeal affirmed the decision of the Munsif, and Mr. Scroope in the last page of his judgment sets out the grounds upon which he bases his decision in affirming the decree of the primary Court. No doubt at the beginning of the last paragraph of his judgment the learned Judge says: "As to the circumstances of the execution of the *satta*, I may say at once that I do not believe the plaintiff that Mr. MacDonald forced him to execute the *satta* by threats and took Rs. 6 from him." But in my view this by no means disposes of the case made by the plaintiff, and I think that Mr. Scroope in his judgment gives very cogent reasons for holding that the plaintiff was under the circumstances of this case induced to execute the contract, that he did with the defendant company, by reason of undue influence. The learned Judge says: "It is quite probable then that the factory servants took advantage of the

plaintiff being in a tight place and their master being the president of the *panch*, to threaten the plaintiff and so to get the *satta* out of him. Anyhow having regard to the fact that the plaintiff was mixed up in a criminal case at the time, that the said company was his immediate landlord and that its Manager Mr. MacDonald was a president of the *panch* in the habit of dealing with such criminal cases one, must hold that the defendant company was in a position to dominate the will of the plaintiff and that it was in such circumstances that the contract was executed." The learned Judge goes on to say: "The relative position of the parties then being such, the person claiming the benefit of the *satta* should be able to prove that in point of fact the terms are fair and reasonable (section 16, Contract Act), which they are not as we have seen. I, therefore, think that the plaintiff, especially when he came to Court at the earliest possible opportunity, is entitled to have the *satta* rescinded on the ground of undue influence and the decision of the learned Munsif in giving him a decree is, therefore, correct." The decision came before Mr. Justice Kingsford, and the learned Judge remanded the case for re-trial on Issue No. 3 as originally settled, stating his reason for doing so in the following terms:—

"Now, I think, it is quite clear that when the plaintiff alleged coercion only, and not undue influence, the learned Judge was not authorised to find for the plaintiff a case which was not the plaintiff's own."

I cannot follow the learned Judge at all when he says that in the plaint the case put forward on behalf of the plaintiff was not undue influence. But even if coercion alone was alleged it seems to be quite immaterial because, in my opinion, coercion and undue influence are really synonymous terms. Lord Macnaghten in a case reported as *Miller* v. *Grand Trunk Railway Company of Canada* (1), citing with approval the dictum of Sir James Hannen, lays down that "To be undue influence in the eye of the law there must be to sum it up in a word coercion." Therefore I cannot see how the ground upon which the learned Judge based his order remanding the case for re-trial is sustainable. On remand the case came before Mr. Sheepshanks for decision at Muzafferpore. That learned Judge took a contrary view to that taken by Mr. Scroope. The combat between the parties before me now is whether or not I am bound by the order of remand. The defendants contend that I am bound by the order of remand made by Mr. Justice Kingsford and that Mr. Sheepshank's decision disposes of this case. On the other hand the plaintiff contends that the whole case is open to me, and that I am at liberty to consider whether or not the decision of Mr. Scroope was right in point of law. Mr. Scroope had the evidence before him, he found as a fact and he agreed with the Munsif in finding as a fact that the contract made by the plaintiff in favour of the defendant company was made under circumstances which constituted undue influence in point of law, and that being so, it was not open to the learned Judge Mr. Justice Kingsford, when sitting here in July 1916, to remand the case on the ground he did, because the finding of the Judge was a conclusive finding of fact supported by evidence. It is contended on behalf of the appellants before me that the order of remand is binding upon me inasmuch as the decision of Mr. Justice Kingsford was an unappealed-from decision, and no appeal having been taken from it I am bound by his order remanding the case. With this argument I cannot agree, having regard to the meaning to be attached to the word "judgment" in section 10 of the Letters Patent of this Court. The word "judgment" as used in section 10 of the Letters Patent, in my opinion, means a final judgment and not a judgment or order remanding case for re-trial on a certain issue. However on the other side it is contended that it is open to me to review the order directing the remand and several cases have been cited in support of that contention. The strongest case is the case of *Mubarak Husain* v. *Bihari* (2). That case originally came before Mr. Justice Mahmood who remanded the case and the finding on remand came before Mr. Justice Aikman, who held that the reference was unnecessary and he disposed of the appeal on the original findings. It was held on Letters Patent Appeal that

(1) (1906) A. C. 187; 75 L. J. P. C. 45; 94 L. T. 231; 22T . L. R. 297.

(2) 16 A. 306; A. W. N. (1894) 97; 8 Ind. Dec. (N. S.) 199.

the Judge before whom the appeal subsequently came was competent to disregard the findings arrived at on remand. The same point was taken in the case *of East Indian Railway Co.* v. *Changa Khan* (3). At page 1036*, Holmwood and Mullick, JJ., say: "It is clear as a matter of principle that after there has been a decision of fact in the two Courts of Original and first Appellate jurisdiction, the High Court cannot entertain a second appeal upon any question as to the soundness of the findings of fact by the lower Appellate Court." To the like effect I think is the decision of the case of *Hiatunnessa Bibi* v. *Kailash Chandra Saha* (4). At page 262† the Chief Justice gives very cogent reasons why the Court should disregard the order of remand made by the Judge. In my opinion the judgment of Mr. Scroope was quite clear, precise and intelligible. It was a judgment warranted by the facts, and, therefore, there was no ground for remanding the case. That being so, I consider that the order of remand is not in any way binding upon me, nor do I feel myself bound by the decision of Mr. Sheepshanks in this case given pursuant to the order of Mr. Justice Kingsford. Accordingly I hold that the order of remand should not have been made. I disallow this appeal with costs of the hearing on remand of the lower Appellate Court and the costs in the Munsif's Court.

Messrs. *P. Kennedy* and *Saroshi Charan Mitter*, for the Appellant.

Messrs. *Sushil Madhab Mullick*, *Mustafa Khan*, *Harnarain Prasad* and *Sambhu Saran*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This appeal arises out of a suit brought by the respondent to have a *satta* executed by him on September 25th, 1913, in favour of the appellant set aside, on the ground that it was obtained from him under what he described in his plaint as "*dabao najaiz*." The *satta* binds the respondent for a period of fifteen years to grow sugarcane on 12 *cottas* of his holding every year according to the directions of the servants of the appellant. The respondent was to get 3 annas per maund for the sugarcane produced and was to receive Rs. 30 as *taccavi* in certain instalments. If he failed in any year to cultivate the requisite area with sugarcane, he was to pay damages at the rate of Rs. 50 per *bigha*. The *satta* expressly provides that the appellant's servants shall be entitled to select the land on which the respondent was to grow the sugarcane. The respondent in his plaint alleged that there was a dispute between him and a *pattidar* named Jagan Choudhuri, that Jagan Choudhuri went to Mr. MacDonald, the Manager of the appellant company, and that Mr. MacDonald sent for a Sub-Inspector of Police, who took the respondent to the Factory and directed him to go to the Manager and settle the dispute. The respondent accordingly went to the Manager's bungalow. When he arrived there the Manager was told by the Munshi of the Factory that the respondent was not willing to pay damages on account of the sugarcane. Thereupon the Manager asked the respondent to put his thumb-impression upon a certain stamped paper. The respondent refused to do so and thereupon the Manager threatened him and said that he would cite the respondent's wife and daughter as witnesses in the case with Jagan Choudhuri. The respondent says that he was alone when the employees of the Factory and the Manager himself threatened him and that it was in that state of affairs that he put his thumb-impression on the printed stamped paper. Ultimately the Manager let the respondent go after taking Rs. 6 from him as a fine. The respondent says that he subsequently learned that the stamped paper was in fact *satta* binding him to grow sugarcane on the terms above stated. He says that he was not willing to sign any such *satta* but was induced to do so by "*dabao najaiz*" and that if the *satta* were left outstanding it would prejudice him greatly. He, therefore, asks that the *satta* may be set aside.

The appellant pleaded that the *satta* represented a fair contract and denied all the material allegations in the plaint and pleadings. The Munsif fixed four issues one of which was, "was the *satta* in suit executed by the plaintiff under duress or coercion." The Munsif found in favour of the respondent on that issue and

(3) 28 Ind. Cas. 245; 22 C. L. J. 212; 42 C. 888; 19 C. W. N. 1034.

(4) 17 Ind. Cas. 224; 16 C. L. J. 259.

*Page of 19 C. W. N.—*Ed.*

†Page of 16 C. L. J.—*Ed.*

decreed the claim. There was an appeal to the Court of the District Judge. Mr. Scroope, who was presiding in that Court at the time, examined the *satta* and gave it as his opinion that it was a "most one-sided arrangement." He declined to accept the respondent's story that he had been forced by Mr. MacDonald or his servants to execute the *satta* by means of threats but he found that it was proved that just before the *satta* was executed there was a criminal case pending against the respondent. He points out that Mr. MacDonald himself had stated that there was such a case and that the Sub-Inspector of Police had visited the Factory in connection with it. Mr. Scroope went on to say that in his opinion it was probable that the Factory servants took advantage of the respondent being in a tight place and their master being President of the *panch* to threaten the respondent and so got the *satta* out of him. "Anyhow", said the learned District Judge, "having regard to the fact that the plaintiff was mixed up in a criminal case at the time, that the said company was his immediate landlord and that its Manager Mr. MacDonald was a president of the *panch* in the habit of dealing with such criminal cases, one must hold that the defendant company was in a position to dominate the will of the plaintiff and that it was in such circumstances that the *satta* was executed." In the opinion of the learned Judge, the relative position of the parties being such as he describes, the appellant was bound to show that the terms of the *satta* were fair and reasonable under section 16 of the Contract Act. Mr. Scroope was of opinion that there was no proof that the terms were fair and reasonable and he accordingly dismissed the appeal.

There was then a second appeal to this Court which came before Mr. Justice Kingsford. That learned Judge was of opinion that a case had been made out for the present respondent which had not been put forward by him in his plaint and that what the Munsif and the District Judge should have done was to set themselves to enquire whether the respondent had proved the allegations contained in the plaint which amounted in the opinion of Mr. Justice Kingsford to a definite charge of coercion, whereas they had disposed of the case as if it was one of undue influence. Mr. Justice Kingsford, therefore, directed that the record should be returned for a fresh finding upon the third issue, which I have set out above. The case then came before Mr. Sheepshanks. He also was of opinion that the circumstances afforded good ground for supposing that the execution of the *satta* was not altogether a voluntary one but had been induced by pressure of one kind or another. He went on to carry out the orders of this Court and see whether the respondent had proved the allegations made by him in his plaint. He came to the conclusion that the respondent had not proved that the Manager had taken any part in obtaining the execution of the *satta*, or had used any threats of the kind suggested in the plaint and he, therefore, found that the definite case of coercion had not been established.

The case was then returned to this Court and it came before Mr. Justice Atkinson. That learned Judge was of opinion that the case ought not to have been remanded for re-trial of the third issue, that the findings recorded by Mr. Scroope were sufficient and should have been accepted and that the appeal should have been dismissed. He accordingly disregarded the remand order made by Mr. Justice Kingsford and accepting the findings recorded by Mr. Scroope he dismissed the appeal.

The case now comes before us as an appeal under the Letters Patent. The first point taken in appeal was that if the respondent was dissatisfied with the order of remand made by Mr. Justice Kingsford he should have appealed against it. In my opinion there was no right of appeal under the Letters Patent against the order of Mr. Justice Kingsford, which was not an order of remand at all but merely an order directing the trial of a certain issue. The learned Vakil, for the appellant, admits that he is unable to produce any authority to the effect that an appeal could have been maintained against the order of Mr. Justice Kingsford. In my opinion no appeal could have been filed under the Letters Patent and, therefore, the question whether the order made by Mr. Justice Kingsford was right or wrong may be considered by us. Having heard

the arguments on both sides I have come to the conclusion that the judgment under appeal is right and should be affirmed. It is true that the respondent made certain definite allegations against the Manager of the appellant company and the servants of the company, which amounted to a charge of coercion as defined in the Contract Act, and that he failed to prove those allegations, but he also pleaded and proved a number of facts and circumstances which in the opinion of Mr. Scroope brought the case within the purview of section 16 of the Contract Act. I agree with Mr. Scroope that the facts as found show that the manager of the appellant company was in a position to dominate the will of the respondent at the time when the *satta* was executed. I agree with him also that the contract is on the face of it unconscionable. In my opinion he was right in holding that it was the duty of the appellant company to prove that the contract was not induced by undue influence. The company did not prove this. It is suggested that they were misled by the terms of the third issue into supposing that they had to meet a charge of coercion and nothing else. I cannot accept the suggestion. The respondent's case was that the execution of the *satta* had been brought about by "*dab o najaiz*" and he set out the whole of the facts which he proposed to prove. The appellant company must have known that proof of some only of the respondent's allegations would be sufficient to require them to show that the execution of the *satta* had not been obtained by unfair means. I would affirm the decision of Mr. Justice Atkinson and dismiss this appeal with costs.

CHAPMAN, J.—I agree.

JWALA PRASAD, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 181 OF 1916.

April 26, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Srinivasa Aiyangar.

PARVATHAMMAL—PETITIONER—

versus

CHOKALINGA CHETTY—

RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 2 (14)—"*Order*", *meaning of—Guardians and Wards Act (VIII of* 1890), *ss.* 34 (e), 36—*Order passed against guardian under s.* 34 (e) *of Act, whether executable.*

Under section 34 *(e)* of the Guardians and Wards Act, the District Court directed the guardian appointed by Court for the estate of a minor female to pay the sum of Rs. 1,600 to the guardian of the person of the minor step-daughter of the aforesaid minor for her marriage expenses. The money was not so paid. The ward attained marjority and obtained possession of the property. The step-daughter's guardian applied for execution of the order passed by the District Court as a decree of Court:

Held, that the order was not one contemplated by section 2 (14) of the Code of Civil Procedure, and could not be executed under the provisions of that Code, the proper remedy being by a suit. [p. 342, col. 2; p. 343, cols. 1 & 2.]

Komma Somakka v. *Kodidala Pedda Ramiah*, 13 Ind. Cas. 251; 36 M. 39; 22 M. L. J. 193; (1911) 2 M. W. N. 519, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court, Salem, in Revision Execution Petition No. 14 of 1914, in I. A. No. 20 of 1908, connected with Original Petition No. 28 of 1906.

FACTS of the case appear from the judgment.

Mr. *T. M. Vedantam* (with him Mr. *C. Pattabirama Aiyangar*), for the Appellant.—The order attaching the minor's property is illegal; it is executed as one passed under the Code of Civil Procedure. Under the Guardians and Wards Act only orders passed under section 36 (2) of the Act are executable. The question is whether this is an order of the kind contemplated by the section. Anyhow this is an order passed against the guardian and there is no reason why the minor's property should be attached in execution of that order. *Komma Somakka* v. *Kodidala Pedda Ramiah* (1) clearly lays

(1) 13 Ind. Cas. 251; 36 M. 39: 22 M. L. J. 193; 1911) 2 M. W. N. 519.

down that such an order cannot be executed as a decree.

A regular application for execution is put in as if it was executable under the provisions of the Code of Civil Procedure.

[SRINIVASA AIYANGAR, J.—But suppose the Court passes an order that such money must come out of the minor's estate, the attachment of the minor's property in execution of that order would not be illegal.]

Mr. *T. R. Ramachandra Aiyar* (with him Mr. *T. R. Krishnaswami Aiyar*), for the Respondent.—The only question before the Court is whether an order passed under section 34 of the Act is executable as an order passed under section 36 (2). This is an order against the estate, and as such executable by the Court under the procedure prescribed by the Code of Civil Procedure. The question is whether it is an order contemplated by section 36 (2) of the Act.

[SRINIVASA AIYANGAR, J.—How is it executable as an order passed under the Code of Civil Procedure? The definition of order in section 2 (14) of the Code refers only to orders passed adjudicating the rights of parties, and has no reference to orders of this kind.]

JUDGMENT.

SPENCER, J.—One Anganna Chetti had three wives. At his death he left surviving him a daughter by his first wife, named Thayammal, and Parvathammal, his third wife. Application was made to the District Court of Salem to appoint a guardian for the estate of Parvathammal. As the result of a *razinama* put in by the contending parties, it was arranged that Chokkalinga Chetti should be guardian of Thayammal. Subsequently Gurunatha Chetti was appointed by Court guardian of the person and property of the minor Parvathammal, he being her own father. In 1908 an application was made to the Court to allot a sum of money for the marriage expenses of the minor Thayammal. The District Judge, after considering all the circumstances of the case, fixed Rs. 1,600 as a proper sum to be paid out of the estate for the said marriage, and, on appeal to this Court, the order was confirmed. Parvathammal has now attained majority and her guardian Gurunatha Chetti has been discharged. Chokkalinga Chetti now seeks to have the order, directing the minor's guardian to pay Rs. 1,600 for the marriage expenses of Thayammal, executed under the Civil Procedure Code by attachment and sale of the property of Parvathammal and the District Judge has made an order accordingly.

Objection has been taken in appeal that the Court was not competent to pass an order of this kind, as though it was an order passed between parties in execution orders passed under the Guardians and Wards Act, being by way of administrative directions to the guardian.

Under section 34 of the Guardian and Wards Act, a guardian may apply, for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of the persons dependent on him may be a party, such portion of the income of the property of the ward as the Court may direct to be employed for that purpose. But this Act contains no provision for the execution of such orders as decrees of the Court. It is, however, sought to justify the District Judge's order by a reference to section 36, Civil Procedure Code. That section says: "The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders" and an "order" has been defined in section 2 (14) of the Civil Procedure Code as "the formal expression of any decision of a Civil Court which is not a decree". I do not think that the order passed by the District Judge in 1908 was such an order as is contemplated in this section. Moreover the order was one intended to be obeyed by the guardian appointed by the Court and to relate to the property of the minor who was a ward of Court. There is now no guardian and no minor. It is, therefore, not possible to execute it against Parvathammal, who has now become a major, without allowing her an opportunity to contest the order in

her own right. In *Komma Somakka* v. *Kodidala Pedda Ramiah* (1), to which I was a party, it was pointed out by Abdur Rahim, J., that the Guardians and Wards Act does not provide any machinery for deciding upon and enforcing claims of third parties for or against a ward, as those are left to be regulated by ordinary proceedings by suits.

We decided that an order purporting to be made under the Guardians and Wards Act could not be enforced as a decree passed in a suit.

Secondly, an attempt has been made to justify the order by relying on the fact that notice was given to Parvathammal of the application and that she did not object that the Court had no jurisdiction. In *Komma Somakka* v. *Kodidala Pedda Ramiah* (1) that point also was considered, but there the respondent's Pleader did not attempt to argue that, if the Court did make an order without jurisdiction altogether, any waiver of objection or consent on the part of a party would make it valid. I am clearly of opinion that if there is an intitial absence of jurisdiction, the conduct of the parties cannot validate an order passed without such jurisdiction.

Lastly, it is suggested that justice does not require the order to be set aside, that it is an order held by three Courts to be a fair one, and, therefore, that we should not interfere in revision. In the previous proceedings, Parvathammal was represented by her guardian Gurunatha Chetti, who has since been discharged. She has had no opportunity of raising any contention as to her personal liability to pay the sum now sought to be recovered, the order in that case being one of the nature of a direction to the guardian appointed by Court. It is thus an open question whether Parathammal should justly be made to pay the sum.

I, therefore, consider that the order under appeal was one that the Court was not competent to pass and it should be set aside with costs here and in the lower Court.

SRINIVASA AIYANGAR, J.—I agree. The facts of the case have been fully stated in the judgment just delivered. The order that was passed in favour of Chokkalinga Chetti on behalf of the minor girl Thayammal in the guardianship matter of Parvathammal was in these terms: "I accordingly direct that the respondent (*i.e.*, Gurunatha Chetti) pay this amount (*viz.*, Rs. 1,600) to the petitioner (*i.e.*, Chokkalinga Chetti)". This order was passed under section 34, clause (*e*), of the Guardians and Wards Act, under which a Court may direct a guardian to apply the income of the property or if the Court so directs the whole of the property for, among other things, the celebration of the ceremonies of any person who is dependent on a ward. This is in the nature of a direction to the guardian, over whom the Court has control, to pay a certain sum of money out of the funds of the minor in discharge of the liability of the minor's estate. If this is obeyed by the guardian, that would be so far as between himself and the minor a good payment, and to that extent the guardian will be discharged of his liability to account for that sum. But this does not, in my opinion, give any right to the person, to whom the money is directed to be paid, to enforce it as if there was a decree in his favour. The order, as a matter of fact, does not purport to adjudicate upon the relative claims of the minor and the person who seeks to enforce the liability against the minor's estate. If, for example, a person calling himself a creditor of the minor's estate applies to the Court for a direction to the guardian to discharge that debt, and if on enquiry, the Court comes to the conclusion that the liability is subsisting, and the debt is payable out of the minor's estate, and makes an order to pay that debt, still I conceive that the minor would be entitled to challenge the order or the amount of debt so directed to be paid. That is the nature of the order and I think there was nothing to execute. It was quite competent to the person in whose favour this order was made to go to the Court which had jurisdiction in the guardianship matter and ask for a direction that the guardian should pay the money or the income of the minor's estate in his hands into Court and if he gets such an order, the Court will be competent to pay the money on behalf of the guardian or of the minor to

the person so entitled. But I do not think that this so-called order can be executed as if it was a decree. In this case, as has been pointed out, the guardian has been discharged and the minor has been allowed to take possession of her property.

One argument which was advanced by Mr. Krishnaswami Ayyar is that at the time the guardian was discharged, in view apparently of some objection by the guardian with reference to this order for payment of Rs. 1,6C0 which he had not obeyed, there was an undertaking by Parvathammal who had then attained majority that she would pay this sum. That undertaking evidently was given in order that the guardian may be free from all liability with reference to this matter. But that, to my mind, does not, by itself, impose any liability on the minor, for it is not shown that that undertaking was given to or that agreement was made with Chokkalinga Chetti on behalf of Thayammal.

The next objection taken is, there having been notice to Parvathammal of an application made to execute this order and there having been an order for attachment, that order is *res judicata* and binding on her. But it is clear that she is entitled to raise the question that the order cannot be executed at all, in that it is not an order within the meaning of section 36, Civil Procedure Code. I do not think there is any substance in the contention, and further it was quite open to the Court which previously passed the order, on objection made at a later stage, to vacate the previous order, if it came to the conclusion that that order was *ultra vires*, as I think it was in this case.

I do not wish to add anything with regard to the last contention of the learned Pleader, *viz.*, that in this case we ought not to interfere in the interests of justice, for we do not know whether the order directing Rs. 1,600 to be paid out of the minor's estate is just or unjust.

Petition allowed.

V.R.P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2137 OF 1916.

June 20, 1917.

Present:—**Mr. Justice Broadway.**

AMAR NATH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAGHPAT RAI—DEFENDANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 41 (4)—Order of discharge of guardian, not in express terms, effect of—Civil suit, whether barred.

An order of discharge under section 41 (4) of the Guardians and Wards Act, in order to bar a civil suit by the minor against the guardian for rendition of accounts, must be in express terms, and not by implication. [p. 345, col. 2.]

Second appeal from the decree of the District Judge, Jullundur, dated the 16th February 1916, affirming that of the Munsif, 1st class, Jullundur, dated the 16th February 1915, dismissing the claim.

Bakhshi *Tek Chand*, for the Appellants.

Rai Sahib Lala *Moti Sagar* and Lala *Rup Chand*, for the Respondent.

JUDGMENT.—The facts of the case out of which this appeal has arisen are these: —

(*a*) On 2nd June 1908 Raghpat Rai was appointed guardian under Act VIII of 1890 of the person and property of Amar Nath, his brother Maharaj and their sisters. He rendered annual accounts of his stewardship and these accounts were duly audited at the instance of the Court and passed. The accounts to the end of 31st May 1913 were so audited by Lala Bishen Das, Munsif, and passed by the Court on 4th September 1913.

(*b*) On 6th May 1914 Amar Nath attained majority and on 21st May 1914 applied to the Court, asking for the property to be made over to him, and on 22nd May 1914 an order was issued to Raghpat Rai to do so. On 25th May 1914 a receipt by Amar Nath was filed relating to certain jewellery and moveable property, which had been made over to him. On 11th June 1914 Amar Nath filed a receipt in Court of what he had received, but stated that he desired to check the accounts, and an order was accordingly passed giving Amar Nath one month within which to examine the accounts.

(*c*) On 16th June 1914 Raghpat Rai put an application, to the effect that the

receipt filed by Amar Nath was not in order, and on 23rd June 1914 Amar Nath filed an application in Court objecting to the accounts and though no specific allegation of fraud or misappropriation was made, the general tenor of this application is indicative of a suggestion of bad faith on the part of the guardian in his dealings with the property in his charge.

(*d*) On 27th July 1914 Raghpat Rai gave a copy of the accounts to Amar Nath, who was directed to examine them and raise any objections he wished to raise by 31st July 1914, on which date Amar Nath failed to put an appearance, whereupon the Court passed the following order in vernacular: —

"Raghpat Rai *hazir* Amar Nath *hazir nahin.* Raghpat Rai *naqul bahiyat* Amar Nath *ko de chuka hai aur kul jaidad bhi hawala* Amar Nath *kar di hai. Lihaza Muqaddama dakhil daftar howe.*"

(*e*) On the 26th August 1914 Amar Nath again filed an application similar in effect to that filed by him on the 23rd of June and explaining his absence on 31st July 1914 as due to his having fallen ill. Upon this application the District Judge, on 8th October 1914, recorded an order in vernacular to the effect that the order passed by his predecessor quoted above on 31st July 1914 was an order discharging the guardian and that, therefore, no further enquiry could be made under Act VIII of 1890, but suggesting that a civil suit might lie.

Instead of taking any further action under Act VIII of 1890 Amar Nath instituted the present suit on 30th November 1914 against Raghpat Rai for rendition of accounts and in the plaint alleged fraud, specifying three distinct acts. The learned Munsif dismissed the suit on a preliminary point, the issue being "*whether the suit in its present form does not lie?*" The learned Munsif held that the order, dated 31st July 1914, was an order discharging the guardian and that, therefore, the plaintiff could not claim rendition of accounts. He also held that the suit could only lie on the ground of fraud, when such fraud is discovered *after* the guardian has been discharged, but that in the present case the plaintiff had not discovered any fraud subsequent to 31st July 1914.

On appeal by Amar Nath to the District Judge the decision of the learned Munsif was upheld, whereupon Amar Nath has preferred this second appeal through Mr. Tek Chand, and I have heard Mr. Moti Sagar on behalf of Raghpat Rai.

Mr. Tek Chand's contention was that section 41 (4) of Act VIII of 1890 required that an order of discharge should be expressly made and in support of this contention referred me to *Nabadwipa Chandra Shaha* v. *Jugol Dasi Dassya* (1), *Kaniz Fatima* v. *Sajjad Hosain* (2) and *Nabu Bepari* v. *Sheikh Mahomed* (3). He also urged that the acts of fraud as stated in the plaint were as a matter of fact discovered by his client subsequent to 31st July 1914.

In reply Mr. Moti Sagar urged that although no order was passed declaring the guardian to be discharged in *express* words, the Courts below have rightly construed the order of 31st July 1914, which was tantamount to an order of discharge. He laid stress on the fact that the respondent had been filing annual accounts which had been duly passed and also referred to the fact that the appellant, since his coming of age, had been making certain allegations or insinuations against the correctness of the accounts and, therefore, when he failed to appear on 31st July 1914, the Court must clearly have intended to discharge the guardian from his liability to render accounts.

Section 41 (4) of Act VIII of 1890 is to the effect that "when a guardian has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liability save as regards any fraud which may subsequently be discovered." It seems to me that the proper interpretation of these words is that the Court should expressly make the declaration therein contemplated. This declaration is of considerable importance, as by it the guardian is relieved of his liability to render accounts to his former ward and, therefore, such an order, it is obvious, is of extreme importance to the parties concerned.

The authorities cited by Mr. Tek Chand are in point. In *Kaniz Fatima* v. *Sajjad*

(1) 7 Ind. Cas. 214; 15 C. L. J. 57.
(2) 34 C. 211.
(3) 5 C. W. N. 207.

Hosain (2) a Division Bench held that an order of discharge under section 41 (4) must be expressly made. This case was followed in *Nabadwipa Chandra Shahi* v. *Jugol Dasi Dassya* (1) by a Division Bench of the Calcutta High Court, which held that an order under the section in question must be in express terms, and not by implication. In these circumstances I am of opinion that the decisions of the Courts below are erroneous and that the order of 31st July 1914 cannot be regarded as an order of discharge passed under section 41 (4) of Act VIII of 1890. The suit, therefore, lay and the respondent is liable to render accounts.

In this view of the case it is not necessary for me to discuss the second point argued at the Bar relating to the discovery of fraud subsequent to an order of discharge. I accordingly accept this appeal and remand the case under Order XLI, rule 23, Civil Procedure Code, to the Primary Court for disposal of the other issues in the case. The st mp on appeal to this Court will be refunded. Other costs will be costs in the cause.

Appeal accepted.

ALLAHABAD HIGH COURT.
STAMP REFERENCE IN FIRST CIVIL APPEAL
No. 364 OF 1915.
March 5, 1917.
Present: – Mr. Justice Tudball.
LALTA PRASAD AND OTHERS—
DEFENDANTS—APPELLANTS
versus
SHEORAJ SINGH AND OTHERS—
PLAINTIFFS RESPONDENTS.

Appeal—Court-fee—Mortgage — Redemption suit—Preliminary decree declaring plaintiff's right to redeem, appeal against—Decree on accounts, appeal against—Consolidation of appeals.

In a redemption suit the defendant denied the plaintiff's right to redeem and also challenged the amount on which redemption was sought. The Court held that the plaintiff had the right to redeem and directed that accounts be taken. Defendant appealed against this decree, and the Trial Court in the meantime went into the accounts and found a certain sum to be due. The defendant again appealed, claiming a higher sum:

Held, that the two appeals should be consolidated and considered as one and that the full amount of Court-fee should be realised as if the two appeals were one appeal. [p. 346, col. 2.]

Mr. *P. N. Banerji* (with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the Appellants.

JUDGMENT.–(*February 15th*, 1917.)—The facts of this case may be briefly stated as follows. The plaintiff-respondent brought a suit for redemption of a mortgage. The suit was resisted by the present appellant, who denied the plaintiff's right to redeem and also challenged the amount on which redemption was sought. The Court below held that the plaintiff had the right to redeem and directed that the accounts be taken. The defendant appealed against that decree. He paid the necessary Court-fees and the appeal was admitted. The Court below has now gone into the accounts and has found a sum of about Rs. 37,000 to be due The defendant has again appealed and he claims a sum of about Rs. 51,000. He has filed his appeal on a two-rupee stamp. The office reports that the Court-fee is the *ad valorem* fee on the value of the appeal. The only argument before me is that the appellant has had to appeal once against the preliminary decree, that it was the fault of the Court below in passing this preliminary decree in two parts and that he ought not to be penalized thereby and made to pay Court-fees a second time. The first appeal filed is now pending, and, in my opinion, the two appeals should be considered as one and full amount of Court-fee realized as if the two appeals were one appeal. The amount which the Court below has found to be due to the sub-mortgagee is a sum of Rs. 85,322. The Court has ordered that the amount due from the mortgagor shall be devoted first of all to the satisfaction of the sub mortgage. It is obvious that if the sum found due to the sub-mortgagee has been correctly ascertained, the amount payable by the mortgagor, even if the appeal succeeds as to the amount, will not satisfy the sub-mortgage. Therefore in calculating the value of the appeal the sum which has been found to be due to the sub-mortgagee must not be taken into consideration. The office will calculate the fee payable on the appeal as if the two appeals were one. The sum already paid will be deducted and the balance only will be recoverable. Let the office submit a report on this basis. When the amount is ascertained, I

will fix the time within which the deficiency should be made good.

FINAL JUDGMENT.—By my order, dated the 15th February of 1917, this appeal and the earlier appeal (F. A. No. 364 of 1915) have been consolidated into one appeal. The valuation of the appeal to this Court must be taken to be Rs. 61,000, and on that valuation a Court-fee of Rs. 1,250 must be paid. A Court-fee of Rs. 1,035 having been paid in the earlier appeal, and of Rs. 2 on this appeal, total Rs. 1,037, there is a deficiency of Rs. 213, payable by defendants-appellants in this Court. Let the deficiency be received, if paid, within six weeks.

Order accordingly.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEALS NOS. 1894 AND 1895 OF 1915.

April 4, 1916.

Present:—Mr. Justice LeRossignol.

DIWAN CHAND—PLAINTIFF—APPELLANT

versus

IMAM DIN AND OTHERS—DEFENDANTS—RESPONDENTS

AND

DIWAN CHAND—PLAINTIFF—APPELLANT

versus

HARI CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation by widow of her husband's property—Reversioner's right, extent of—Transfer of right to stranger, whether permissible—Transferee of right, locus standi *of—Contract Act* (*IX of* 1872), *s.* 23.

A reversioner's right to contest an alienation or sale by a widow of her husband's property for want of necessity or otherwise is a personal one; and its transfer to a stranger, whether it is made in her lifetime or after her death, is both illegal and opposed to public policy as stimulating gambling in litigation. Consequently the transferee of such a right has no *locus standi* to maintain a suit for recovering the alienated property, on the ground that the alienation is an unauthorized one. [p. 348, col. 1.]

Jawala Sahai v. *Ram Singh*, 2 Ind. Cas. 954; 133 P. L. R. 1909; 67 P. R. 1909; 98 P. W. R. 1909 and *Debi Dayal Sahoo* v. *Bhan Pertap Singh*, 31 C. 433 at p. 439; 8 C. W. N. 408, followed.

Second appeals from the decree of the District Judge, Jhelum, dated the 31st March 1915, affirming those of the Munsif, first Class, Jhelum, dated the 21st December 1912, dismissing the suit.

FACTS appear from the following judgment of the District Judge:—

"This appeal and the cognate Appeals Nos. 112 and 113 of 1913 may all conveniently be disposed of in a single judgment.

"All three are suits by the same plaintiff as vendee to obtain possession of, the property sold to him by the same vendor in all three cases, which property he is obstructed in taking possession of not by his vendors, but by third persons on various pretexts. According to the plaintiff the property in each case belonged to one Amir Chand, who was succeeded by his widow Maya Devi, and it was after Maya Devi's death that the plaintiff acquired the properties from Amir Chand's reversioners, *Musammat* Nihal Devi and Hari Chand.

"The plaintiff is a Pleader, not indeed practising in Jhelum, close to which place the three properties are situate, but he is the son of a Pleader practising in Jhelum, who has indeed conducted these cases for him, and, as he has in one case, No. 113 of 1913, bought in the face of a Will executed by *Musammat* Maya Devi in favour of her nephew, Mana Singh, and in the other two cases in the face of alienation by *Musammat* Maya Devi during her lifetime, it is difficult to come to any other conclusion than that an enterprising Pleader has been deliberately purchasing mere litigation. The unpleasant and disquieting feelings aroused by these three cases are intensified by the extraordinarily large proportion of the purchase-money which in each case is said to have been paid at home. Thus in one of the three cases Rs. 460 out of Rs. 700 was paid at home; in another Rs. 600 out of Rs. 800; and in the third Rs. 1,250 out of Rs. 1,500. I find it impossible in these circumstances to believe that there have been any honest and genuine transactions of sale, and I accordingly dismiss all three appeals with costs."

Mr. *Gokal Chand Narang*, for the Appellants.

Mr. *Duni Chand* and Mr. *Nihal Chand Mehra*, for Mr. *Ganpat Rai*, for the Respondents, in Appeal No. 1894.

Lala *Hukam Chand*, for the Respondents, in Appeal No. 1895.

JUDGMENT.

IN APPEAL NO. 1895 OF 1915.

The District Judge's judgment in these cases is not very satisfactory, but as all necessary materials for a final judgment are on the record and appellant has been given full opportunity for argument, I can dispose of them at once.

The case was one for possession of land, brought by the son of a Pleader, who alleged he had purchased their rights in the land from the collaterals of a widow. The widow's vendees were third parties and the widow was dead when the collaterals conveyed such rights as they had to the plaintiff.

The first Court found that the land had been acquired by the widow herself and that she had sold to her vendees for necessity.

The District Judge dismissed the appeal, on the ground that the sale to the plaintiff by the collaterals was a very fishy transaction and he could not believe that any sale had in fact taken place.

This finding is challenged in appeal before me and as the vendors admitted the sale, the finding cannot be upheld.

Appellant contends that the cases should be remanded for a decision on the merits. I cannot adopt this course, for the plaintiff's case on the face of it is unmaintainable. Until the sales by the widow are set aside, the collaterals have no inheritance, all they have at the best is a right to sue for possession on the ground that the sales were not for necessity.

But such a right is not transferable, whether in the lifetime or after the death of the widow. *Jawala Sahai* v. *Ram Singh* (1) is a case exactly in point, which I have great satisfaction in following.

Again, it is obvious that the transaction between plaintiff and the collaterals was a speculative affair, and even if *Jawala Sahai* v. *Ram Singh* (1) did not apply, I should hold, following *Debi Dayal Sahoo* v. *Bhan Pertap Singh* (2), that the sale was opposed to public policy as stimulating gambling in litigation.

(1) 2 Ind. Cas. 954: 133 P. L. R. 1909; 67 P. R. 1909; 98 P. W. R. 1909.
(2) 31 C. 433 at p. 439; 8 C. W. N. 408.

For these reasons I refuse to interfere and dismiss the appeal with costs.

IN APPEAL NO. 1894 OF 1915.

The appeal is dismissed with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 121 OF 1916.

April 19, 1917.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

BISWANATH BHATTACHARJEE—DECREE-HOLDER—APPELLANT

versus

SAMESWAR SARMA BARUAH—JUDGMENT-DEBTOR—RESPONDENT.

Decree, construction of—Interest, right of creditor to appropriate payment towards—Contract Act (IX of 1872), s. 60, applicability of, to decrees.

An instalment decree made in a suit upon a hand-note ran as follows: "It is ordered that the defendants do pay to the plaintiff the sum of Rs. 2,888-8-0 with interest thereon at the rate of 12 per cent. per annum * *. The amount decreed * * to be paid in yearly instalments of Rs. 600 payable on July 15th each year * * * *."

Held, that under the decree interest was payable yearly and for the purpose of the decree the year must be taken to end on the 14th July, and that the plaintiff was, therefore, at liberty, in the absence of any express or implied appropriation by the judgment-debtor, to appropriate, out of each payment as it was made, a sum sufficient to satisfy the interest due at the date of the payment towards the satisfaction of the interest and to credit the balance only towards the principal. [p. 349, col. 2; p. 350, col. 1.]

In the absence of any appropriation by the debtor, it is open to the creditor to apply the payments made by the debtor in the first instance towards the interest and the balance only towards the principal. [p. 349, col. 2; p. 350, col. 1.]

There is no reason why this rule should not apply to a decree when there is an express provision for the payment of interest in the decree, whether the decree be an instalment decree or a decree of an ordinary kind. [p. 350, col. 2.]

If money is paid by a debtor when there is interest due to the creditor, unless the contract or decree provides to the contrary or the money is otherwise specially appropriated by the debtor, the creditor has a right to pay himself his interest. [p. 350, col. 2; p. 351, col. 1.]

When interest is payable under an express stipulation or provision, the interest becomes a debt accessory to the principal debt and section 60 of the Contract Act is applicable. [p. 351, col. 1.]

Appeal against the order of the District Judge, Assam Valley Districts, dated the 4th March 1916, affirming that of the

Subordinate Judge, Sibsagar, dated the 6th September 1915.

FACTS of the case appear from the judgment.

Babu *Nitish Chandra Lahiri* (with him Babu *N. C. Bardalai*), for the Appellant.—The judgment-debtor applied for a certificate of full satisfaction of the judgment-debt decreed against him on 21st December 1908. The decree holder opposed the application on the ground that a certain sum was still due.

The point for determination in this appeal is the interpretation of the decree of the 21st December 1908, which ordered the judgment-debtor to pay to the plaintiff decree-holder the sum of Rs. 2,888 8-0 with interest thereon at the rate of 12 per cent. per annum with costs of the suit, the amount decreed with costs to be paid in yearly instalments of Rs. 600 payable on July 15th each year. According to the terms of the decree the annual amount of interest decreed ought first to be deducted out of the amount paid and the balance should then be applied towards the principal debt. Section 60 of the Contract Act is applicable here. See *Gooroo Doss Dutt* v. *Ooma Churn Roy* (1), *Ramundoss Mookerjea* v. *Omeish Chunder Raee* (2), *Luchmeswar Sing Bahadur* v. *Syad Lutf Ali Khan* (3), *Maharaja of Benares* v. *Har Narain Singh* (4).

Babu *Narendra Kumar Bose*, for the Respondent.—The authorities cited in support of the case for the appellant had reference only to the practice as it existed then. The basis of the decree-holder's calculation would give rise to compound interest which he is not entitled to get under the terms of the decree. The plaintiff must allocate the whole of each periodical payment to principal only, and this is clear if the judgment and decree are read together.

JUDGMENT.

RICHARDSON, J.—The case as it seems to me is really a simple one. It relates to an instalment decree, dated the 21st December 1908. The decree is founded on a judgment in these terms :—

"Defendant admits the claim but prays for an order to pay by instalments. Plaintiff will get a decree with costs for the amount claimed to be paid in yearly instalments of Rs. 600 (six hundred) payable on July 15th each year with interest at 12 per cent. In default of any instalment the whole amount will be payable."

The decree itself runs as follows : —

"*It is ordered that* the defendant do pay to the plaintiff *the sum of Rs.* 2,888-8 0 *with interest thereon at the rate of* 12 *per cent. per annum*, with the costs of the suit.

The amount decreed with costs to be paid in yearly instalment of Rs. 600 (six hundred) payable on July 15th each year. In default of any instalment the whole amount will be payable."

In the decree the words underlined (italicised) are printed and it may be that the printed form of which use was made is not as suitable for an instalment decree or for a decree of the ordinary kind. But reading the judgment and the decree together the meaning seems clear. The amount decreed excluding the costs is Rs. 2,888-8-0 with interest at 12 per cent. per annum. The decree makes it clear that the interest is payable yearly and for the present purpose the year must be taken to end on the 14th July. No doubt the payment of interest on interest is not directed, but on every 15th July the decree holder became entitled to the interest accrued due on the amount of his claim or the balance of that amount.

The judgment-debtor regularly paid Rs. 600 and the question is now one of accounting. The judgment debtor did not expressly or impliedly appropriate these payments to principal. The plaintiff, therefore, contends that he was at liberty to appropriate out of each payment as it was made sufficient to satisfy the interest due at the date of the payment, and to credit the balance only to principal. The judgment-debtor, on the other hand, contends that the plaintiff was obliged to allocate the whole of each periodical payment to principal and to take nothing for interest so long as there was any principal due. So far as I can see there is nothing in the decree which entitles the defendant to

(1) 22 W. R. 525.
(2) 6 M. I. A. 289; 1 Sar. P. C. J. 542; 19 E. R. 108.
(3) 8 B. L. R. 110 at p. 112; 2 Sar. P. C. J. 700; 2 Suth. P. C. J. 461.
(4) 28 A. 25; A W. N. (1905) 167; 2 A. L. J. 585.

have the account taken on that footing. Interest was expressly made payable by the decree. The amount decreed comprised the principal debt and the debt annually due on account of interest. On general principles, in the absence at any rate of any appropriation by the debtor, it was open to the creditor to divide each sum of Rs. 600 between principal and interest, as he did, and to make up his account accordingly.

In other words the case falls within the general rule which the Courts have long recognised. "It is usual," said the Sadar Diwani Adalat in 1827 [*Goverdhun Das* v. *Waris Ali* (5)], "till the whole amount of interest is paid to carry any sums received to the account of interest and not of principal." The case was cited before the Privy Council in *Bamundoss Mookerjea* v. *Umeish Chunder Raee* (2). Judgment was delivered by Sir William Maule who said this:—"Their Lordships during the argument in this case intimated their opinion on the main question, namely, whether the payments made should be ascribed exclusively to principal, and no part of them to interest; expressing their opinion that the course adopted was the ordinary one, and that the construction of this instrument is one which does no point out any other, namely, that the payments should be applied in the first instance to interest, and to principal only so far as those payments exceed the interest due. That is the main point in question and their Lordships entertained no doubt at all about it." The rule was again applied by the Privy Council in *Luchmeswar Sing Bahadur* v. *Syad Inti Ali Khan* (3). The head-note is as follows :—"Where payment was made upon a bond, the amount paid being less than the interest due, *held* the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree." The report states that when the appeal was opened, their Lordships intimated that unless the learned Counsel could satisfy them that there had been an appropriation at the time of payment to the payment of the principal, the creditor had a right to consider it as a payment on account of the interest. It seems to have been argued (as it has been argued before us in the present case) that the result of adopting the rule was virtually to allow the creditor compound instead of simple interest. Their Lordships delivered a short judgment but took occasion expressly to observe that "there has been no calculation so as to give compound interest." Reference may also be made to the decision of Sir William Markby and Romesh Chunder Mitra, JJ., in *Gooroo Doss Dutt* v. *Ooma Churn Roy* (1) and to the decision of the Allahabad High Court in *Maharaja of Benares* v. *Har Narain Singh* (4). The rule is so well established that but for the respect due to the Courts below and to my learned brother, I should hardly have thought it necessary to cite authority at all.

Most of the cases relate to bonds containing an express stipulation for the payment of interest, but in *Gooroo Dutt's* case (1) the rule was applied to payments on account of a decretal debt. Nor is there any reason why the rule should not apply when there is an express provision for the payment of interest in a decree, whether the decree be an instalment decree or a decree of the ordinary kind. Take for instance a decree for Rs. 1,000 with interest at 5 per cent. per annum. If at the end of a year a sum of Rs. 100 is realized the judgment-debtor would be entitled to appropriate Rs. 50 for the interest due.

As to the argument that the rule virtually allows compound interest, it may be that when the amounts paid on account are regularly paid and are always sufficient to satisfy the interest due, so that the interest is never in arrears, the result as regards the total amount paid is the same as allowing compound interest, or as though the instalments paid were credited to principal and the interest due were added to principal. But this would not always be so. For instance, if nothing be paid on a debt carrying simple interest for two years, the interest due for the first year would not be added to principal, so, too, if the amount paid on account be less than the interest due, the balance of the interest would not be added to principal. The point is that when the money is paid there is interest due to the creditor and unless the contract or decree provides to the contrary,

(5) 4 Select Reports 330; 7 Ind. Dec. (o, s.) 246.

or the money is otherwise specially appropriated by the debtor, the creditor has a right to pay himself his interest.

The principle underlying the rule appears to be this, that when interest is payable under an express stipulation or provision, the interest becomes a debt accessory to the principal debt and section 60 of the Contract Act is applicable (Pollock and Mulla's Indian Contract Act, 2nd Edition, page 260).

One point remains. On the 28th July 1909, the decree-holder filed an application praying "that the decree may be amended in conformity with the judgment." The application does not state in what respect the decree was not in conformity with the judgment. The judgment-debtor presented a counter-petition, in paragraph 4 of which he stated "that if the Court passes orders for payment of interest on the whole sum decreed along with the instalment of Rs. 600, the defendant will not be in a position to pay the same, and if the defendant in that case fails to pay the *kist*, the plaintiff, no doubt, will not let him off easily." The learned Subordinate Judge before whom the matter came contented himself with saying that he was not inclined to amend the decree as too much time had elapsed. It is suggested that what the decree-holder asked for by way of amendment was a direction that the judgment-debtor should pay on each 15th July not only the sum of Rs. 600 but also the interest due to date, and that this request showed that he meant to allocate each payment of Rs. 600 in its entirety to principal. In my opinion no such declaration of intention can be extracted from the petitions and the order of the Subordinate Judge. The fact, if it be a fact, that plaintiff wanted the instalments increased from Rs. 600 to Rs. 600 and interest due is no proof of any intention on his part, if he received instalments of Rs. 600 only, to allocate the whole to principal.

The Courts below decided in favour of the defendant. It may be that their sympathy was with him but for the reasons indicated their orders should, in my opinion, be discharged. The certificate of full satisfaction of the decretal debt granted by the first Court must be set aside and an order drawn up stating the amount still due on the basis above indicated.

As regards costs, I do not myself see any reason for departing from the usual rule, but as my learned brother thinks differently, I do not press the point. The appeal will, therefore, be allowed without costs.

WALMSLEY, J.—This appeal has caused me much difficulty, and if it were necessary to state a general rule as to the manner of calculating interest on an ordinary decree for money, I fear I could not agree with my learned brother. The case of *Gooroo Doss Dutt* v. *Ooma Churn Roy* (1) deals with the question, but with all deference to the learned Judges, I doubt whether their statement "of the rule usually adopted in this country" is correct at the present day. Moreover, I think that a method of calculation which has the practical effect of allowing compound interest cannot be distinguished from compound interest, and should be acknowledged as such.

In the present case, however, the plaint and the written statement with the judgment passed thereon, supplemented by the decree-holder's petition for amendment with the debtor's petition in reply, make it plain that the arrangement between the parties was that the amount due under the decree should continue to bear interest at the rate stipulated in the handnote in the same manner as if the debt were still due under the handnote and not under the decree, and that the only relief granted to the debtor was that he should pay off the debt in regular instalments, instead of becoming liable immediately to execution proceedings for the entire amount due under the decree. There is no uncertainty about the manner in which, by custom and authority, interest would be calculated under the handnote. I, therefore, agree that the appeals should be allowed, but without any order as to costs.

Appeal allowed.

KHUSHALI RAM v. GOKUL CHAND.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 1349 OF 1915.
May 26, 1917.
Present:—Mr. Justice Tudball and
Mr Justice Rafique.
KHUSHALI RAM—DEFENDANT—APPELLANT
versus
GOKUL CHAND—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Cause of action—Jurisdiction—Decree obtained by fraud, suit to set aside.

Defendant fraudulently obtained a decree in the Court of the Second Munsif of Sirajgang in Lower Bengal, and having got the decree transferred for execution to Agra, put it into execution and caused the plaintiff to be arrested. The latter thereupon brought a suit at Agra for a declaration that the decree obtained by the defendant was a nullity and for damages on account of loss of reputation and for physical and mental pain:

Held, that the Agra Courts had jurisdiction to entertain the suit, inasmuch as a material portion of the plaintiff's cause of action had accrued to him at Agra. [p. 352, col. 2.]

Umrao Singh v. *Hardeo*, 29 A. 418; A. W. N. (1907) 112; 4 A. L. J. 392; *Dau Dial* v. *Munna Lal*, 24 Ind. Cas. 978; 12 A. L. J. 955; 36 A. 564, distinguished.

Second appeal from a decree of the District Judge, Agra.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Messrs. *J. M. Banerji* and *Bhagwati Shankar*), for the Appellant.

Mr. *Uma Shankar Bajpai* (for Mr. *S. K. Dar*), for the Respondent.

JUDGMENT.—This is a defendant's appeal. The facts found by the Court below are that the defendant fraudulently obtained a decree in Suit No. 1445 of 1913 in the Court of the Second Munsif of Sirajganj, District Pabna, in Lower Bengal; that he had the decree transferred for execution to the district of Agra in these Provinces, and that he there put it into execution and caused the plaintiff to be arrested. The plaintiff on these facts asked for the following reliefs—*first*, that it might be declared that the Decree No. 1445 of 1913 passed by the Court of the Second Munsif of Sirajganj, District Pabna, is fraudulent and null and void and has been given without jurisdiction and power and that it is ineffectual as against the plaintiff; *secondly*, that a perpetual injunction may be issued prohibiting and restraining the defendant from taking out execution of the said decree as against the person of the plaintiff and his property situate within the jurisdiction of this Court, and that the security, which the plaintiff was required to furnish at the time of his arrest in execution of the said decree, should be cancelled; *thirdly*, that the sum of Rs. 200 as damages on account of loss of reputation and physical and mental pain, together with future interest, may be awarded against the defendant.

The Court below has decreed the plaintiff's claim and has awarded the sum of Rs. 100 as damages against the present appellant. The plea taken before us is that the Courts below had no jurisdiction to entertain the suit. Reliance has been placed on two decisions of this Court, one in *Umrao Singh* v. *Hardeo* (1) and the other in *Dau Dial* v. *Munna Lal* (2). Both these cases are easily distinguishable from the present case. In neither of these cases did the defendant go further than to obtain a fraudulent decree in Calcutta. In the case of *Dau Dial* v. *Munna Lal* (2), to which judgment one of us was a party, the facts were clearly held to be distinguishable from those of the case of *Banke Behari Lal* v. *Pokhe Ram* (3). In this latter case it was pointed out that not only had the decree been obtained fraudulently but that further steps had been taken and property had been attached in execution of the decree in Cawnpore. This was also the case in *Jawahir* v. *Neki Ram* (4). In both these two latter cases it was held that the Courts in these Provinces had jurisdiction to entertain the suit, and in the present case it is quite clear that a material portion of the plaintiff's cause of action accrued to him in these Provinces. It is here that the decree was executed and he was arrested. Quoting from the decision in *Dau Dial* v. *Munna Lal* (2), "A plaintiff's cause of action consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court." One of the material facts the plaintiff in the present case would have had to prove, if it had been denied, was the execution of the decree and his arrest thereafter within the jurisdiction of the Court. We have no hesitation

(1) 29 A. 418; A. W. N. (1907) 112; 4 A. L. J. 392.
(2) 24 Ind. Cas. 978; 12 A. L. J. 955; 36 A. 564.
(3) 25 A. 48; A. W. N. (1902) 179.
(4) 28 Ind. Cas. 502; 13 A. L. J. 190; 37 A. 189.

whatsoever in holding that the facts and the circumstances of the present case clearly go to show that part of the plaintiff's cause of action arose in these Provinces and that the Courts below had jurisdiction to entertain the suit. They had jurisdiction to declare that the decree was fraudulent and null and void as against the plaintiff. They had jurisdiction to grant a perpetual injunction which he demanded and to decree the damages which they found he had suffered. In our opinion there is no force in this appeal. We, therefore, dismiss it with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
LETTERS PATENT APPEAL NO. 137 OF 1915.
April 23, 1917.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.
SYEDUNNESSA KHATUN—PLAINTIFF—APPELLANT
versus
AMIRUDDI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Rent-decree—Decree-holder ceasing to be sole landlord, at time of sale, effect of—Execution-sale, effect of, on status of decree-holder—Bengal Tenancy Act (B. C. VIII of 1885), Chap. XIV—Precedent, value of.

The legal effect of an execution sale should depend upon the status of the decree-holder at the time proceedings for sale are taken by the Court at his instance. [p. 357, cols. 1 & 2.]

Where a landlord decree-holder continues to be the sole landlord at the date of his application for execution of a decree for rent, and in his character as landlord decree-holder takes the necessary steps for sale of the defaulting under-tenure in conformity with the statutory provisions in Chapter XIV of the Bengal Tenancy Act, the effect of the execution sale is to pass the under-tenure, and not merely the right, title and interest of the tenant, to the purchaser, even though the decree-holder has lost his interest partially or entirely as landlord before the actual sale. [p. 357, col. 2.]

The history of judicial opinion on the question of the effect of the cessation, partial or entire, of the interest of a landlord on his right to enforce realisation of arrears of rent by sale of the tenancy under the special procedure of Chapter XIV of the Bengal Tenancy Act reviewed. [p. 355, col. 2; p. 356, cols. 1 & 2.]

The language of a judicial pronouncement must be understood as spoken in reference to the facts under consideration and limited in meaning by those facts. [p. 357, col. 1.]

Appeal against the decree of Mr. Justice Mullick, dated the 30th July 1915 in Appeal from Appellate Decree No. 1666 of 1914.

FACTS material will appear from the following judgment of

MULLICK, J.—There were three under-tenures, namely, Osat Taluq Naba Kishore, Howla Chandra Shekhar and Howla Haranath, the proprietors of which were the Guhas. In 1290 B. S. the Guhas mortgaged to one Raj Kumar half of the Osat Taluq and half of the Howla Chandra Shekhar. By a *kobala*, dated the 15th *Chait* 1295 B. S., they then sold their proprietary interest to the plaintiff and on the same date executed a *dar-mirash kabuliyat* in her favour. On the 18th *Magh* 1296 B. S. being unable to pay the dues on the mortgage of 1290, they executed a *kistbandi* in favour of Raj Kumar. Raj Kumar sued upon his mortgage on 13th *Falgoon* 1303, and obtained a decree on the 10th November 1897, corresponding to 24th *Kartick* 1304 B. S. In 1908 the plaintiff sued the Guhas for arrears of rent in respect of the *dar-mirash* and after realising some money in execution, eventually brought the tenure to sale on the 15th February 1905 and purchased it herself. It appears, however, that the sale in execution of Raj Kumar's mortgage-decree was held on the 20th January 1909, and that, at this sale, the Barisal Loan Company purchased one of the properties, namely, the half of Howla Chandra Shekhar.

In Suit No. 268, out of which arises the Second Appeal No. 1460 of 1914, the plaintiff sues the defendant Ratan Khan for *khas* possession after annulment of incumbrances, which are alleged to consist of a Nim Osat Howla and an Osat Howla created by the *darmirashdars*, the Guhas, and described in *Khewats* Nos. 56 and 58 of the recent Cadastral Survey Record.

In Suit No. 269, out of which arises the Second Appeal No. 1667 of 1914, the same prayer is directed against the defendant Aswini Kumar in respect of two under-tenures—Osat Howla Mathura Nath and Osat Howla Chandra Kumar as described in *Khewats* Nos. 61 and 73 in the Survey Record.

In Suit No 270, out of which arises the Second Appeal No. 1666 of 1914, the defendant is Amiruddi and the under-

tenure is a Nim Osat Howla as described in *khewat* No 57.

I shall take up these cases separately.

SUITS NOS. 268 AND 269.

In these suits, the Court below has found that owing to the non-service of notices the plaintiff is only entitled to rent. In second appeal, it is now urged that the plaintiff has no title and that the whole suit shall be dismissed, because the *kobala* of 1295 by the Guhas in favour of the plaintiff was not duly registered within the meaning of the Registration Act, inasmuch as no part of the property was situated within the Sub-Registry of Barisal where it was registered. Now the *kobala* alleges that one of the properties, namely, the Osat Taluq Naba Kishore, is situated within the jurisdiction of the Sub-Registry of Barisal. The view that the Courts below appeared to have taken is this that although there was some evidence to show that, at the time of the *Thakbust* Survey, no part of the *lakheraj* Osat was situated within the Sub-Registry of Barisal, yet from other circumstances it is proved that a different state of affairs existed at the time of registration. In my opinion, this is a finding of fact which cannot be reversed in second appeal. Further, there is a clear finding in the judgment of the learned Subordinate Judge to the effect that the plaintiff has been in possession for twelve years since the execution of the *kobala*. It is urged that there is no finding that there has been twelve years' continuous possession. In my opinion, taking the judgment of the learned Subordinate Judge together with the judgment of the learned Munsif which it affirms, there can be no doubt that it has been found by both the Courts that the plaintiff had been in continuous possession since her purchase. The defects, therefore, if any, with regard to the registration, have been cured. I also notice that there was an admission in the *kobala* executed by the defendants in favour of the *dar-mirash ijaradar* of the Guhas of he title of the plaintiff by purchase. It is submitted before me that that admission ws made inadvertently. It is, however, an item of evidence and the Courts below were entitled to draw an inference from it. The title of the plaintiff, therefore, being found, the decree of the learned Subordinate Judge is correct. Appeals Nos. 1460 and 1667 of 1914 will, therefore, be dismissed. As nobody appears for the respondents, there will be no order of costs.

SUIT NO. 270.

In this suit the only point in addition to that relating to registration already dealt with above is whether at the time of her purchase at the auction-sale the plaintiff had the 16-annas interest in the property. It is established that the Loan Company had purchased the half share of the Howla Chandra Shekhar at the mortgage sale on the 20th January 1909. Therefore, on the 15th February 1909, when the plaintiff brought the *dar-mirash* tenures to sale, the plaintiff was not the 16 annas landlord in respect of those properties. Therefore according to the ruling of the Privy Council in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1) the plaintiff was not the purchaser in execution of rent-decree. This ruling of the Privy Council, as I understand it, overrules the decision of the Full Bench in *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2), upon which both the lower Courts have relied. The decree of the learned Subordinate Judge will be set aside and the plaintiff will get a declaration of her title in respect of her share. The appeal is, therefore, decreed with costs, although the respondents do not appear.

Mr. *A. K. Fuzlul Huq* (with him Babu *Kali Prosonno Piplai*), for the Appellant.—The present case is on all fours with the Full Bench case of *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2). The Privy Council decision in the case of *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1) has not overruled the Full Bench case. The facts of the Privy Council case are entirely different from the facts of this case and also of the Full Bench case. There may be fonnd some observations in the Privy Council judgment which might seem to be against my contention. But what the Privy Council actually decided does not, in any way, go against

(1) 23 Ind. Cas. 632; 18 C. W. N. 747; 41 C. 926; 15 M. L. T. 380; (1914) M. W. N. 397; 12 A. L. J. 653; 27 M. L. J. 4; 1 L. W. 1059 (P. C.).

(2) 33 C. 566; 10 C. W. N. 547; 3 C. L. J. 470.

my case. It holds that unless a decree-holder continues to be the sole landlord at the time when he applies for execution of the decree for rent, the sale of the tenure that takes place cannot be a sale under the Bengal Tenancy Act. But in this case, what are the facts? The interest of the landlord remained vested in the decree holder at the time when application was made for execution of the rent-decree by the sale of the tenure. All the steps necessary to be taken for execution of the rent-decree had been taken by the decree-holder while he retained the character of a sole landlord. The mere fact that at the time of the actual sale, the decree-holder ceased to be the landlord cannot prevent the sale from being one under the Bengal Tenancy Act. After the application for sale, what remained to be done was the mere mechanical duty of the Court Officers to sell the tenure by auction. As the decree-holder was the landlord at the time he applied for sale of the tenure in execution of his rent-decree, and as he intended to sell the tenure under the Bengal Tenancy Act, the entire tenure passed by the sale and not merely the right, title and interest of the tenant.

Babu *Abinash Chandra Guha*, for the Respondents.—This case is governed by the Privy Council case of *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1), which has overruled the decision in the Full Bench case of *Khetra Pal Singh* v *Kritarthamoyi Dassi* (2). The Privy Council decision has the effect of restoring the case of *Hem Chunder Bhunjo* v. *Mon Mohini Dassi* (3), which was overruled by the Full Bench case. The sale of a tenure, in order to be a sale under the Bengal Tenancy Act, must be a sale held while the decree-holder remains the sole landlord. To determine the legal incidents of a sale, we must look to the time when the sale actually took place and not to the time when the application was made for the sale. The Privy Council decision shows that unless the decree-holder remains the landlord at the time of the actual sale, the sale would be one under the Civil Procedure Code and not under the Bengal Tenancy Act.

Mr. *A. K. Fuzlul Huq*, in reply.

(3) 3 C. W. N. 604.

JUDGMENT.

MOOKERJEE, J.—This is an appeal, under clause 15 of the Letters Patent, from the judgment of Mr. Justice Mullick in a suit for recovery of possession of land on declaration of title. The case for the plaintiff is that, on the 19th February 1908, she obtained a decree for rent against an under-tenure-holder, that she executed the decree in accordance with the special procedure prescribed in Chapter XIV of the Bengal Tenancy Act, and that on the 15th February 1909, she purchased the defaulting under-tenure at the execution sale. When she proceeded to take possession of the property through Court on the 17th July 1909, the present defendants declined to deliver up possession to her on the allegation that they were in possession as holders of a subordinate under-tenure lawfully created by the defaulter. The plaintiff thereupon proceeded to annul the alleged incumbrance by service of notice in accordance with the provisions of section 167 of the Bengal Tenancy Act, and, subsequently, on the 7th July 1911, instituted the present suit for ejectment of the defendants. The defendants pleaded that inasmuch as a half share of the interest of the plaintiff as superior landlord had been sold in execution of a mortgage-decree against her on the 20th January 1909, and as, consequently, she had ceased to be the sole landlord on that date, the sale held on the 15th February 1909 operated not as a sale under the Bengal Tenancy Act, but only as a sale of the right, title and interest of the judgment-debtor under the Code of Civil Procedure. The Trial Court overruled this contention and decreed the suit. On appeal to the Subordinate Judge, the decree of the Court of first instance was affirmed. On second appeal to this Court, Mr. Justice Mullick has held that the contention of the defendants must prevail on the authority of the decision of the Judicial Committee in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1) and in this view, he has dismissed the suit. The question of the effect of the execution sale held on the 15th February 1909 is the sole point for consideration in the present appeal.

The history of judicial opinion on the

question of the effect of the cessation, partial or entire, of the interest of a landlord on his right to enforce realisation of arrears of rent by sale of the tenancy under the special procedure prescribed in the Bengal Tenancy Act, may be briefly reviewed. In *Hem Chunder Bhunjo* v. *Mon Mohini Dassi* (3) the interest of the landlord ceased after he had obtained a decree for rent in respect of saleable under-tenure. It was ruled by O'Kinealy and Ameer Ali, JJ., that he could not thereafter bring the tenure itself to sale in execution of the decree in conformity with the special provisions of the Bengal Tenancy Act. In *Chhatrapat Singh* v. *Gopi Chand Bothra* (4) the landlord lost his interest after the institution of the suit for arrears of rent and before the decree was made in his favour. It was ruled by Macpherson and Ameer Ali, JJ., that the decree so made had all the characteristics of a rent-decree under the Bengal Tenancy Act. In *Srimant Roy* v. *Mahadeo Mahata* (5) the landlord lost his interest before the institution of the suit for arrears of rent, by reason of the expiry of the term of his own lease. It was ruled by Harington and Brett, JJ., that he could, in execution of his decree for rent, sell only the right, title and interest of the tenant as existing at the time of the sale. In this state of the authorities, the matter came before a Full Bench of this Court in the case of *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2). In that case, the landlord had parted with her interest after she had obtained a decree for arrears of rent and before she applied to execute the decree. It was ruled that the decree was capable of execution as a rent-decree at her instance. Sir Francis Maclean, C. J, held that if at the time when the rent suit is instituted and the rent-decree made, the plaintiff is still the landlord, the decree is liable to be executed at his instance as a rent-decree, notwithstanding that he has parted with his interest as landlord before he applies for execution. It may be observed that the Full Bench dissented from the decision in *Hem Chunder Bhunjo* v. *Mon Mohini Dassi* (3) which was indistinguishable on the facts. We come finally to the decision of the Judicial Committee in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1). There, the landlord lost his interest before the institution of the suit for arrears of rent and was consequently not the landlord at the time when the decree was obtained or the application was made for its execution A Division Bench of this Court, Rampini and Sharfuddin, JJ. [*Maharaj Bahadur Singh* v. *Forbes* (6)] held that the decree operated as a decree for rent. The Court treated the decisions in *Hem Chunder Bhunjo* v. *Mon Mohini Dassi* (3) and *Srimant Roy* v. *Mahadeo Mahata* (5) as overruled by the Full Bench in *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2), although the facts of the case before the Full Bench were different from those of the case then before the Court in a material particular, namely, while in the one case the landlord had lost his interest before the institution of the suit for rent, in the other he lost his interest after he had obtained his decree for rent. The case was then taken up on appeal to the Judicial Committee, and the decision of this Court was reversed. In the elaborate judgment delivered by Mr. Ameer Ali who, it will be observed, was a party to the conflicting decisions of *Hem Chunder Bhunjo* v. *Mon Mohini Dassi* (3) and *Chhatrapat Singh* v. *Gopi Chand* (4), the provisions of the Bengal Tenancy Act relating to rent were reviewed; but the Judicial Committee did not in express terms overrule the decision of the Full Bench in *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2) and proceeded, on the other hand, to observe that the High Court had fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based on facts different from those with which they had to deal. The facts of the case before us are substantially different from those of the cases already mentioned, and consequently, we are not called upon to consider the question which formed the subject-matter of reference to a Special Bench in *Prafulla Krishna Deb* v. *Nosibannessa Bibi* (7), namely, whether the decision of the

(4) 26 C. 750; 4 C. W. N. 446; 13 Ind. Dec. (N. S.) 1080.

(5) 31 C. 550; 8 C. W. N. 531.

(6) 35 C. 737; 7 C. L. J. 652.

(7) 37 Ind. Cas. 425; 24 C. L. J. 331.

Full Bench has been in essence overruled by the decision of the Judicial Committee. As we have observed, we are not concluded here by any of the decisions just analysed, and we are not prepared to apply to this case isolated *dicta* from the judgment of the Judicial Committee pronounced in a case where the facts were in essential particulars different from those of the litigation before us; otherwise there would be a manifest abuse of judicial precedents, which has been condemned by Lord Halsbury in *Quinn* v. *Leatham* (8) and by Lord Haldane in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (9). The view thus emphasised had been recognised many years earlier by Marshall, C. J., in *Brooks* v. *Marbury* (10), where he observed that the language of a judicial pronouncement must be understood as spoken in reference to the facts under consideration and limited in meaning by those facts [*United States* v. *Burr* (11)].

What then is the position of the parties, when tested from the point of view of principle? The plaintiff was the sole landlord at the date of the institution of the suit for arrears of rent, at the date of the decree, and at the time when the application for execution was made. The application was made in accordance with the special procedure prescribed in Chapter XIV of the Bengal Tenancy Act for execution of decrees for arrears of rent. Proceedings were thereupon taken under section 163 for simultaneous issue of writ of attachment and proclamation of sale; and it cannot be disputed that this was done in strict conformity with the position of the decree-holder at the time. Does it, then, make any difference that the decree-holder lost a part of his interest as landlord before the sale was actually held by the Court? In our opinion, the answer must be in the negative. The legal effect of the sale should depend upon the status of the decree-holder at the time the proceedings for sale were taken by the Court at her instance. She was competent to ask the Court to bring the defaulting under-tenure to sale and to adopt for that purpose the measures prescribed by the Statute. Those measures were duly adopted, and the property was brought to sale in conformity therewith. The respondents have not been able to invoke the aid of any intelligible principle by which the legal effect of the sale can under such circumstances be made to depend, not upon the true character of the proceedings in execution duly taken, but the relative situation of the parties at the moment of the sale. We are of opinion that, in a case of this description, where the decree-holder continued to be the sole landlord at the date of the application for execution of the decree, and, in his character as landlord decree-holder, took the necessary steps for sale of the under-tenure in conformity with the statutory provisions, the effect of the execution sale is to pass the under-tenure to the purchaser, even though the decree-holder has lost his interest as landlords before the actual sale.

The result is that this appeal must be allowed and the decree of the Subordinate Judge restored with costs of both hearings in this Court.

BEACHCROFT, J.—I agree.

Appeal allowed.

(8) (1901) A. C. 495 at p. 506; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 129; 65 J. P. 708; 17 T. L. R. 749.

(9) (1914) A. C. 25 at p. 40; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 30 T. L. R. 114.

(10) 11 Wheaton 78 at p. 90; 24 U. S. 423; 6 Law. Ed. 423.

(11) 4 Cranch 470 at pp. 482, 488; 58 U. S. 604.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO 3 OF 1917.

April 13, 1917.

Present:—Mr. Justice Piggott.

AJODHYA PRASAD—PETITIONER

versus

BADARUL HUSAIN—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), *Sch. II, para.* 3—*Arbitration—Reference, validity of*—Pro forma *defendants not parties to reference, effect of—Objections to award—Court ordering reference—Jurisdiction.*

Before a Court comes to the conclusion that a reference to arbitration is invalidated by reason of some of the defendants not joining the reference, the facts of each case should be carefully examined, as to whether under the circumstances of the particular case the reference to arbitration may not have involved a virtual, if not an express, abandonment by the plaintiff of his claim as against any defendant or defendants who had not joined in the order of reference. [p. 360, col. 2; p. 361, col. 1.]

AJODHYA PRASAD *v.* BADARUL HUSAIN.

Ishar Das v. *Keshab Deo*, 7 Ind. Cas. 68; 32 A. 657; 7 A. L. J. 807, followed.

Haswa v. *Mahbub*, 10 Ind. Cas. 559; 8 A. L. J. 645, distinguished.

A suit was brought against several defendants but the cause of action as set forth in the plaint was in substance against one defendant alone. The suit was referred to arbitration. Some of the defendants were exempted, but those of the defendants against whom the suit was proceeding *ex parte* neither joined nor were exempted. The plaintiff, it appeared, was prepared to treat such of the defendants as did not join in the reference as mere *pro forma* defendants:

Held, that under the circumstances of the case there was a valid order of reference and the contesting defendant could not challenge the award on the ground of the invalidity of the reference. [p, 360, col. 1.]

Semble.—Objections to an award on the ground of invalidity from any cause whatever should be decided by the Court which has made the order of reference to arbitration and by no other Court. [p. 360, col. 2.]

Civil revision from an order of the Munsif, Hamirpur, dated the 27th of July 1916.

FACTS appear from the judgment.

Mr. *K. N. Laghate*, for the Petitioner, contended on the facts of the case that the arbitrator went beyond the authority given by the parties. He then contended that the Court had no jurisdiction to refer the case to arbitration when all the parties to the suit did not join it.

He referred to *Pitam Mal* v. *Sadiq Ali* (1), *Kadhu Singh* v. *Baljit Singh* (2), *Negi Puran Singh* v. *Hira Singh* (3), *Ishar Das* v. *Keshab Deo* (4), *Dooly Chand* v. *Mamuji Musaji* (5), *Haswa* v. *Mahbub* (6) and *Sabta Prasad* v. *Dharam Kirtisaran* (7).

Mr. *Abdul Raoof*, for the Opposite Party, contended that no revision lay but that an appeal lay. The Court is not bound to exercise discretion under section 115 of the Civil Procedure Code unless injustice is done.

He referred to *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (8).

(1) 24 A. 229; A. W. N. (1902) 19.
(2) 29 A. 423; A. W. N (1907) 147: 4 A. L. J. 347.
(3) 1 Ind. Cas. 146; 6 A. L. J. 333.
(4) 7 Ind. Cas. 68; 32 A. 657; 7 A. L. J. 807.
(5) 41 Ind. Cas. 295; 21 C. W. N. 387; 25 C. L. J. 339.
(6) 10 Ind. Cas. 559; 8 A. L. J. 645.
(7) 18 Ind. Cas. 609; 35 A. 107; 11 A. L. J. 66.
(8) 9 C. W. N. 873.

Mr. *K. N. Laghate*, in reply, referred to *Lutawan Kubar* v. *Lachiya* (9), *Haswa* v. *Mahbub* (6).

JUDGMENT.—This is an application in revision by one Ajudhya Prasad, who was one of the twenty-one defendants impleaded in a certain suit in which the plaintiff claimed a sum of money by way of damages. A number of defendants, including Ajudhya Prasad, joined with the plaintiff in petitioning the Court to refer the entire matter in dispute to the decision of a certain arbitrator. On receiving this application the Court seems to have examined the array of parties. It found that there were two contesting defendants who had not joined in the application; but in respect of these the plaintiff abandoned his claim, so that they undoubtedly ceased to be parties interested in the suit. There were three other defendants Nos. 5, 18 and 19, who also had not joined in the agreement to refer to arbitration. With reference to these three defendants the Court made a note to the effect that they had never entered any appearance in the suit and that order had already been passed that the trial of the suit should proceed *ex parte* as against them. Thereupon the Court passed an order of reference under paragraph 3 of the Second Schedule to the Code of Civil Procedure. The arbitration dealt with the matter under the authority conferred upon him by this order of reference and delivered an award for a certain sum of money against Ajudhya Prasad alone, exempting all the remaining defendants. Objections were taken to this award and, amongst others, a point was taken that, inasmuch as all the parties interested in the suit had not agreed that the matter in difference between them should be referred to arbitration, the order of reference was bad and all proceedings thereunder null and void. The learned Judge of the Court below proceeded to deal with this objection. He considered that the point was covered by a decision of this Court in *Pitam Mal* v. *Sadiq Ali* (1) and accordingly overruled the objection. He also overruled all the other objections taken to the award and pronounced judgment accordingly. A decree in favour

(9) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

of the plaintiff in accordance with the terms of the award necessarily followed. Ajodhya Prasad has brought the matter in revision before this Court. One of the pleas taken by him seeks to raise a point which was not taken at all in the Court below, namely, that the award went beyond the terms of the reference. I should not in any case have allowed the applicant to raise this point when he had omitted to take it in the Court below, but as a matter of fact there is no force in it. I am satisfied that the award did not go beyond the terms of the order of reference. The other point taken is that already referred to as having been considered and overruled by the Court below. On the question whether there can be a valid reference to arbitration upon an agreement entered into between the plaintiff and the contesting defendants in any suit, when certain other defendants who had entered no appearance and against whom the trial of the suit was proceeding *ex parte*, have not joined in the application to refer to arbitration, the course of decisions in this Court appears by no means uniform. The case relied upon by the learned Munsif is certainly in favour of the view which he has taken. That case was distinguished against, but upon a somewhat different state of facts, in *Kadhu Singh* v. *Baljit Singh* (2). In another case, that of *Negi Puran Singh* v. *Hira Singh* (3), the proceedings of the trial Court had been marked by so many irregularities that it is not easy to say upon what point in particular the decree, which purported to have been passed in accordance with an arbitration award, was set aside. Finally, in *Ishar Das* v. *Keshab Deo* (4) the older decision in *Pitam Mal* v. *Sadiq Ali* (1) was re-affirmed and acted upon in circumstances quite undistinguishable in principle from those of the case now before me. I find, however, that the authority of this decision has undoubtedly been shaken by certain subsequent pronouncements of this Court. I refer particularly to the case of *Haswa* v. *Mahbub* (6), where the decision in *Ishar Das* v. *Keshab Deo* (4) was referred to and seems to have been in substance dissented from. Moreover the learned Judges who decided this case referred in the course of their judgment to an unreported decision by another Bench of this Court as supporting the view taken by them. There has been another case on the point since then, namely, that of *Sabta Prasad* v. *Dharam Kirtisaran* (7). The learned Judges who decided that case affirmed the decree passed upon an arbitration award; but they have used language in the course of their judgment which seems to indicate agreement rather with the principles laid down in *Haswa* v. *Mahbub* (6) than with the older decisions of this Court. In this state of the authorities I should ordinarily have been disposed to refer any point of law to a Bench of two Judges, if only I was satisfied that the point of law arose in a pure form and was capable of being definitely decided.

I think, however, that an order of reference would be of little use in the present case in the way of obtaining a definite pronouncement from this Court on the precise point on which the reported decisions of the learned Judges appear to differ. The circumstances of the present suit were peculiar, and I apprehend that they are such as to bring the point for determination within the operation of the principles affirmed in *Sabta Prasad* v. *Dharam Kirtisaran* (7) as well as those which govern the decision in *Ishar Das* v. *Keshab Deo* (4). I have examined the pleadings in some detail. It seems to me that, although the plaintiff elected to drag twenty-one defendants into Court and to take his chance of obtaining relief against any or all of them, he set forth in his plaint a cause of action maintainable in substance against the defendant Ajodhya Prasad alone. At the time of the reference to arbitration, it is clear that the plaintiff was prepared to treat any of the defendants who had not chosen to join of their own accord in the reference to arbitration as being merely *pro forma* defendants. I feel no real doubt that if the Munsif had, on the very date when the application for a reference to the decision of an arbitrator was made to him, indicated his opinion that the reference would be incomplete in law by reason of the absence of those defendants against whom the suit was proceeding *ex parte*, the plaintiff would have at once agreed to an order formally exempting these defendants from his claims. As a matter of fact, it seems to me that the Court below only did not record them as being exempted from the plaintiff's

claim, because it took the view that, as defendants who had not entered an appearance, they had already ceased to be parties interested in the result of the suit, and there was, therefore, no need of any formal order to put that point beyond doubt. I think, therefore, that there was in the present case a valid order of reference or at any rate one which the defendant Ajudhya Prasad should not be permitted to challenge.

In this connection I have one more point to notice. It is a remarkable circumstance that all the cases of this Court, to which I have referred as authorities on the question of law involved, came before this Court either as second appeals, or as first appeals from orders, or as regular first appeals. The learned Judges who decided the case of *Sabta Prasad* v. *Dharam Kirtisaran* (7) were dealing with a regular first appeal from a decree and it is obvious that they would have been prepared to reverse that decree in appeal if they had found that the order of reference to arbitration was void in law. Since that decision was pronounced, however, the question of the admissibility of an appeal in a case like the present had been referred to a Full Bench. In the case of *Lutawan Kubar* v. *Lachiya* (9) it was held that no appeal would lie from a decree purporting to be passed on the basis of an award, except on the grounds stated in Article 16 of the Second Schedule to the Code of Civil Procedure. The decision proceeds, of course, to some extent on the particular facts which were before the Court in that case, but I think it may fairly be quoted as authority for the broad proposition of law above stated. The learned Chief Justice in the course of his decision laid stress upon certain alterations in the law effected by the passing of the present Code of Civil Procedure (Act V of 1908). He summed up his opinion in the following words:—"It seems to me that it was the clear intention of the Legislature. . . . . that objections to the award on the ground of invalidity from any cause whatever should be decided by that Court (meaning the Court which had made the order of reference to arbitration and passed a decree in accordance with the award) and *by no other Court.*" I do not know how far the learned Judges who concurred in the decision can be regarded as having committed themselves to the same proposition of law; but personally I am prepared to say that I find myself in the completest accordance with the view above expressed in the language of the learned Chief Justice. It seems to me, however, that those words raise a further question, namely, the discretion of this Court to interfere in revision in a matter like that now before me. If the principle of law which I have quoted above is correct, then this question, namely, whether there had been in the present case a valid reference to arbitration, was one which the provisions of paragraph 15 of the Second Schedule to the Code of Civil Procedure expressly reserved to the decision of the trial Court, without any right of appeal. If this Court is to make it a practice to interfere in revision, merely on the ground that the decision arrived at by the trial Court upon a point which it had jurisdiction to determine, namely, the validity or otherwise of the order of reference, was a wrong decision, I can only say that it seems to me that this Court will fail to carry into effect the express intention of the Legislature. According to the practice prevailing before the decision of the Full Bench in the case of *Lutawan Kubar* v. *Lachiya* (9), an appeal from the decree of the Munsif would have lain in this case to the Court of the District Judge. To admit the present application would, it seems to me, amount to giving the defendant the privilege of an appeal on a point of law direct to this Court.

These are my reasons for preferring to dispose of this application myself rather than to seek a fresh pronouncement from a Bench of this Court on the controverted question of law which has been discussed before me. So far as my own opinion in the matter goes, I desire to place it on record that while I think that the facts of each case should be carefully examined, I find myself in general agreement rather with the decision in *Ishar Das* v. *Keshab Das* (4) than with that in *Haswa* v. *Mahbub* (6). More particularly I think that the point which was taken in the present case should always be carefully considered before a Court comes to the conclusion that the reference to arbitration was invalid, namely, whether under the circumstances of the particular case the reference to arbitration may not have involved a virtual, if not an express, abandonment by the plaint-

iff of his claim as against any defendant or defendants who had not joined in the order of reference. I do not think this consideration was present to the minds of the learned Judges who decided the case of *Haswa* v. *Mahbub* (6). Possibly it did not arise in any clear form on the facts of that case. The result is that I dismiss this application with costs.

Application dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1471 OF 1915.

February 7, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

ASA BEEVI AND OTHERS—DEFENDANTS NOS. 5 TO 7—APPELLANTS

versus

S. K. M. KARUPPAN CHETTY—PLAINTIFF—RESPONDENT.

Muhammadan Law—Inheritance, relinquishment of rights of validity of—Spes successionis, *transfer of—Transfer of Property Act (IV of* 1882), *ss.* 2, 6—*Renunciation for consideration—Estoppel—Evidence Act (I of* 1872), *ss.* 115, 116.

Per *Sadasiva Aiyar, J.* (*Spencer, J., dissenting*).—The relinquishment of his rights of inheritance by an heir-apparent is invalid under the Muhammadan Law. [p. 365, col. 1.]

Chances of succession are not rights of property under the Muhammadan Law, as there can be no heir to a living person under that law. [p. 365, col. 1.]

Meerangani Rowther v. *Karupathi Nagur Meera Lubbai*, 18 Ind. Cas, 185; 24 M. L, J. 258; (1913) M. W. N. 371; *Sumsuddin* v. *Abdul Husein*, 31 B. 165; 8 Bom. L. R. 781, followed.

Mohammad Hashmat Ali v. *Kaniz Fatima*, 27 Ind. Cas. 701; 13 A. L. J. 110; *Kunhi Mamod* v. *Kunhi Moidin*, 19 M. 176; 6 M. L. J. 62; 6 Ind. Dec. (N. S.) 828, explained and distinguished.

The said rule of Muhammadan Law is unaffected by the provisions of section 6 of the Transfer of Property Act. [p. 363, col. 2.]

In so far as the Muhammadan Law prohibits relinquishment of rights of future inheritance, whether for consideration or not, a declaration as to present or future intention about such relinquishment cannot he relied on as an estoppel. [p. 366, col. 2.]

Section 115 of the Evidence Act does not estop any person from denying the legal effect of a transaction to which he is a party, but only the truth of a "thing" which he intentionally caused the other party to believe. The "thing" does not refer to the legal validity of an agreement to reliuquish a *spes successionis* when it actuates, nor to an intention which has to come into existence in the future, *e. g.*, when a succession opens. The intentional misleading under the section refers to the present existence of a right or fact and not to a future metaphysical possibility. [p. 365, col. 2; p. 366, col. 1.]

Per *Spencer, J.*—A mere renunciation of a right of succession is not repugnant to the principles of Muhammadan Law. [p. 369, col. 1.]

Where an heir-apparent renounces such a right by reason of an arrangement whereby he accepts a benefit and compounds for his share in the property, he or any one claiming under him is estopped from repudiating the transaction by which he is benefited. [p. 369, cols. 1 & 2.]

Second appeal against the decree of the Temporary Subordinate Judge, Sivaganga, dated the 21st December 1914, in Appeal Suit No. 301 of 1914, preferred against that of the Additional District Munsif, Sivaganga, in Original Suit No. 96 of 1913.

FACTS of the case appear from the judgment.

Mr. *A. Krishnaswami Aiyar* (with him Mr. *G. Duraiswami Aiyar*), for the Appellants.—My first point is that Exhibit A is not a deed of release; it is merely a relinquishment. The distinction between a relinquishment and release is clearly stated in *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya* (1); a relinquishment is for consideration. He received Rs. 500 and then gave up his right to his father's property.

Even if it were a release, it is valid. The lower Court considers that it is a kind of *spes successionis* and, therefore, void under section 6 of the Transfer of Property Act. That section says that that chapter does not affect any rule of Hindu, Muhammadan or Buddhist Law.

Under Muhammadan Law the release of a right not yet come into existence is valid. *Musammat Hurmut-ool nissa Begum* v. *Allahdia Khan* (2) clearly supports me. The case was followed in *Nasirul Haq* v. *Fyaz-ul-Rahman*(3) and *Narayan Dei* v. *Durga Dei* (4). So also in *Kunhi Mamod* v. *Kunhi Moidin* (5).

(1) 30 M. 201; 2 M. L. T. 184.
(2) 17 W. R. 108.
(3) 9 Ind Cas. 530; 33 A. 457; 8 A. L. J. 275.
(4) 16 Ind. Cas. 489; 10 A. L. L. J. 97 at p. 100.
(5) 19 M. 176; 6 M. L. J. 62; 6 Ind. Dec. (N. S.) 828.

Anyhow this being a family settlement, it is binding upon both parties and it is not open to any of them to recede from the contract. *Muthuraman Chettiar* v. *Ponnuswamy Udayar* (6) and *Mohammad Hashmat Ali* v. *Kaniz Fatima* (7) clearly support this view.

When once parties enter into a contract it is not open to any of them to recede from that contract.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.—These decisions draw a distinction between cases where inheritance has become vested and where it has not. In *Musammat Hurmut-ool-nissa Begum* v. *Allahdia Khan* the transfer was made after the inheritance had become vested. In *Kunhi Mamod* v. *Kunhi Moidin* (5), the respondent was not represented and the case was not properly argued. The case of *Musammat Khanum Jan* v. *Musammat Jan Beebee* (8) can be distinguished on the ground that it is not? The case of *Sumsuddin* v. *Abdul Husein* (9) clearly supports my view. So also *Meerangani Rawther* v. *Karupathi Nagur Meera Lubbai* (10). As to estoppel it is clear that there is no representation of a fact to constitute an estoppel. See Ameer Ali's Law of Evidence. What is relied on as constituting an estoppel is the legal effect of a transaction.

JUDGMENT.

SADASIVA AIYAR, J.—The relevant facts may be shortly stated thus:—

One Pachakanni had two children, a son and a daughter by his first wife Vellayammal. The son's name was Mira Moideen and the daughter's name is Nagoor Ammal. Pachakanni married two other wives. About 25 years after her marriage, Vellayammal and her son Mira Moideen executed a release deed, Exhibit I, on the 28th April 1902 in favour of Pachakanni. The daughter Nagoor Ammal did not join in this release deed, Exhibit I. Under this release deed, Exhibit I, Vellayammal and her son Mira Moideen received Rs. 500 from Pachakanni. The operative portion of the deed is: "as we have received the said Rs. 500 we make a release of the rights and connections of ourselves and our heirs to all the properties or liabilities of yours and your heirs." It is not denied that, on the true construction of this document, the mother and the son released their rights of inheritance also to Pachakanni.

Pachakanni died about the middle of 1908. Shortly afterwards, his son Mira Moideen and his daughter Nagoor Ammal by his first wife sold their father's properties to the plaintiff as if they were the sole heirs of their father, ignoring the release deed, Exhibit I, by which one of them had relinquished his interest in the inheritance and ignoring also the fact that the father had left a widow at his death. Defendants Nos. 5, 6 and 7 represent the heirs of the second wife of Pachakanni, who was the only heir left by him at his death (besides his daughter and his son by his first wife). The 4th defendant is the alienee from one of the heirs of the widow. Defendants Nos. 1 to 3 disclaimed all interest.

The District Munsif found (*a*) that Nagoor Ammal, one of the plaintiff's vendors, was not proved to be the legitimate daughter of Pachakanni by his first wife Vellayammal; (*b*) that the other vendor of the plaintiff had given up all rights of inheritance in his father's properties by Exhibit I and (*c*) that the plaintiff, therefore, got no title under his sale-deed, Exhibit B. On these findings the District Munsif dismissed the suit with costs.

On appeal, the learned Subordinate Judge held (*a*) that Nagoor Ammal was the legitimate daughter of Pachakanni, (*b*) that the release-deed, Exhibit I, was legally inoperative both under the Muhammadan Law and by and on the analogy of section 6 of the Transfer of Property Act and that, therefore, the plaintiff was entitled to 7/8th share under the Muhammadan Law in Pachakanni's estate, such 7/8ths (7/12ths and 7/24ths) being the sum of the fractional shares belonging to his two vendors in that estate.

(6) 29 Ind. Cas. 549: (1915) M. W. N. 405; 2 L. W. 533; 18 M. L. T. 124; 29 M. L. J. 214.
(7) 27 Ind Cas. 701; 13 A. L. J. 110.
(8) 4 S. D. A. 210.
(9) 31 B 165; 8 Bom. L. R. 781.
(10) 18 Ind Cas. 185; 24 M. L. J. 258; (1913) M. W. N. 371.

The contentions in second appeal are as follows:—

1. "The lower Appellate Court is wrong in holding that a renunciation by an heir of a right to inherit is a transfer within the meaning of section 6 of the Transfer of Property Act.

2. The lower Appellate Court ought to have held that under the Muhammadan Law there is nothing illegal in an heir renouncing his right of inheritance for valuable consideration.

3. The lower Appellate Court failed to notice that the Transfer of Property Act does in no way affect the right of an heir to renounce his right of inheritance under the Muhammadan Law.

4. The lower Appellate Court ought to have held that even if a renunciation is invalid as a present transfer, the law will give effect to it immediately on the death of the propositus and that the right in property becomes by operation of law transferred to the other heirs."

It will be seen that none of these four grounds raises the question of Nagoor Ammal's right to inherit her share, nor does any of them state that the release made by Vallayammal and her son is binding on Nagoor Ammal. Thus though the second appeal is valued at the whole 7/8th share decreed to the plaintiff, it is clearly unsustainable so far as Nagoor Ammal's share in the inheritance is concerned.

Confining it then to Kadir Moideen's 7/12th share, his relinquishment, if valid, will enure for the benefit of the other heirs including Nagoor Ammal and hence the plaintiff will be entitled not only to 7/24th share but to the share which belonged to the only daughter of a Muhammadan intestate who left only a widow. (Probably the share will be $\frac{1}{2}$.)

The short question of law, therefore, is whether by the execution of the release-deed, Exhibit I, Mira Moideen forfeited his right of inheritance.

Mr. A. Krishnaswami Aiyar, who argued the case for the appellant with his usual ability and lucidity, contended that the Transfer of Property Act, section 6, could not govern this case and even if it did, its operation was excluded by section 2 of the Transfer of Property Act. Section 6 says that property of any kind may be transferred, but clause (*a*) provides "The chance of an heir-apparent succeeding to an estate,..... or any other mere possibility of a like nature cannot be transferred." The learned Vakil argued that Exhibit I executed to the father Pachakanni by the son Mira Moideen was not a transfer or release (though it is called a release) but it is in law a relinquishment. Speaking for myself, I do not like too fine distinctions. Though there is such a distinction between the relinquishment of such a right as that of an easement by the owner of the dominant tenement so as to relieve the servient tenement (or the right of forfeiture given up by a landlord in the tenant's favour) and the transfer of such a right to a third person, the distinction becomes too fine in the case of most of the other classes of rights usually coming before Courts. [See *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya* (1).] In this case, the document, Exhibit I, clearly recites that it is executed in favour of the father and that it releases the son's rights and claims. If section 6 of Act IV of 1882 could apply, I am clear that Exhibit I is wholly invalid.

Section 2 of the Transfer of Property Act, however, says: "Nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist Law." Section 6 occurs in Chapter II. Hence if the chance of an heir-apparent can be validly transferred or released or relinquished by Muhammadan Law, section 6 will not affect such a transfer or relinquishment. Mr. Krishnaswami Aiyar, therefore, contended that under the Muhammadan Law, it can be validly relinquished. I shall, therefore, deal shortly with that point. Mr. Krishnaswami Aiyar relied upon a passage in the judgment of the Privy Council in *Musammat Hurmut-ool-nissa Begum* v. *Allahdia Khan* (2) for his contention. In that case, a Muhammadan as residuary heir of an intestate sued, to recover from the widow 3/4ths of the intestate's property nearly twelve years after the death of the testator. The Privy Council held, on the question of fact, that the plaintiff (respondent before the Privy Council) had failed to establish

his alleged relationship to the intestate and the right he consequently claimed as residuary heir. They also said casually that according to the Muhammadan Law, there may be a renunciation of the right to inherit and that such renunciation may be implied from the ceasing or refraining from prosecuting a claim maintainable against another. The facts are not fully set out and it does not appear whether their Lordships of the Privy Council intended to find that the plaintiff had by his "conducts and acts" relinquished the possible inheritance before the intestate's death or whether he relinquished an actual inheritance by his conducts and acts after the intestate's death. At page 109 of the report it appears that the widow evidently after her husband's death procured two papers called "general testimonials" of her right to enjoy the whole of her husband's property and that one of these testimonials was signed by the respondent-plaintiff and that after this recognition of her title by the plaintiff, she got mutation of names in the Collector's register in her favour. It seems to me, therefore, that the renunciation of a "right to inherit" which is referred to by their Lordships at page 112 is a renunciation by "conducts" and "acts" and "abstinence from suing for eleven years," all of which took place *after the plaintiff acquired the vested right to inherit*, that is, after the intestate's death and not before. I am, therefore, also of opinion that the cases of *Nasirul Haq* v. *Fyazul-Rahman* (3) and *Mohammad Hashmat Ali* v. *Kaniz Fatima* (7), which rely upon the rather obscure passages above referred to in the judgment of their Lordships of the Privy Council in *Musammat Hurmut-ool-nissa Begum* v. *Allahdia Khan* (2) in support of their view that a future right of inheritance can be validly relinquished by a Muhammadan, have misconstrued the said decision of their Lordships.

I now come to *Kunhi Mamod* v. *Kunhi Moidin* (5) decided by Collins, C. J., and Parker, J. In that case the respondent was not represented and that fact naturally detracts somewhat from the weight to be given to its authority. Then at page 177, it is said that the right relinquished in that case was not a mere contingent right but that it was a vested right. The property in dispute in that case was, according to the judgment, property which belonged to a Mussalman mother who retained that property for maintenance *for her life*, having given other properties of hers and the reversionary interest after her lifetime in the plaint properties to her two sons. This vested right in half the reversion was afterwards given up by the plaintiff (one of the two sons) in favour of his mother for a consideration of Rs. 150. The question was whether this document of release or relinquishment was valid. The learned Judges held that as it was a *vested* right, it could be released and that, therefore, that case could be distinguished from the case of *Musammat Khanum Jan* v. *Musammat Jan Beebee* (8), which was relied on by the lower Courts in support of their view that by Muhammadan Law the right of an heir-apparent could not legally be dealt with *before it becomes a vested right*. Though the learned Judges were thus able to distinguish *Musammat Khanum Jan* v. *Musammat Jan Beebee* (8), they state in the beginning of their judgment that that case of *Musammat Khanum Jan* v. *Musammat Jan Beebee* (8) was not one of any great authority, that though it was true that the majority of the Muhammadan Law officers consulted in that case expressed the opinion that the renunciation was not valid on the ground that the right had not vested, the opinion was not unanimous and that a decision on that point was not necessary to support the conclusion come to in that case. I need not say that if the *dictum* in *Musammat Khanum Jan* v. *Musammat Jan Beebee* (8) is *obiter*, the *dictum* in *Kunhi Mamod* v. *Kunhi Moidin* (5) doubting the former *dictum* is also *obiter*. I might also say that the learned Judges in *Kunhi Mamod* v. *Kunhi Moidin* (5), while stating that *Musammat Khanum Jan* v. *Musammat Jan Beebee* (8) is not of great authority, do not say expressly that the relinquishment of the right of an heir-apparent *is* valid under the Muhammadan Law. On the other hand in *Meerangani Rowther* v. *Karupathi Nagur Meera Lubbai* (10), Benson and Sundara Aiyar, JJ., referred to *Musammat Khanum Jan* v. *Musammat Jan Beebee* (8) as a good authority. They

also referred to the decision of *Abdul Wahid Khan* v. *Nuran Bibi* (11), where their Lordships of the Privy Council held that it would be opposed to Muhammadan Law to hold "that a compromise could validly limit an estate to take effect after the determination, on the death of the owner, of a prior estate by way of what is known to English Law as a vested remainder so as to create an interest which can pass to a third person before the determination of the prior estate."

This case of *Kunhi Mamod* v. *Kunhi Moidin* (5) is noted in Tyabji's Muhammadan Law, page 568 (note 4) thus: "This decision seems to be opposed to principle and would probably not be followed."

Again chances of succession are not rights of property under the Muhammadan Law, as there can be no heir to a living person either under the English Law or under the Muhammadan Law. There can be no such being as an heir to a living person.

The whole matter was fully considered in the case reported as *Sumsuddin* v. *Abdul Husein* (9) by two very learned Judges Jenkins, C. J., and Beaman, J. They held that under the Muhammadan Law such relinquishments were totally invalid. This case of *Sumsuddin* v. *Abdul Husein* (9) is also approved of in *Meerangani Kowther* v. *Karupathi Nagur Meera Lubbai* (10). The Allahabad High Court in *Nasirul Haq* v *Fyazul-Rahman* (3) admit that there is a conflict of decisions of the High Courts in India on this question and at the end say that they will not decide the question (see page 462*), and then proceed upon the footing and decide that case on the validity of a family settlement. On the whole I am inclined to express my entire agreement with the opinions expressed in *Meerangani Kowther* v. *Karupatht Nagur Meera Lubbai* (10) and *Sumsuddin* v. *Abdul Husein* (9) and to hold that the release deed Exhibit I is invalid under the Muhammadan Law.

After I had prepared the draft of this judgment as above, my learned brother suggested to me that there was a question of estoppel raised in the case which should be considered in our judgments. Now, the plea of estoppel has not been raised in any of the grounds contained in the memorandum of second appeal, nor was it argued before us when the second appeal was first heard by us and we reserved our judgment, nor, so far as I could find, had it been taken in the written statement or argued in the lower Courts. But if it was a question of law which could be disposed of on the facts as found, I thought that it might be considered. However, I wished to have the appeal argued further on that point and the case was again posted to-day for arguments on this new point and we heard the further arguments.

Having now considered the further arguments, I do not think that under section 115 of the Evidence Act any question of estoppel arises on the facts as found in this case. It seems to me that there is on the record as it stands no evidence of Pachakanni having acted on any belief created by the execution of this release-deed. In the case of *Musammat Oodey Koowar* v. *Musammat Ladoo* (12), though the question of consideration is also referred to, their Lordships proceed to observe as follows:— "Neither does Oodey Koowur act on any representation made by her, or alter her position in any way." There is no evidence in this case that Pachakanni or any of the heirs of Pachakanni was induced by any representation of fact to do any act which has prejudiced the interest of any such heir owing to the release-deed Exhibit I. I am, therefore, inclined to hold that the question of estoppel, which depends upon appropriate allegations in the pleadings and upon proof of such allegations, even if it is allowed to be raised at this stage in second appeal, could not be decided in the defendants' favour on the materials on the record.

Further, section 115 of the Evidence Act does not estop any person from denying the legal effect of a transaction to which he is a party, but only the truth of a "thing" which he intentionally caused the other

(11) 11 C. 597; 12 I. A. 91; 9 Ind. Jur. 283; 4 Sar. P. C. J. 627; Rafique and Jackson's P. C. No. 89; 5 Ind. Dec. (N. S.) 1157.

(12) 13 M. I. A. 585; 15 W. R. (P. C.) 16; 6 B. L. R. 283; 2 Suth. P. C. J. 388; 2 Sar. P. C. J. 628; 20 E. R. 689.

* Page of 33 A.—*Ed.*

party to believe. What is the thing which the plaintiff's vendor Mira Mohidin caused Pachakanni to believe by his obtaining (along with his mother) the consideration money (Rs. 500) for the release-deed? If the "thing" be the legal validity of the agreement under Exhibit I to relinquish the *spes successionis* when it actuates, both the parties to the release-deed seem to have been ignorant of the law as to the validity of the release and Pachakanni was not persuaded by any representation of his wife or his young son on a point of law to make the payment and obtain the release-deed. If the "thing" be the son's intention not to claim his share of the inheritance when it falls due in future, this would only estop him from denying that at the time of Exhibit I, Mira Mohidin (the son) had no intention of claiming the future inheritance. I do not think a man could deny at the present moment the truth of an intention of his at a future time; for such intention which has to come to existence in the future, that is, when the inheritance opens, is a mere possibility not recognized by law and is not an existing "thing" (assuming that "thing" includes a mental state and has the same significance as the word "fact" defined in section 3 of the Evidence Act).

The illustration to section 115 (Evidence Act) would also show that the intentional misleading refers to the present existence of a right or fact and not to a future metaphysical possibility.

As said in Ameer Ali's Law of Evidence, "the boundary line between estoppel and breach of contract is often apt to be obscured, but must not be confounded." * * * * * * "A proposition of law is not 'a thing' within the meaning of the section and this expression refers to a belief in a fact. So also an admission on a point of law is not an admission of a thing within the meaning of the section. The representation in order to work an estoppel must be a material statement of fact. The rule excluding statements of opinion and statements of law has been said to be based upon the ground that the truth is uncertain, or that the person to whom the statement is made knows as much about the matter as the other. * * * *The fact must be a fact alleged to be at the time actually in existence or past and executed. The representation must have reference to a present or past state of things*; for, if a party make a representation concerning something in the future, *it must generally be either a mere statement of intention or opinion uncertain to the knowledge of both parties.* The intent of a party is necessarily uncertain as to its fulfilment. A person cannot be bound not to change his intention, nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed * * * The doctrine of estoppel cannot be applied to an Act of the Legislature. * * * It is an absolutely fundamental limitation on the application of the doctrine of estoppel that *it cannot be applied with the object or result of altering the law of the land* * * It is not allowed to enlarge the status or capacity of parties nor to be a cloak for illegality, nor to alter the incidents of property. * * The admission exacted must always be of something *which can legally be done by the party from whom it is exacted*". (See pages 757, 758, 780, 781 and 764.)

If the Muhammadan Law prohibits relinquishment of rights of future inheritance, wether for consideration or not, a declaration as to a present or future intention about such relinquishment cannot be relied upon as estoppel.

In the result I would dismiss the second appeal with costs.

SPENCER, J.—It has been found that the plaintiff, who is respondent in this Court, purchased, by a sale-deed of 1908, the rights of one Mira Mohidin and his sister, Nagoor Ammal, in the plaint land. The District Munsif dismissed the suit on the ground that Nagoor Ammal was not the legitimate daughter of the original owner Pachakanni and that Mira Mohidin had prior to the sale to plaintiff released his right to succeed Pachakanni's property. The lower Appellate Court reversed the first of these findings on the evidence, and on the second point held that the relinquishment by Mira Mohidin was invalid, as being a transfer of a *spes successionis*. In second appeal the correctness of the Subordinate

Judge's decision of the point of law has been questioned.

The document (Exhibit I) executed on 28th April 1902 by Mira Mohidin and his mother Vellaiammal in favour of Pachakanni is termed a release-deed, and runs as follows:—

"We having no ancestral property and you divorcing the person No. 2 and marrying Pathmabibi and S. Pathmabibi as 2nd and 3rd wives and going to places like Colombo have acquired property of your own and living with your 2nd and 3rd wives and your children by them, and we are living as a separate family from you and without your protection in Alangampatti for the last 25 years, I, number 1, asked for my share of your self-acquired property and No. 2 for her *mahar* and importuned you therefore, and we then received in cash Rs. 500 from you, as decided by arbitrators. And as we have received the said Rs. 500, we make a release of the rights and connection of ourselves and our heirs to all the properties or liabilities of yours or your heirs."

(Signed) Ayyadurai *alias* Mira Mohidin.
(Mark) Velliammal *alias* Thayamuthammal.

The effect of this transaction is that Mira Mohidin and his mother, who was Pachakanni's first wife, took Rs. 500 paid in cash in satisfaction of their claims to the shares in the property of Pachakanni that would devolve on them at Pachakanni's death. The question for decision is whether this arrangement violated the principles of section 6 of the Transfer of Property Act or was contrary to any rule of Muhammadan Law. Section 6 of the Transfer of Property Act prohibits the transfer of the chance of an heir-apparent succeeding to an estate, and "transfer" has been defined in section 5 as an act whereby a living person conveys property, in present or in future, to one or more living persons.

In *Sumsuddin* v. *Abdul Husein* (9), Sir Lawrence Jenkins held on the authority of *Kemp* v. *Kelsey* (13) that the same reasons which prevent a chance of succession being the subject of a valid transfer would also prevent it being the subject of a valid release, a view accepted by a Bench of this Court in *Meerangani Rowther* v. *Karupathi Nagur Meera Lubbai* (10), although in *Kakaralapudi Lakshmi Narayana* v. *Kandukuri Veera Sarabha* (14), Tyabji, J., in view of the decision of the Allahabad High Court in *Durga Dutt* v. *Gita* (15), which proceeded on different lines from the Bombay decision, preferred to leave the question open whether releases or relinquishments ought not to be governed by a different rule from that applicable to transfers.

If a relinquishment of a right of succession is permissible under Muhammadan Law, then it is not necessary to consider the effect of the Transfer of Property Act, for section 2 of that Act distinctly provides that nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist Law.

In *Musammat Hurmut ool-nissa Begum* v. *Allahdia Khan* (2), the Privy Council recognised the existence of a right of renunciation by an heir-apparent according to Muhammadan Law, and this decision has not, as observed by the learned Judges who decided *Durga Dutt* v. *Gita* (15), been since questioned by that Tribunal, though they observe that being a decision prior to the passing of the Transfer of Property Act it may be that that Act has some bearing on the question. The learned Pleader, who appeared for the respondents before us, attempted to distinguish the case on this ground, but in the face of section 2 of the Act it does not seem justifiable to do so.

A similar renunciation by a Muhammadan in consideration of a sum of Rs. 150 was held to be valid by this Court in *Kunhi Mamod* v. *Kunhi Moidin* (5), an authority which we have been asked to reject on the ground that it was an *ex parte* decision and to distinguish on the ground that in that case the right was considered to have already vested.

The decision in *Sumsuddin* v. *Abdul Husein* (9) certainly favours the respondent's contention, and the decision in *Nasir-ul Haq* v. *Fyaz-ul-Rahman* (3) decidedly supports the appellants in the case before us. In the former case Sir Lawrence

(13) (1720) Prec. Ch. 544; 24 E. R. 245.

(14) 29 Ind. Cas. 241; 39 M. 554; 17 M. L. T. 419; 28 M. L. J. 650; (1915) M. W. N. 626.

(15) 9 Ind. Cas. 498, 33 A. 443; 8 A. L. J. 220.

Jenkins, overruling the opinion of Chandavarkar, J., from whose decision it was an appeal, held that the relinquishment of the chance of an heir-apparent succeeding to an estate was not only invalid under section 6 of the Transfer of Property Act but was opposed to the principles of Muhammadan Law, in support of which he quoted *Musammat Khanum Jan* v. *Musammat Jan Beebee* (8) and *Abdul Wahid Khan* v. *Nuran Bibi* (11).

The learned Judge does not seem to have had his attention directed to the case of *Musammat Hurmut-ool-nissa Begum* v. *Allahdia Khan* (2). He admitted that there was no direct authority that a Muhammadan cannot bind his chance as an heir-apparent, but he thought that on the analogy of Hindu reversioners, it should be held that he could not. He declined to apply principles of equity to the circumstances of that case. It may be noted that the defence to Fathmaboo's action to establish her rights as an heir to her deceased father failed upon another point, which was that Fathmaboo was a *pardanashin* lady who was not shown to have received independent legal advice when she executed the deed of release in question. The compromise in *Nasirul Haq* v. *Fayz-ul-Rahman* (3) was held to be valid as being of the nature of a family settlement not amounting to a transfer or renunciation of an expectant interest or of a mere possibility.

It may be partially distinguished from the facts of the present case by the circumstance that the relinquishment there was embodied in a decree. It was held that this decree prevented the defendant or any one claiming under him from successfully asserting a title to any interest in the property over and above the life-interest reserved to him, especially after he had received the benefits under the compromise.

In *Muthuraman Chettiar* v. *Ponnuswamy Udayar* (6), this case was cited with approval as an authority for holding that a settlement whereby parties at partition bind themselves as to the disposal of their property after death, so long as there is no attempt to create a new line of succession unknown to Hindu Law, is not invalid. In *Mohammad Hashmat Ali* v. *Kaniz Fatima* (7) a similar contract not to claim on becoming entitled to inherit, when embodied in a decree of Court, was considered to be legal.

In *Meerangani Rowther* v. *Karupathi Nagur Meera Lubbai* (10), it was held by a Bench of this Court that the release of a right of inheritance was not a good consideration among Muhammadans for the transfer of a life-estate, and the decision of Jenkins, C. J., in *Sumsuddin* v. *Abdul Husein* (9) was followed.

In *Thattoli Kothilan Aliyamma* v. *Kunhammed* (16), the surrender by a guardian of a right to division when it related to a mere *spes successionis* was held to be invalid, not on account of the words of section 6, Transfer of Property Act, as it was considered that that was not applicable to an agreement merely not to divide, but mainly on the ground that clear benefit to the minors who were concerned had not been shown.

The case of *Manickam Pillai* v. *Ramalingam Pillai* (17), quoted by Jenkins, C. J., was a simple case of the transfer by a Hindu presumptive reversionary heir of his expectancy, which was obviously obnoxious to section 6 of the Transfer of Property Act and that of *Abdul Wahid Khan* v. *Nuran Bibi* (11), also quoted by the same learned Judge, is merely an authority for the principle that Muhammadan Law does not recognise vested estates in remainder. The case of *Musammut Khanum Jan* v. *Musammat Jan Beebee* (8) was a case of daughters renouncing a right of inheritance to their mother's property, which during their mother's lifetime did not exist and might never come into existence. It was also found that the deed of gift upon which the deed of renunciation depended was void and that consequently both deeds were void. In *Kemp* v. *Kelsey* (13) the question whether a release, if made by a person competent to contract, of his or her future right would be good according to custom was left undecided.

Balkrishna Trimbak Tendulkar v. *Savitribai* (18) was a case of relinquishment by a Hindu son of his right to succeed to a share in the property of his father for a money consideration. It was held to be invalid and of no effect, because it was an attempt to alter the natural course of de-

(16) 8 Ind. Cas. 1090; 34 M. 527; 20 M. L. J. 946; 9 M. L. T. 100.

(17) 29 M. 120.

(18) 3 B. 54; 2 Ind. Dec. (N. S.) 36.

volution of property by a private arrangement. Where it was otherwise, an agreement by expectants to divide a particular property in a certain way was upheld in *Ram Nirunjun Singh* v. *Prayag Singh* (19).

Courts in India will not enforce contracts to transfer expectancies when they are forbidden by law [*vide Kakaralapudi Lakshmi Narayana* v. *Kandukuri Veera Sarabha* (14)], but parties who have taken a benefit under a transaction whereby they relinquish their interest in property and those who claim under them may be estopped from afterwards impugning the validity of the transaction [*vide Nasirul Haq* v. *Fyazul-Rahman* (3)].

In this conflict of authority I think I am bound to follow the authority of the highest Court and adopt the view taken in *Musammat Hurmut-ool-nissa Begum* v. *Allahdia Khan* (2) that a mere renunciation of a right of succession is not repugnant to the principles of Muhammadan Law, and I further hold that the plaintiff is estopped from asserting a title to Mira Mohidin's share by reason of the arrangement come to by his vendor on April 28th, 1902, under which the latter took a benefit and compounded for his share of his father's property. In *Musammat Oodey Koowar* v. *Musammat Ladoo* (12), the Privy Council had before them a document renouncing all interest in an estate, executed by a person who had then only an expectant right to the estate but to which she afterwards became absolutely entitled. They propounded two questions to test the legal position of the executant. *First*, they asked—Did the document operate as a conveyance of *A*'s rights? The answer was—no, because at the date of execution *A* had not in fact any interest in the property at all and so had nothing to convey and secondly, because she did not then contemplate a conveyance of the right to which she subsequently became entitled. The *next* question was—Did the document operate by way of estoppel? The answer was—no, because *A* received no consideration for the conveyance of her particular interest and because she did not by misrepresentation cause the person in favour of whom she resigned to alter her position in any way.

(19) 8 C. 138; 10 C. L. R. 66; 4 Ind. Dec. (N. S.) 88.

In the present case if we apply the same tests, let us see what the answers will be. It may be said that Exhibit I will not operate as a transfer because at the date of execution Mira Mohidin had no present right to share in the property acquired by his father, and because the transfer of a non existent thing would be in itself null and void.

Next, as regards estoppel, Exhibit I embodies an agreement, arranged by arbitrators, whereby an adult son agreed with his father to compound for the chance of a certain event happening in the future, namely, his father predeceasing him and leaving property. The consideration for the agreement was a lump sum of Rs. 500 paid down at the time. The contingency provided for having now occurred by the death of Pachakanni during the lifetime of Mira Mohidin (P. W. No. 1), I fail to see by what right the recipients of the money or those claiming under them can be allowed to repudiate the transaction by which they benefited and act as if they had not induced the money to be paid. Mira Mohidin caused Pachakanni to believe a thing to be true and to act upon that belief, that thing being his intention not to make any further claim to Pachakanni's property. See sections 115 and 3 (2), illustration (*d*), Indian Evidence Act. Both as a family settlement by arbitrators and on the ground of estoppel, I am inclined to uphold the transaction evidenced by Exhibit I and I would allow the second appeal so far as Mira Mohidin's share is concerned and in modification of the lower Court's decree direct that plaintiff do recover $\frac{7}{8} - \frac{1}{2} = \frac{3}{8}$ths of Pachakanni's estate with proportionate costs throughout.

BY THE COURT—Under section 98 of the Code of Civil Procedure the second appeal is dismissed with costs.

Appeal dismissed.

NIRANJAN MUKERJEE *v.* SHIB PROSAD.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 384 OF 1913.

March 30, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Smither.

NIRANJAN MUKERJEE—PLAINTIFF—APPELLANT

versus

SHIB PROSAD MUKERJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease granted by some co-sharers of joint property—Partition—Lessee, right of—Hindu Law—Widow purchasing husband's estate in execution of decree against her, rights of—Burden of proof—Presumption.

A person taking a lease of a property from some of the co-sharers, who have an undivided interest in it, takes subject to the right which the other co-sharers would have on partition, namely, that if the property on partition falls to the lot of the other co-sharers, they would not be bound by the lease. [p. 372, col. 1.]

Although in an ordinary case the purchase of a property by a Hindu widow cannot be presumed to be made out of the income of her husband's estate, yet where the widow permits a portion of the husband's estate to be sold in execution of a decree against her more than fifty years after the death of the husband, and purchases it herself, the presumption would be that the purchase was made by the widow out of the income of the husband's estate, so that by the purchase the property was put back in exactly the same position in which it was before the decree and the sale thereunder. [p. 372, col. 2.]

Where a portion of the husband's estate is sold in execution of a decree against the widow more than fifty years after the death of the husband, the presumption would be that the property was not brought to sale for the liability of the husband. Therefore the onus of proving that the property was brought to sale to enforce a liability of the husband, lies on the person alleging it. [p. 372, col. 2.]

Where land, in which a Hindu widow had a 1/5th undivided share, was let out in permanent lease by her co-sharers and the widow without legal necessity, and subsequently on partition that land was allotted to the widow:

Held, that after the widow's death her husband's reversioner would be entitled to set aside the whole lease, but that the lessee would be entitled by a separate suit to enforce his right as against the other co-sharers of getting a lease of property of equal value out of the properties allotted to them. [p. 373, col. 1.]

Appeal against the decree of the District Judge, 24-Pergannas, dated the 18th September 1912, modifying a decision of the Munsif, Sealdah, dated the 30th June 1911.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

"In this case the plaintiff claiming to be a reversioner of Tripura Sundari Debi sued to recover 11 *cottas* of land, which was let out to the present appellant on a *mukarrari mourashi* lease by Tripura Sundari Debi on the 28th *Aswin* 1301.

The case for the plaintiff is that he was the heir of one Khetra Mohan Mukherjee who inherited one-fifth share of certain properties of the Goswamis of Khardah. It appears that on the death of Tripura Sundari he was not aware that he was a reversioner. Subsequently coming to know of it, he has brought suits to set aside certain leases and sales made by Tripura Sundari without leave of any reversioner, on the ground that she had no legal or other necessity to alienate the lands.

The defence in the lower Court was that these lands were leased for legal necessity. Tripura joined with all her co-sharers in leasing out 1½ *bighas* of land to the defendants at a bonus of Rs. 195 and a rent of Rs. 4 per year. Tripura's one-fifth share, therefore, was only Rs. 39 bonus and about 13-annas rent per annum. The lands, however, being situated in the village of Khardah, where there have long been mills and garden land, is now of considerable value. The learned Munsif has found in favour of the plaintiff. * * * * * * * * * * *. There is no evidence at all that the lease of 1301 was granted for legal necessity. It was a lease of 1½ *bighas* and Tripura's share was one-fifth. Tripura, therefore, was entitled to 6 *cottas* only. The plaintiff, however, has sued and got a decree for 11 *cottas*. The reason for this is that sometime between the purchase of 1879 and the lease of 1894, Tripura and her co-sharers went to partition and by the partition Tripura took 11 *cottas* of these 1½ *bighas* in her share. The partition was made without the present appellants being parties thereto and I cannot find how it can be binding on the appellants. The appellants only took a lease of 6 *cottas* from Tripura and the respondent is, therefore, only entitled to recover 6 *cottas* and no more.

I, therefore, allow the appeal in part only. The plaintiff will get a decree to recover *khas* possession by partition of 6 *cottas* with *wasilat* to be determined in the suit from the date of Tripura's death As the appellants

evidently took the lease in good faith I allow no costs."

Babu *Bankim Chandra Mukerjee*, for the Appellant.—The learned Judge, having found that there was no legal necessity for the lease granted by Tripura, should have held that the plaintiff was entitled to take *khas* possession of the lands allotted to him. The lease was granted by Tripura along with her other co-sharers, but there is nothing in the lease to show that she was granting only a one-fifth share of the property. Her undivided share in the property was let out. That undivided share has now been defined and limited to the land now in dispute in a suit for partition and it being found that there was nothing fraudulent, the plaintiffs are entitled to succeed. I rely upon the principle of the decision in *Byjnath Lall* v. *Ramoodeen Chowdhury* (1) and *Tarini Kanta Majumdar* v. *Ishur Chandra Chakravarti* (2).

Babu *Siva Prosunna Bhattacharjya* (with him Babu *Riraj Mohan Mazumdar*), for the Respondent, contended that the permanent lease, which was granted by the widow Tripura Sundari jointly with the other co-sharers, must have been beneficial to the estate of her deceased husband, as the land let out was a jungle. The very fact that the co-sharers joined with the widow in granting the lease shows that the lease was not an improvident one. It ought to have been found by the lower Courts that there was legal necessity for the lease. Moreover this land was sold in execution of a decree against the widow and her co-sharers, and was purchased by them. This purchase by the widow cannot be presumed to have been made for the benefit of the estate It ought to be presumed that the widow purchased the the land for her own benefit out of her own money. Every purchase by a widow cannot be regarded or presumed to be made out of the income of the husband's estate. In the absence of any evidence that the purchase was made out of the income of the husband's estate, it ought to be held that this property was the widow's absolute property not belonging to the estate of her deceased husband. Even assuming that this property belonged to the husband's estate, and the widow had no legal necessity to grant a permanent lease of her share therein, the reversioner, who is entitled only to the share which the widow had in the property, cannot set aside the whole lease. The partition which took place cannot affect the rights of the lessees, who were no parties to the partition.

(1) 21 W. R. 233; 1 I. A. 106.
(2) 18 Ind. Cas. 240; 21 C. L. J. 603.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against a decision of the learned District Judge of the 24-Pergannas, dated the 18th September 1912, modifying a decision of the Munsif at Sealdah. The suit was brought by the plaintiff to recover possession of a certain plot of land that had been awarded to him in a certain partition suit. The defence set up by the contesting defendant, namely, the tenant, was that he had obtained a permanent lease of the property from the owners prior to the partition. The learned Judge in the Court of Appeal below has found these facts and they are not seriously controverted:—That, on the 13th November 1894, the contesting defendant took a lease from the Goswami defendants who were then the co-sharers of the property. The person representing an one-fifth interest in the property was a Hindu widow named Tripura Sundari, to the estate of whose husband the present plaintiff succeeded on the death of Tripura. The learned Judge has found that that lease, so far as regards the interest of Tripura, was not granted for legal necessity. Therefore, the statement made in the lease of the reasons that moved the Hindu widow to grant this permanent lease obviously was disbelieved by the learned Judge. The question, therefore, arises in the present suit, this property having fallen to the lot of the plaintiff, "to what extent, if at all, is he bound by the lease granted by the other four co-sharers and Tripura." The learned Judge in the Court below has held that the plaintiff is bound, at any rate, as regards a portion of the interest so granted and that, therefore, he is not entitled to get actual possession of the land sued for. That seems to be unsupported by the authorities. The findings made in this case show that, as regards one-fifth of the property, the lease was not binding beyond the lifetime of Tripura and, therefore,

the reversioner, who is the present plaintiff, is not bound by the terms of that lease. In that view, the lessee had a lease of an undivided four-fifths of the property which was comprised in the lease. There was also a lease of an undivided one-fifth during the lifetime of Tripura. Under the law laid down in a series of decisions in this Court of which two examples may be given, namely, the cases of *Bynath Lal* v. *Ramoodeen Chaudhry* (1), and *Tarini Kant i Mojumdar* v. *Ishur Chandra Chakravarty* (2), a person taking an interest from persons who have an undivided interest in the property takes subject to the rights of the other co-sharers who are not bound by the transaction, namely, that if the property comes to be partitioned, the rights of the other co-sharers not bound by the lease, as it is in the present case, would not be affected by the grant of the lease. In the present case, the property comprised in the lease has fallen to the lot of the plaintiff. The persons who were the lessors of the four-fifths received on the partition other properties and, therefore, if the present lease stands as against the plaintiff and in his view is not a favourable lease, the property allotted to the plaintiff is seriously affected and cannot be in value anything like the property as the property which has been awarded to the other co-sharers of which they have received actual possession. That is so far as the case set up by the plaintiff is concerned. Against that, the defendant says that this transaction by the widow Tripura, joining along with the other co-sharers in granting a permanent lease of a piece of land that was jungle, must have been beneficial to the estate of her deceased husband. That case was not set up and was not tried. The case that was put forward and tried was the case of legal necessity as evidenced by the recitals in the lease. Those recitals were found to be wholly illusory and no case of legal necessity such as is mentioned in the recitals was proved to the satisfaction of the Judge. The case of benefit, namely, that the widow should join in this permanent lease at a small rent to benefit the estate has not been tried and we cannot at this stage of the proceeding consider a totally new case.

Then, another point was urged by the respondent, namely, that the widow along with the other co-sharers purchased this property, it having been brought to sale in execution of a decree against the widow and the other co-sharers. It is said that the presumption is that the widow purchased that out of her own money for her own benefit. The first point is, "Is there anything in this case to show for what purpose the property was, in fact, brought to sale and the decree passed, in execution of which the property was sold." It appears that the widow's husband had died fifty years prior to the suit. There can be no presumption, I take it, that a Hindu who has been dead for fifty years still has liabilities outstanding. Any such liability would apparently be barred years before under the law of limitation of suits; and if such a case is set up that the property was brought to sale for the liability of the husband who has been dead for fifty years, the onus in that case would lie on the person who says that the suit was brought for that purpose. In the present case, there cannot be any doubt that it was not so. Everything points to the fact that it was probably that the co-sharers failed to keep down the rent or revenue or some other obligation for which they were responsible and the suit was brought and the property was repurchased by the co-sharers including the widow and the widow having an income of Rs. 200 or Rs. 300 a year from her husband's estate, everything points to the fact that the purchase was made by the widow out of the income of her husband's property. This case, I am quite satisfied, was not raised very definitely in the Court of first instance. It was dealt with much more clearly by the learned District Judge. But I think the learned District Judge had ample warrant in finding that the re-purchase by the widow put the property back to exactly the same position as it was before the decree and the sale in execution thereunder. A reversioner cannot be ousted in a manner like this and although the learned Vakil may be right that, in the ordinary case, the purchase by the widow cannot be presumed to be made out of the income of her husband's estate, where the widow permits the property to be sold in execution more than fifty years after the death of the husband and purchases it herself, I am not sure that different considerations do not apply. I think the learned Judge had ample warrant in coming to the conclusion that this purchase was, in fact, made by the widow for the benefit of the estate. That is the position and how the matter stands. I think,

on the view of the law, the learned Judge ought to have come to the conclusion that the lessee took the lease from the co-sharers subject to the right that the plaintiff would have on partition, namely, that if this property fell to the lot of the plaintiff, the plaintiff would not be bound by the lease granted by the other co-sharers. In that view, the plaintiff ought, I think, be given possession of the land he sues for. The question then is—"What is the position of the lessee against the other co-sharers?" Can we deal with that in this case? I think, on the whole, it would not be wise to do so. Of course, the lease as against the other co-sharers is a perfectly good lease. The lessee is entitled, on general principles that have been followed in cases with reference to mortgages and also to leases, to have a lease of property of corresponding value given to him out of the properties that have been awarded to the other co-sharers in the partition suit. Those other co-sharers except the minors have not appeared in the present appeal. I think it would be much better to leave the lessee to enforce his rights as against the other co-sharers of getting a lease of property of equal value out of the properties allotted to them in a separate suit. The present appeal, I think, ought to be allowed with costs and, in lieu of the decree passed by the learned District Judge, the plaintiff ought to be given a decree for *khas* possession of the whole of the property that has fallen to him on partition. The cross-objection is dismissed with costs.

SMITHER, J.—I agree. The plaintiff has inherited as reversioner, after a Hindu widow. There being no legal necessity, the Hindu widow could not place a *sikmi*, to last beyond her own life, on the share. Also, the other co-sharers could not put any kind of encumbrance on this share. Therefore, the plaintiff's share, and the allotment which he now has in place of his share, is free. The *sikmidar* must follow the allotments of the other co-sharers, who created the *sikmi*. The plaintiff must get *khas* possession of his allotment as against the *sikmidar*.

Appeal allowed;
Cross-objection dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 29 OF 1916.

March 2, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Sheikh KAMAARDDI—DEFENDANT—APPELLANT

versus

Srimati MONMOHINI DASYA—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), *s.* 48, *applicability of, to under-*raiyat *holding at produce rent —Lease, construction of—Tenant undertaking to deliver paddy and on default its price, liability of.*

Where under a contract of tenancy an under-*raiyat* undertook to deliver to the landlord a certain quantity of paddy as rent for each year and on default, to pay to the landlord Rs. 20 as the price of the paddy with damages and costs:

Held, that as the under-*raiyat* did not hold at a money-rent but at produce rent, section 48 of the Bengal Tenancy Act had no application to the case. [p. 374, col. 2; p. 375, col. 1.]

The expression "holding at a money rent" in section 48 of the Bengal Tenancy Act refers not only to the landlord, but also to the under-*raiyat* so that that section applies when both the *raiyat* and the under-*raiyat* hold their respective tenancies at a money-rent. [p 375, col. 1.]

Appeal against the decree of Mr. Justice Newbould, dated the 19th January 1916, in Appeal from Appellate Decree No. 313 of 1914.

FACTS material to the report will appear from the following judgment of

NEWBOULD, J.—In this appeal which arises out of a rent suit, the question to be determined is whether the amount of rent recoverable by the plaintiff is limited by the provisions of section 48, Bengal Tenancy Act. I am of opinion that the learned Subordinate Judge was right in holding that the provisions of this section did not apply as the rent payable by the defendant was not money rent. The defendant's *kabuliyat* provides that he is to pay 35 *powas* of paddy each year. There is a further stipulation that in default of payment of this paddy the plaintiff will be entitled to realise Rs. 20 as price of the said paddy, with damages and costs, by instituting suits and obtaining decrees. I agree with the learned Subordinate Judge that the terms of this *kabuliyat* are distinguishable from the terms of the *kabuliyat* in the cases of *Ananda Chandra Roy* v. *Makr m Ali* (1) and *Bipro*

(1) 3 Ind. Cas. 204; 10 C. L. J. 144.

Charan v. *Suchand Roy* (2). In these cases it appears that the tenant had the option of paying his rent in cash or in kind. In the present case under the terms of the *kubuliyat* the tenant is clearly bound to pay his rent in kind and it is the landlord alone who has the option of recovering a money rent; or rather the terms of the *kubuliyat* provide, not that the landlord should recover money rent, but that should he be compelled to bring a suit he would be able to avoid the necessity of proving what was the value of the paddy at the time when it became due. In fact the condition is similar to a stipulation for liquidated damages such as is commonly provided for the breach of an ordinary contract. I hold that rent payable by the defendant is not money rent and this is sufficient to dispose of this appeal, and it is not necessary to consider the other points argued. But I may add I have considerable doubt whether the learned Subordinate Judge was right in holding that the decision of this Court in the case of *Nim Chand Shaha* v. *Joy Chandra Nath* (3) is applicable to a case in which the rent claimed for a portion of the holding exceeds, by more than the statutory amount, the amount paid by the lessor for the whole of the holding. The appeal is dismissed with costs.

Babu *Akhoy Kumar Banerjee*, for the Appellant.

Babu *Surendra Nath Guha*, for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Newbould in a suit for rent. Under the contract of tenancy, dated the 8th September 1898, the defendant undertook to deliver to his landlord 35 *powas* of paddy as rent for each year. There was a further provision that, on default, the landlord would be entitled to realise from the tenant Rs. 20 as price of the paddy with damages and costs. The landlord instituted this suit on the allegation that the paddy due for the years 1317 and 1318 had not been delivered and sought a decree for recovery of Rs. 40 with damages and costs. The defendant pleaded that the contract contravened the provisions of section 48 (*a*) of the Bengal Tenancy Act and was consequently not enforceable in law. This contention was accepted by the Court of first instance. Upon appeal a contrary view was taken by the Subordinate Judge, and the decision of the lower Appellate Court has been confirmed by Mr. Justice Newbould.

Section 48 is in these terms:—"The landlord of an under-*raiyat* holding at a money-rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than the following percentage of the same, namely, (*a*) when the rent payable by the under *raiyat* is payable under a registered lease or agreement, 50 per cent., and (*b*) in any other case, 25 per cent." In the present case, the rent was payable by the under-*raiyat* under a registered lease. Consequently, if the section is applicable, the plaintiff cannot recover from the tenant, as rent, a sum which exceeds by more than 50 per cent. what is paid by himself to his superior landlord. The Court of first instance found that, for the entire holding, the plaintiff pays to his superior landlord Rs. 2-8-0 a year, and in the view that the section was applicable, held that the plaintiff could recover rent at the rate of Rs. 2-8-0 plus Rs. 1-4-0 that is Rs. 3-12-0. Consequently, the question arises whether section 48 is applicable to this tenancy. The appellant contends that the section is applicable, because the tenant holds at a money-rent, and in support of this view relies upon the cases of *Ananda Chandra Roy* v. *Makram Ali* (1) and *Bipro Charan* v. *Suchand Roy* (2). In our opinion, there is no foundation for this contention and the cases mentioned are clearly distinguishable.

In the first of these cases, the tenant had the option to deliver a certain quantity of produce, or in the alternative, to pay a certain sum of money. In the second case, the agreement was exactly the reverse. In the case before us, the agreement on the face of it shows that the tenant held at produce rent. No doubt there was a provision to the effect that if there was default on the part of the tenant, the landlord would be entitled to realise a certain sum of money as the

(2) 8 Ind. Cas. 945; 12 C. L. J. 595.
(3) 15 Ind. Cas. 256; 39 C. 859; 16 C. W. N. 857.

price of the paddy. This only accentuates the true position, namely, that rent is payable not in cash but in kind, and the contract only prescribes the measure of the damage which the landlord could claim in the event of default on the part of the tenant. We hold, accordingly, that this is not a case of an under-*raiyat* holding at a money-rent. We may add that it was contended before us that the expression 'holding at a money-rent' refers to the landlord and not to the under-*raiyat* [*Ananda Chandra Roy* v. *Makram Ali* (1)]; it is clear, however, that section 48 taken as a whole indicates plainly that the landlord and the under-*raiyat* must both hold their respective tenancies at a money-rent; otherwise, no comparison can possibly be instituted, as contemplated by the section. In this view it is needless to consider the question raised by Mr. Justice Newbould as to the applicability of the decision in *Nim Chand Shaha* v. *Joy Chandra Nath* (3).

The result is, that the decree made by Mr. Justice Newbould is affirmed and this appeal is dismissed with costs

Appeal dismissed.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 304 OF 1916.
March 30, 1917.
Present:—Mr. Justice Mullick and
Mr. Justice Atkinson.
SHEO LOTAN RAI AND OTHERS—
DEFENDANTS—APPELLANTS
versus
BHIRGUN RAI—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Putrishta jag *ceremony, whether necessary—Specific Relief Act (I of* 1877), *s.* 42—*Declaratory suit, maintainability of—Consequential relief.*

Where both the adoptive father and the adopted son are members of the same *gotra*, the *putrishta jag* ceremony is not necessary to validate the adoption. [p. 376, col. 2.]

Luchmun Lall v. *Mohun Lall*, 16 W. R. 179, not followed.

Where plaintiff sued for a declaration in respect of what he described as a hereditary trust under the management of his adoptive father, and it appeared that if the devolution of the office of hereditary trustee was to be held as governed by the rules bearing on the holding of joint family property, the plaintiff could claim joint possession and management:

Held, that a suit for a mere declaratory decree was unsustainable under the proviso to section 42 of the Specific Relief Act. [p. 377, col. 1.]

Appeal from the decision of the District Judge, Shahabad.

Messrs. *Raghunath Singh*, *Sushil Madhub Mullick*, *Atul Krishna Roy* and *Umacharan Laha*, for the Appellants.

Sir *Ali Imam* (with him Mr. *Shahabuddin Khan*), for the Respondent.

JUDGMENT.

MULLICK, J.—The plaintiff is a person who claims to be the adopted son of defendant No. 1; and defendants Nos. 2 and 3 are the natural sons of defendant No. 1. The parties belong to one of the twice-born castes, and the reliefs claimed by the plaintiff are :—

1. That it be declared that defendant No. 1 and his wife adopted this plaintiff after due performance of the rites enjoined under the *Shastras* and they treated him as their son.

2. That it be declared that since the date of adoption this plaintiff became a son of defendant No. 1 and is so even now, that he has been living jointly with the defendant No. 1 and that this plaintiff has no more any connection or concern either with Harbans Rai, his family, or even with the property belonging to Harbans Rai's family.

It is alleged by the plaintiff that defendants Nos. 1 and 3 are displeased with the plaintiff and wish to deprive him of the family estate.

The learned Judge framed the following issues :—:

1. Is the Court-fee paid sufficient ?

2. Is the suit barred by section 10 of the Civil Procedure Code?

3. Was the plaintiff adopted by defendant No. 1? Is the adoption valid?

4. Do the plaintiff and defendants form members of a joint family?

5. What relief, if any, is the plaintiff entitled to?

The learned Subordinate Judge found all the issues in favour of the plaintiff and decreed the suit in full, giving the plaintiff all the declarations he sought.

In appeal the learned District Judge arrived at the same result and the defendants now prefer this second appeal before us.

The first point taken is that the adop-

tion was not valid because the *putrishta jag* ceremony was not performed. It is contended that this ceremony is essential to make an adoption valid in any of the twice-born castes.

It was held so far back as 1871, by Dwarka Nath Mitter, J., in the case of *Luchmun Lal* v. *Mohun Lall* (1) that the performance of *putrishta jag* was essential in order to validate an adoption in *dattaka* form at least among the three superior castes. Apparently there is no other authority so directly in point, but we find that the above ruling was considered by Mookerjee and Beachcroft, JJ., in *Katki* v. *Lakpati Pujari* (2) and it was there explained that the *dictum* of Dwarka Nath Mitter, J., to the effect that *putrishta jag* was an essential ceremony was an error in the nature of a *lapsus linguæ* and that what the learned Judge must have really meant to say was that the *dattahoma* ceremony, and not the *putrishta jag* ceremony, was essential to a valid adoption in the *dattaka* form among the three superior twice-born castes.

It is contended on behalf of the appellant that the learned Judges proceeded on mere speculation in finding this explanation and that so high an authority as Dwarka Nath Mitter, J., must be presumed to have known what the Hindu Law on the subject was.

On the other hand the opinion of the Bench which decided the case in *Katki* v. *Lakpati Pujari* (2) is entitled to the greatest weight and, in my opinion, their interpretation of the texts is correct and supports the view that the *putrishta jag* ceremony is a matter of form and not essential to an adoption. Following this view Chaudhuri and Newbould, JJ., have recently held in *Asita Mohan Ghose* v. *Nirode Mohan Ghose* (3) that the *putrishta jag* ceremony is not essential among *sudras*. The reply of the learned Vakil for the appellant is that it follows by implication that it is essential among the higher castes, but, in my opinion, this conclusion does not necessarily follow.

We are not required, however, for the purposes of the present case to decide the larger question as to what is the position where the adoptor and adoptee belong to different *gotras*.

It has been settled by the Privy Council* as also by the Calcutta High Court [see *Katki* v. *Lakpati Pujari* (2)] that even the *dattahoma* is not necessary among the higher castes if the adoptor and adoptee are members of the same *gotra*, and I take it that the rule applies with greater force to the *putrishta jag* which is certainly a less important ceremony.

In the present case it has not been proved, the burden being on the defendants, that the plaintiff was not of the same *gotra* as defendant No. 1. In fact there are indications on the record which show that they are members of the same *gotra* and we are entitled to draw the inference that the plaintiff and the defendant No. 1 are members of the same *gotra* and that in their case at any rate the *putrishta jag* ceremony was not necessary to validate the adoption set up by the plaintiff.

This disposes of the first point put forward by the appellant.

The next point is a more difficult one. It is contended by the appellant that the suit is not maintainable as the relief claimed is a declaratory relief under section 42 of the Specific Relief Act. It is contended that the plaintiff was bound to ask for consequential relief either in the shape of confirmation of possession or joint possession or partition and that as he has not included in his plaint any relief of these kinds, the suit is not maintainable.

To-day we have not had the assistance of Sir Ali Imam who appeared on behalf of the respondent yesterday and consequently the appeal must to all intents and purposes be decided *ex parte*; but we have looked at the authorities relied upon on the respondent's side and we find that none of these authorities support the contention that the plaintiff is entitled to relief upon the plaint as it stands.

It is true that this is not a suit for declaration that the plaintiff is entitled to succeed to the joint family property on the death of his father. Sir Ali Imam's contention would probably have been that a

(1) 16 W. R. 179.

(2) 27 Ind. Cas. 39; 20 C. W. N. 19; 20 C. L. J. 319.

(3) 35 Ind. Cas. 127; 20 C. W. N. 901.

*See the decision of *Bal Gangadhar Tilak* v. *Shri Shrinivas Pandit*, 29 Ind. Cas. 639; 39 B. 441 (P. C.).—*Ed.*

prayer for declaration of the plaintiff's status is quite sufficient; that as the plaintiff has not been dispossessed he need not ask for any further relief, and that upon the death of his father he will succeed by survivorship. But in this case it is quite clear that there has been a denial of the plaintiff's right and although the plaintiff cannot be compelled to ask for partition which he says he does not want, yet the law requires that he should ask for at least one of the other reliefs which it is open to him to ask for. It is certainly open to him to ask for recovery of joint possession or for confirmation of possession jointly with defendants Nos. 1, 2 and 3. Having failed to do either, the suit is bad as at present framed.

The authorities all say that what is to be looked at is the real object of the suit. If the real object of the suit is to get a declaration which will enable the plaintiff hereafter to seek further relief to which the plaintiff is at present entitled, the Court will not grant the declaration. So when the plaintiff sued for a declaration in respect of what he described as a hereditary trust under the management of his adoptive father, it was held that if the devolution of the office of hereditary trustee was to be held as governed by the rules bearing on the holding of joint family property, the plaintiff could have claimed joint possession and management and a suit for a mere declaratory decree was unsustainable under the proviso to section 42, Specific Relief Act, *Nataraja Chetty* v. *Kolandavelu Chetty* (4).

There are also authorities which explain how the discretion of the Courts, even though a mere declaration may be permissible under section 42 of the Specific Relief Act, should be exercised. It has been observed in all the High Courts in this country that the discretion should be used with the utmost caution.

This principle was recently affirmed by Jenkins, C. J., in *Deokali Koer* v. *Kedar Nath* (5). That distinguished Judge observed that even in cases where section 42 of the Specific Relief Act does not limit the powers of the Court to give declaratory decrees, as when such a declaration is ancillary to the consequential relief and sanctioned by long established practice, the Court should be circumspect and even chary as to the declaration it makes. It is ordinarily enough that the relief should be granted without a declaration. In the present case the relief claimed is not even ancillary. The suit is for a mere declaration which the law forbids. No question of discretion arises.

The plaintiff is a Mitakshara son, who, if his adoption is proved, as it has been proved, is entitled to claim joint possession with the other members of the joint family; and this suit has obviously been brought in the declaratory form simply for the purpose of evasion of stamp duty.

The order, therefore, which I think we ought to make in this case is the same as that made by Jenkins, C. J., in the case cited above.

We will give the plaintiff leave to amend his plaint and to add a prayer for consequential relief, so as to bring his suit within the scope of section 42 of the Specific Relief Act; and in order that he may have sufficient time to pay up the necessary Court-fees we will fix the first of May 1917 as the date on or before which such payment is to be made. Upon the appeal being put up before us on that date we will determine the nature of the issues to be framed and tried.

The plaintiff must come on the date fixed prepared to state the nature and scope of the amendment he wishes to make.

In the event of the plaintiff's failing to comply with this order, the appeal will succeed and the suit will be dismissed with costs in all Courts.

Leave to amend plaint given.

(4) 15 M. L. J. 456.
(5) 15 Ind. Cas. 427; 39 C. 704; 16 C. W. N. 838.

ISHAN CHANDRA DHUPI *v.* NISHI CHANDRA DHUPI.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 97 OF 1913.

March 15, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

ISHAN CHANDRA DHUPI—PLAINTIFF—APPELLANT

versus

NISHI CHANDRA DHUPI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings, determination of case on grounds taken in —Relief to be consistent with pleadings—Landlord and tenant—Ejectment—Plaintiff's title proved—Relief—Adverse possession against lessee, whether adverse against lessor.

In an action in ejectment when the plaintiff has established his alleged title, the Court should not refuse him relief on a ground not only not urged by the defendant but wholly inconsistent with the defence taken by him in his written statement. [p. 380, col. 2.]

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made; although it cannot be maintained as an inflexible rule of law that a Court is not competent to determine that the rights of the parties litigant are really different from what is alleged either by the plaintiff or by the defendant. [p. 380, col. 2; p. 38', col. 1.]

The possession of an under-tenant of a tenant who had no power to transfer the demised land does not become adverse to the landlord until the tenancy comes to an end. [p. 381, col 2.]

The plaintiff instituted a suit for the ejectment of the defendant, on the allegation that the plaintiff was a *raiyat* of the land in suit and had granted a permanent heritable under-*raiyati* interest to the defendant on condition that if the latter transferred the property, the plaintiff would be entitled to re-enter, that in 1908 the defendant No. 1 had sold his right to defendant No. 2 and that defendant No. 3 was in occupation of the land as a trespasser. Defendant No. 3 contested the suit, denying the title set up by the plaintiff and claiming to be a *raiyat* in respect of the land under the same superior landlord. It was found that defendant No. 3 did not hold as a *raiyat* but that he came upon the land as a tenant under defendant No. 1 and was in occupation of the land for more than twelve years and that the plaintiff had proved his alleged title to the land as a *raiyat*:

Held, (1) that the plaintiff should have a decree and relief should not be refused to him on the ground that the third defendant was a tenant under the first defendant, a ground which was never suggested in and was inconsistent with the pleadings of the third defendant; [p. 380, col. 1.]

(2) that the suit of the plaintiff was not time-barred, as time did not begin to run against him till the tenancy of defendant No. 1 had terminated in 1908, when he ceased to pay rent to the plaintiff after having transferred his rights to defendant No. 2. [p. 381, col. 2.]

Appeal against the decree of Mr. Justice Chapman, dated the 6th March 1913, in Appeal from Appellate Decree Nos. 828 of 1911.

FACTS material will appear from the following judgment of

CHAPMAN, J.—This appeal arises out of a suit for ejectment. The plaintiff based his case upon an agreement which was come to with defendant No. 1 in the course of a previous litigation in the year 1893. That agreement has not been placed before me, but it is conceded that it amounts to a lease for an indefinite period coupled with a condition enabling the landlord to re-enter in the event of the tenant defendant No. 1 making any transfer of the land. Now the plaintiff was a *raiyat* and the provisions under which a *raiyat* is allowable to eject an under-*raiyat* are contained in section 49 of the Bengal Tenancy Act and the contract which entitles the landlord to eject otherwise in accordance with those provisions is not enforceable under section 178 (1). Therefore the landlord was not entitled to eject merely by reason of the transfer which took place admittedly from defendant No. 1 to defendant No. 2, and further the lease being for an indefinite term he was not entitled to eject his under-*raiyats* except for non-payment of rent [*Madon Chandra Kapali* v. *Jaki Karikar* (1)].

The contest, however, has been between the plaintiff and a third person defendant No. 3. The defendants Nos. 1 and 2 did not contest the suit. The defendant No. 3's case was that he held not under defendant No. 1 but under another superior landlord. The learned Sub-Judge has held that in fact the defendant No. 3 did hold as under-*raiyat* under defendant No. 1 and the defendant No. 3 has been in possession for a very long period more than twelve years. The contention in this connection is that the defendant No. 3 not having set up the case which was found in his favour by the learned Sub Judge, he is not entitled to the benefit of the facts found. I do not think that this principle applies in a case for ejectment, if upon the facts found by the learned Sub-Judge on the case made by the plaintiff, the plaintiff was not entitled to eject. I think defendant No. 3 being in possession was entitled to the benefit of these findings.

(1) 6 C. W. N. 377.

It is suggested that the learned Sub-Judge did not intend to come to a finding as to the title of defendant No. 3, inasmuch as in the portion of his judgment which relates to the form of his decree he recites that it is not decided in this suit as to whether the defendant No. 3 is a sub-tenant of defendant No. 1 or a trespasser. I understand him simply to mean that in that connection he did not intend his decision to operate as *res judicata* between the defendant No. 3 and defendant No. 1. I do not understand that he wished to resile from his previous express finding that defendant No. 3 for the purpose of the plaintiff's suit in ejectment must be regarded as an under-tenant of defendant No. 1.

It has been contended that defendant No. 2 abandoned her holding. There is a finding of fact on this point that there has been no abandonment.

The appeal, therefore, fails and is dismissed with costs.

Babu *Bepin Behari Ghose II* (with him Babu *Frobodh Kumar Das*), for the Appellant.—This appeal arises out of a suit for ejectment brought by the plaintiff, on the allegation that he purchased a *ryoti* interest in the land in March 1882, and continued in occupation of the land till 2nd May 1893, when he sub-let it to the defendant No. 1, and that in the sub-lease there was a stipulation that the plaintiff would be entitled to re-enter the land in the event of the defendant No. 1 transferring his interest in in any way. The defendant No. 1 sold his interest to defendant No. 2 in 1903. Thereupon the plaintiff instituted this suit for *khas* possession by ejecting the defendants.

The defendant No. 3 was in actual occupation of the land claiming title thereto as a tenant under the same landlord as the plaintiff was. It was found by the lower Courts that the title claimed by the defendant No. 3 was false. But the first Appellate Court held that defendent No. 3 was really a tenant under defendant No. 1 and he was in occupation of the land for a number of years and so the land had not been abandoned by the defendant No. 1. In this view though the Court held that the plaintiff's title was proved, it dismissed his suit. On appeal to the High Court, that decision has been upheld, and I now come up before your Lordships under section 15 of the Letters Patent for reversing the decision of the Courts below.

The defendant No. 1 does not claim any right in the land. He does not now hold it, nor has he made any arrangement for the payment of rent to the plaintiff. So there is no longer any relationship of landlord and tenant between the defendant No. 1 and the plaintiff; and it must be held that the holding has been abandoned by the defendant No. 1, entitling the plaintiff to take *khas* possession of it. The defendant No. 3 set up a title which has been negatived by the Courts below, but still he has got a decree in his favour on a ground on which he did not base his claim or title and which was not set forth in his pleadings. I submit the lower Courts are entirely wrong in giving relief to the defendant No. 3 on a plea which he did not raise in his pleadings.

[MOOKERJEE, J.—What is the finding as to the nature of the holding? Is it transferable or not?]

Whatever might be the nature of the *ryoti* interest purchased by the plaintiff, the interest of the defendant No. 1 was clearly non-transferable, as he was an under-*ryot*. Refers to *Aminunnissa* v. *Jinnat Ali* (2) and section 85 of the Bengal Tenancy Act. As soon as an under-*ryot* transfers his interest, his landlord becomes entitled to re-enter. Moreover in this case there was an express stipulation in the under-*ryoti* lease, under which the plaintiff was entitled to re-enter in case the under-*ryot*, defendant No. 1, transferred his interest to anybody else. Hence, I submit, under the law as well as under the terms of the sub-lease the plaintiff is entitled to get *khas* possession of the land. The defendant No. 3 cannot defeat the plaintiff's suit by setting up a tenancy, a defence which was not raised nor suggested in his pleadings.

Babu *Ram Dayal Dey*, for the Respondent.—It has been found as a fact that the defendant No. 3 is a tenant under defendant No. 1, and that finding is conclusive in second appeal.

(2) 27 Ind. Cas. 271; 42 C. 751; 19 C. W. N. 43; 20 C. L. J. 548.

[MOOKERJEE, J.—Did you make any such case in your written statement?]

No, but this finding was arrived at by the lower Courts on a consideration of the evidence and the circumstances of the case. It might be an irregularity or an error on the part of the lower Appellate Court to come to such a finding when the defendant No. 3 did not take such a defence in his written statement. But this error or irregularity in the proceedings in this suit is not sufficient for reversing the decision of the lower Courts. Refers to section 99, Civil Procedure Code.

Moreover the defendant No. 3 was in possession for more than twelve years to the knowledge of the plaintiff, and if it is held that the defendant No. 3 had no title to possess and he was a trespasser, then his possession must be regarded as adverse to the plaintiff. Therefore the plaintiff's suit for *khas* possession cannot succeed.

[MOOKERJEE, J.—Your possession commenced after the plaintiff had granted a lease to defendant No. 1 in 1893, so how could your possession be adverse to the plaintiff as long as that lease subsisted? That lease determined when the defendant No. 1 transferred his interest to defendant No. 2 in 1908 and limitation began to run against the plaintiff from that time.]

There is no legal evidence as to when my possession commenced, whether before or after the granting of the lease by the plaintiff to defendant No. 1.

Moreover, it was in the knowledge of the plaintiff that the defendant No. 3 was in occupation of the land.

Babu *Bepin Behary Ghosh*, in reply.

JUDGMENT.—It is an appeal, under clause 15 of the Letters Patent, from a judgment of Mr. Justice Chapman in an action in ejectment. The plaintiff instituted this suit on the allegation that he had acquired a *raiyati*-interest in the land before 1893, and that on the 2nd May of that year, the first defendant became an under-*raiyat* under him on condition that he would have permanent and heritable rights but would not be entitled to sell, mortgage or exchange the land and that if in contravention of the agreement, he transferred the property, the plaintiff would be entitled to re-enter. In 1908, the first defendant sold his right as an under-*raiyat* to the second defendant. Thereupon the plaintiff commenced this action on the 8th September 1908 to eject both the defendants; he also prayed that the third defendant who was in occupation as a trespasser might be ejected. The suit was defended by the third defendant, who pleaded that the land did not belong to the plaintiff and that he himself held it as *raiyat* under the superior landlord of the plaintiff. The Court of first instance dismissed the suit and that decision has been successively affirmed by the Subordinate Judge and by this Court. It has been found that the third defendant did not hold under the landlord of the plaintiff, that the plaintiff had established his alleged title, and that the third defendant came upon the land as an under-tenant of the first defendant. In this view, the Courts below have refused the plaintiff a decree for ejectment. But the Subordinate Judge has stated at the same time that the question whether the third defendant was a tenant under the first defendant would be left open, to be litigated again, between the parties, if occasion should arise. The plaintiff has now appealed to this Court and has argued that the Courts below should not have refused him relief on a ground not only not urged by the third defendant but wholly inconsistent with the defence taken by him in his written statement. In our opinion this contention is well-founded and must prevail.

No doubt, it cannot be maintained as an inflexible rule of law that a Court is not competent to determine that the rights of the parties litigants are really different from what is alleged either by the plaintiff or by the defendant. *Nabadwipendra Mookerjee* v. *Madhu Sudan Mandal* (3), *Jalim Singh* v. *Choonee Lal* (4), *Hira Lal* v. *Gribala Debi* (5). But as was explained by Lord Westbury in the case of *Eshen Chunder Singh* v. *Shamacharan Bhutto* (6), it is absolutely necessary that the determination in a cause should be founded upon a case either to be found in the pleadings or in-

(3) 16 Ind. Cas. 741; 18 C. W. N. 473.
(4) 11 Ind. Cas. 540; 15 C. W. N. 882.
(5) 34 Ind. Cas. 444; 23 C. L. J. 429.
(6) 11 M. I. A. 7 at p. 21; 6 W. R. (P. C.) 57; 2 Sar. P. C. J. 209; 20 E. R. 3; 2 Ind. Jur. (N. S.) 87.

volved in or consistent with the case thereby made. In that case, the plaintiff was restricted to the state of fact alleged by him in his plaint. Similary, in the cases of *Chova Kara* v. *Isa* bin *Khalifa* (7) and *Munchershaw Bezonji* v. *New Dhuramsey Spinning and Weaving Company* (8) it was ruled that the defendant must be restricted to the state of facts alleged in his written statement or consistent therewith. In the case before us, there were two alternative assertions before the trial Court. The plaintiff alleged that he was a *raiyat* in respect of the disputed land under the superior landlord. The third defendant contradicted this allegation and claimed to be the *raiyat* under the same landlord. There was no suggestion that the third defendant was an under-tenant under the first defendant who held as a tenant under the plaintiff. In these circumstances, evidence was not and would not be directed to the elucidation of the question whether the third defendant had a tenancy under the first defendant. We are of opinion that the Courts below should not have refused relief to the plaintiff on the ground that the third defendant was a tenant under the first defendant.

What, then, is the relative situation of the parties? The plaintiff has established his title. The third defendant has failed to prove his assertion. The first defendant was a tenant under the plaintiff. He had no transferable right in the land, yet he has transferred the land to the second defendant. It has further been found that the first defendant, notwithstanding the sale of the entire land of the tenancy, is in occupation of the homestead portion which covers about one-tenth of the entire area, but he has made no arrangement for payment of rent to the plaintiff. There is thus ample indication of his intention to sever all connection with the land as tenant under the plaintiff. In these circumstances, the plaintiff is clearly entitled to take up the position that there has been an abandonment [*Sailabala Debi* v. *Sriram Bhattacharya* (9), *Aminunnessa* v. *Jinnat Ali* (2)].

(7) 1 B. 209; 1 Ind. Dec. (N. S.) 139.
(8) 4 B. 576; 5 Ind. Jur. 482; 2 Ind. Dec. (N. S.) 891.
(9) 7 C. L. J. 303; 11 C. W. N. 873.

If, then, none of the defendants had a subsisting right in the land at the date of the institution of the suit, there is no answer to the claim for re-entry except the plea of limitation. Now the Courts below have found that the third defendant has been in actual occupation of the land for more than twelve years. It appears that his possession commenced in 1894 or 1895; that is, after the land had been let out by the plaintiff to the first defendant on the 2nd May 1893. Consequently, time did not begin to run against the plaintiff till that tenancy had terminated. In support of this proposition reference may be made to the decisions in *Womesh Chander Goopto* v. *Raj Narain Roy* (10), *Krishna Gobind Dhur* v. *Hari Churn Dhur* (11), *Sheo Sohye Roy* v. *Luchmeshur Singh* (12), *Sarat Sundari Debia* v. *Bhobo Pershad Khan Chowdhury* (13) and *Thamman Pande* v. *Maharaja* of *Vizianagram* (14). There is nothing to show that the first defendant had ceased to pay rent to the plaintiff before the transfer in 1908. Consequently the case does not fall within the rule recognised in *Gossain Mahendra Giri* v. *Rajani Kant Das* (15). The tenancy in favour of the first defendant terminated in 1908 and the cause of action of the plaintiff to eject the third defendant thus arose shortly before the suit was instituted. Consequently the claim is not barred by limitation.

The result is that this appeal is allowed, the decrees of the Courts below set aside and the suit decreed with costs in all the Courts.

Appeal allowed.

(10) 10 W. R. 15.
(11) 9 C. 367 at p. 369; 12 C. L. R. 19, 4 Ind. Dec. (N. S.) 894.
(12) 10 C. 577; 5 Ind. Dec. (N. S.) 387.
(13) 13 C. 101; 6 Ind. Dec. (N. S.) 566.
(14) 29 A. 593; A. W. N. (1907) 185; 4 A. L. J. 726.
(15) 1 C. W. N. 246.

SHAH YAD ALI *v.* SHYAM PRATAP DUBEY.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2332 OF 1915.

February 22, 1917.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

SHAH YAD ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHYAM PRATAP DUBEY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Tort—Custom—Irrigation—Reservoir, accumulation of water in—Overflow of water damaging crops—Damages, suit for.

Where by ancient custom defendant was entitled to accumulate water in reservoirs for purposes of cultivation, and owing to the deposit of silt in the bed of the reservoirs and to no "non-natural" acts of the defendant, the water in the reservoirs overflowed and submerged the lands of the plaintiff and damaged his crops:

Held, that the defendant was not liable to the plaintiff for the damage to his land and crops. [p. 383, col. 2.]

The rule laid down in *Rylands* v. *Fletcher*, (1868) 3 H. L. 330; 37 L. J. Exch. 161; 19 L. T. 220, is not generally applicable to the circumstances in India. [p. 383, col. 2.]

Madras Railway Co. v. *Zemindar of Karvatenagaram*, 1 I. A. 364 at p. 372; 22 W. R. 279; 14 B. L. R. 209 (P. C.); 3 Sar. P. C. J. 391, followed.

Appeal from a decision of the District Judge, Gaya, dated the 15th September 1915, modifying that of the Subordinate Judge, 2nd Court, Gaya, dated the 16th February 1915.

Mr. *Muhammad Mustafa Khan*, for the Appellants.

Messrs. *Khurshaid Husnain* and *Baidyanath Narain Sinha*, for the Respondents.

JUDGMENT.

MULLICK, J.—The plaintiffs are the proprietors of *Mauza* Bahadurpur, which lies to the south as shown on the map prepared by the Commissioner for this suit. The defendants are the proprietors of *Mauza* Mahiara which lies to the north. There was a dispute at one stage of the suit as to the correctness of the line of demarcation between the two villages, but upon the findings of the Court of first instance the line is now settled as being the northernmost red line marked upon the map running east to west. According to that line *Mauza* Bahadurpur extends from the south up to that line. The dispute arises as to a reservoir which is alleged to be situated north of that line, in which the defendants are said to have stored water for the purpose of irrigating their own lands to the detriment of the plaintiffs.

According to the learned Subordinate Judge the plaintiffs' case is substantially this: That the defendants constructed certain masonry works in 1315 and 1316 at the points N. and L. delineated on the map and obstructed the Sultani Pyne; that they raised the heights of the northern and eastern *pinds* of Kalan Ahar (the reservoir) in 1316 and extended the eastern *pind* from the point J. to the point F; that they also closed the upper *nali* of Chahka H. 1; that the result of these wrongful acts was that more water was stored in the Kalan Ahar than before and 27 *bighas* of Bahadurpur lands were submerged, and the paddy crops of the lands were destroyed.

The reliefs claimed by the plaintiffs are set out in paragraph 17 of the plaint and they are substantially for a declaration as to their right and title to the lands and for an injunction upon the defendants restraining them from storing so much water in their Ahar and from doing such acts as may cause the submersion of any land of the plaintiffs' *mauza* or interfere with the free discharge of surplus of surface water from the lands of the said *mauza*.

The defendants, while denying that they had committed any tort in respect of the lands of the plaintiffs, urged that they had by twenty years' user acquired an easement to store water on the plaintiffs' lands.

The learned Subordinate Judge in the course of an extremely careful and able judgment has examined the merits of the plaintiffs' case and come to the conclusion, after taking evidence as to the various levels of the bed of the reservoir and the surrounding country, that the plaintiffs have no cause of complaint at all against the defendants. He finds that the water level of the reservoir cannot on an average be less than 98 and that there was no room for doubt that water used to remain upon the greater part of the plaintiffs' 27 *bighas* before the year 1316 F. S. He also finds it proved that water has been stored on the Bahadurpur lands in the manner stated for over twenty years and that the course of irrigation from Bahadurpur to Mahiara is partly by the

Sultani Pyne and partly direct from Bahadurpur from south to north.

The learned Subordinate Judge accordingly declared the plaintiffs' title to *Mauza* Bahadurpur according to the boundary claimed by them but dismissed their prayer for the other declarations and for consequential relief.

Against that decree the plaintiffs preferred an appeal to the District Judge, who modified the decree of the learned Subordinate Judge by adding the following reliefs :—

(1) "The defendants will be permanently enjoined from allowing the water of the Kalan Ahar to spread over the plaintiffs' land."

(2) "The defendants are to remove the silt from the bed and *khata* of the Ahar, to an extent to be decided in execution, to be sufficient to keep the water within the defendants' boundaries, or the plaintiffs can have this done at the defendants' expense."

(3) "The plaintiffs are declared to have the right to discharge surface water from Bahadurpur into lower and adjacent lands of Mahiara."

(4) "Damages claimed for the paddy crops of 1318 and 1319 F. S. are allowed."

(5) "The plaintiffs-appellants will get three-quarters of their costs in both Courts."

The present second appeal has been preferred by the defendants.

The learned District Judge does not set aside any of the findings of the learned Subordinate Judge except as to the enjoyment of the easement claimed by the defendants for more than twenty years. The learned District Judge, however, bases his decree upon the principle enunciated in *Rylands* v. *Fletcher* (1) in which Blackburn, J., remaks:—"It is reasonable and just that the neighbour who has brought on his own property something (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

(1) (1868) L. R. 3 H. L. 330; 37 L. J. Exch. 161; 19 L. T. 220.

The learned District Judge, in my opinion, has altogether misapplied that enunciation of the law to the conditions of the present case. The facts of that case have no application here, even if the conditions prevalent in England were applicable generally to the conditions in this country. Here the finding expressed in clear terms by the learned Subordinate Judge, and adopted by implication by the learned District Judge, is that the defendants have done nothing to interfere with the course of irrigation, that is to say, with the *status quo*: as it existed at the time when these irrigation arrangements were first entered into. The origin of irrigation rights is generally merged in antiquity and we have only the evidence of immemorial user to indicate their nature and extent. Here we have a definite finding that the rights conferred upon the plaintiffs at their inception have not been disturbed in any way by the defendants, and if that is the case, then it is impossible to see how the plaintiffs can now sue the defendants in tort for a damage which has not resulted from any act of their own.

The essence of the ruling in *Rylands* v. *Fletcher* (1) is that the defendant has by some "non-natural" act of his own contributed to the damage upon his neighbour's property. Here the finding is that the defendants are not responsible in any degree for changing the *status quo* and that the damage was due to a cause that must have been foreseen by all parties, namely, the deposit of silt.

In this connection the observation of their Lordships of the Privy Council in *Madras Railway Company* v. *Zemindar of Carvatenagaram* (2) appear to me particularly apt. Their Lordships, while approving generally of the doctrine laid down in *Rylands* v. *Fletcher* (1), observed that the rule was not generally applicable to the circumstances in India and in particular to the circumstances of the case before them. There the dispute was as to the maintenance of water in certain ancient tanks as reservoirs, and their Lordships held that the defendants were entitled to maintain the water in the said reservoirs even though the overflowing of the tanks caused damage to the plaintiffs, because the tanks formed part of a natural

(2) (1874) 1 I. A. 364; 22 W. R. 279; 14 B. L. R. 209 (P. C.); 3 Sar. P. C. J. 391.

system of irrigation recognized by Hindu and Muhammadan Law and by Regulations of the East India Company. Here, too, the rights of the parties as to irrigation have apparently been regulated from time immemorial by the ancient custom of the country and while the plaintiffs are entitled to drain off surplus water from south to north, the defendants are equally entitled to retain by erection of Ahars for their own benefit a quantity sufficient for the purpose of cultivation. There is no finding that the defendants have in any way contravened the ancient custom. In these circumstances the case of *Rylands* v. *Fletcher* (1), upon which the learned Judge in the Court below has relied solely, is no authority for giving the decree which he has given.

The learned Judge in one part of his judgment seemed to throw out the suggestion that the defendants had, by omitting to clear silt from the *khata* or ditch of the Ahar, diverged from the ancient order of things. Apparently that point has not been developed by either party in any of the Courts below and before us it has not been shown that it was the duty of the defendants to excavate silt from the bed of the *khata*. We, however, suggested to the learned Vakil for the respondents that he might perhaps accept a compromise if the defendants kept the bed of the *khata* at the level of 97, but the learned Vakil was not able to accede to this suggestion although the appellant was willing to agree to it. Therefore we must proceed upon the findings of the learned District Judge as they stand, and upon these findings it is impossible for us to say that he has definitely found that any act of the defendant was the cause of the damage of which the plaintiffs complain. The learned District Judge seems to think that because water accumulates upon the defendants' Ahar and because silt by the natural force of gravitation is deposited on the bed of the defendants' Ahar and because thereby the bed of the defendants' Ahar is raised, it is the defendants' duty either to reduce the level of the Ahar or to prevent the silt from being deposited. This duty clearly is not part of the original scheme; the deposit of silt must have been foreseen and there is no evidence that it was contemplated that the defendants should remove it.

The result, therefore, is that the judgment of the lower Court will be vacated and that of the learned Subordinate Judge restored. The appeal will be allowed with costs in this Court and the lower Appellate Court and the suit will be decreed in the modified manner in which it was decreed by the Subordinate Judge.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 64 OF 1917.

March 26, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Srinivasa Aiyangar.

M. KANDASWAMI CHETTI—DEFENDANT—APPELLANT

versus

P. SUBRAMANIA CHETTI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2—Specific Relief Act (I of 1877), s. 53—Injunction, temporary, whether can be mandatory in form.

Courts in India have the power by virtue of Order XXXIX, rule 2, of the Civil Procedure Code to issue temporary injunctions in a mandatory form. [p. 385, col. 1.]

Rasul Karim v. *Pirbhai Amirbhai*, 24 Ind. Cas. 625; 38 B. 381; 16 Bom. L. R. 288, dissented from.

The description of temporary injunctions in section 53 of the Specific Relief Act does not exclude injunctions of a mandatory nature. A temporary injunction may take not only the form of restraining a person from further erection of a building, but may also direct that he should pull down as much of it as he has erected after he became aware of the institution of the suit. [p. 385, col. 1.]

Israil v. *Samset Rahman*, 21 Ind. Cas. 861; 41 C. 436; 18 C. W. N. 176; 19 C. L. J. 47, followed.

Champsey Bhimji & Co. v. *Jumna Flour Mills Co.* 28 Ind. Cas. 121; 16 Bom. L. R. 566; *Bonner* v. *G. W. Ry. Co.*, (1883) 24 Ch. D. 1; 48 L. T. 619; 32 W. R. 190; 47 J. P. 580, referred to.

Appeal against the order of the City Civil Court, Madras, in Civil Miscellaneous Petition No. 1652 of 1916, in Original Suit No. 460 of 1916.

Mr. *T. R. Venkatrama Sastriar* (with him Messrs. *V. Govindachariar* and *V. S. Kallabhiran Aiyar*), for the Appellant.

Messrs. *Short, Bewes & Co.*, for the Respondent.

JUDGMENT.—Upon the question whether Courts in this country have the power by

virtue of Order XXXIX, rule 2, of the Code of Civil Procedure to issue temporary injunctions in a mandatory form, we are not prepared to adopt the opinion expressed by Beaman, J., in *Rasul Karim* v. *Pirubhai Amirbhai* (1).

The description of temporary injunctions in section 53, Specific Relief Act, does not exclude injunctions of a mandatory nature, and in *Israil* v. *Shamset Rahman* (2) upon an application for an *interim* injunction, pending the disposal of a suit, it was ordered that defendant should not only be restrained from further erection of a building but that he should pull down so much of it as he had erected after he became aware of the institution of the plaintiff's suit. We also may observe that Shah, J, did not agree with the opinion of his learned brother in *Rasul Karim* v. *Pirbhai Amirbhai* (1) and that two other Judges of the Bombay High Court took a different view from Beaman, J. in *Champsey Bhimji & Co.* v. *Jumna Flour Mills Co.* (3).

On the merits, however, we are of opinion that the present was not a case of such urgency as to make it necessary for the protection of the plaintiff's rights that the defendant should be made to remove the screen put up by him before the rights of the parties were heard and determined in the regular suit which was filed for this very purpose. The facts of this case resemble those of *Bonner* v. *G. W. R. Co.* (4), in which a temporary injunction was disallowed.

The question of what rights the plaintiff possessed to light and air through the window which the defendant blocked by his screen, might very well have been left to be decided in the suit without anticipating the result of it. We allow the appeal. Each party will bear his own costs in this Court.

Appeal allowed.

V. R. P.

(1) 24 Ind. Cas. 625; 38 B. 381; 16 Bom. L. R. 288.
(2) 21 Ind Cas. 861; 41 C. 436; 18 C. W. N. 176; 19 C. L. J. 47.
(3) 28 Ind. Cas. 121; 16 Bom. L. R. 566.
(4) (1883) 24 Ch. D. 1; 48 L. T. 619; 32 W. R. 190; 47 J. P. 580.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1146 OF 1916.

April 26, 1917.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

RAM PERTAP LAL—PLAINTIFF—APPELLANT

versus

Maharaja KESHO PRASAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 18—Decree in rent suit—Fraud—Suit to set aside decree—Limitation—Burden of proof—Judgment—Finding, defective.

Where plaintiff brought a suit to have it declared that a compromise decree in a certain rent suit passed in March 1902 had been obtained by fraud and was not binding upon him, and gave the date of his knowledge of the fraudulent proceedings as 17th June 1913, *i.e.*, within three years from the date of the suit, and the defendants pleaded the bar of limitation, alleging that the plaintiff had such knowledge more than three years prior to the date of suit:

Held, that the onus was, in the first instance, upon the plaintiff to give some evidence of fraud committed in obtaining the decree of 1902, and that then the onus would be cast upon the defendants to prove and show that the plaintiff had acquired knowledge of the rent proceedings more than three years prior to the date of the suit, the plaintiff not being required to prove the period of time when he became aware of the alleged fraud that had been practised upon him. [p. 386, col. 2.]

The law requires that proof of limitation should be clearly established, and a finding that "on a consideration of all the circumstances of the case" the suit is barred by limitation, is defective and unsatisfactory. [p. 387, col. 1.]

Second appeal against a decision of the District Judge, Shahabad, dated the 9th August 1916, on appeal from a decision of the Sub-Judge, 1st Court, Shahabad, dated the 4th December 1915.

JUDGMENT.

ATKINSON, J.—The plaintiff brings this suit against the defendants, seeking a declaration that a certain decree which was obtained for rent by the Maharaja of Dumraon in March 1902 is void and not binding upon him, and that the compromise on which that decree was based was a forgery in so far as it bore the plaintiff's signature. The defendant No. 1 is the *zemindar* of certain properties in the Dumraon Raj; and the defendants Nos. 2 to 5 are the step-brothers of the plaintiff No. 1. It is alleged that the father of the plaintiff and the defendants Nos. 2 to 5 obtained a lease of a village on the Dumraon Estate which commenced to run

RAM PERTAP LAL *v.* KESHO PRASAD SINGH.

from the year 1307 F. S., subject to a reserved yearly rent of Rs. 1,654 and cesses. In the year 1308 the rent not having been paid, the Maharaja instituted rent proceedings against the lessees, the lessees being all the members of the joint family, the father of the plaintiff and the step-brothers, the defendants Nos. 2 to 5, and as it is alleged the plaintiff himself also. In the course of that rent suit the parties agreed to a compromise; and it is alleged that the plaintiff was a party to that compromise, which provided that the defendants the lessees would pay the amount due for rent to the *zemindar*. From time to time executions were taken out in the endeavour to realise the amount due on foot of the compromise decree as against the defendants Nos. 2 to 5. The plaintiff alleges that he never knew or had any knowledge whatsoever of the existence of the rent suit and that no plaint had ever been served upon him, nor was he a party nor did he execute in fact the compromise on which the decree was based and that he knew nothing whatsoever concerning the various executions which had been effected by the *zemindar* as against the other members of his family. He further alleges that prior to this lease being granted, he, the plaintiff, had separated from his family, and that he was no party to the lease and did not occupy the position of lessee. The plaintiff contracted a marriage prior to 1902 and went to live with his wife's people. Certainly it appears that he left his father's house, and did not return to reside there though from time to time he may have paid visits. But undoubtedly it is an admitted fact in this case that between the years 1902 and 1913 no attempt was ever made to make the plaintiff personally liable to pay the amount of the compromise decree in the rent suit. That is an admitted fact. The plaintiff alleges that for the first time on the 17th June 1913 he became aware of the existence of this rent-decree through the Superintendent of Police, who informed him that his salary as a Police Officer had been attached to satisfy the rent-decree obtained in the year 1902. This date, the 17th June 1913, is the period of time when the plaintiff says he first became aware of the antecedent rent proceedings. Accordingly he instituted this suit to have the rent-decree declared not binding upon him, on the ground that the decree as against him was obtained by fraud and that the compromise so far as he was concerned was a forgery. The answer by way of defence to the plaintiff's claim is, "Oh, you the plaintiff had knowledge long long ago of the existence of the rent suit and of the decree and of the execution proceedings taken thereunder, and you made no objection whatsoever, and now by virtue of the provisions of Article 18 of the Limitation Act you are barred from asserting your rights to set aside this decree." Now the learned Munsif tried this case very fully and very carefully. He has dealt exhaustively with all the issues and the evidence given in respect of each. On appeal the learned Judge seems to us not to have considered each issue and the evidence in relation to each issue, but he has taken the rather peculiar course of first of all deciding whether the particular section of the Limitation Act applied, irrespective of the other issues in the case. Now obviously the first duty of the learned Judge was to satisfy himself that the plaintiff had given some evidence to show that the decree that was obtained in the year 1902 was obtained by fraud. That onus was clearly upon the plaintiff in the first instance; but the learned Judge has not satisfied himself that in respect of that issue no evidence was given by the plaintiff to establish proof of fraud. The learned Judge did not adopt that course, and by reason of this mistake he did not consider rightly upon whom the onus rested in showing whether section 18 of the Limitation Act applied. The onus would be clearly upon the defendants as to proof of limitation, and that onus would only arise after the plaintiff had given some evidence to establish proof of fraud. Then by way of defence to the evidence of fraud the onus would be cast upon the defendants to prove and show that the plaintiff had acquired knowledge of the rent proceedings more than three years prior to the date when the suit was instituted. Now the learned Judge in this case has thrown the onus upon the plaintiff of proving the period of time when he became aware of the alleged fraud that had been practised

upon him, thereby shifting the onus from the proper shoulders of the defendants to the shoulders of the plaintiff: and the learned Judge in effect says:—You the plaintiff must show that you had knowledge of these proceedings within three years before the action was instituted. Clearly we think that the learned Judge mistook the legal obligations as to the onus of proof that rested upon both the parties. The learned Judge does not seem to have considered at all the other issues in the case, he has not considered the question of fraud, nor has he considered whether the compromise decree was binding on the plaintiff, or if in fact the plaintiff was a party to the lease as lessee. He does not deal with one aspect of the case touching the question of fraud which is most remarkable. The plaintiff alleged that he never signed or executed the *vakalatnama* which was produced; but the learned Judge assumes that he did. A witness was called for the defence to prove the fact of the plaintiff's execution of the *vakalatnama* and this witness says he personally saw the plaintiff sign it. The learned Judge considers this witness who was called for the defence as an utterly worthless witness. Thus there was no evidence at all before the learned Judge to show that the plaintiff executed the *vakalatnama*, and yet the Judge without evidence holds that the plaintiff did execute the *vakalatnama* in the previous rent suit. That fact seems to us to show strongly that the learned Judge's judgment is unsatisfactory and is not such as the law requires should be given. The learned Judge does state in a summary manner at the end of his judgment that he found on a consideration of all the circumstances of the case that the plaintiff knew of the proceedings prior to the time alleged by him, that is, some time prior to the 17th June 1913; but that finding is also unsatisfactory and uncertain. The law requires that proof of limitation should be clearly established. Therefore we think that the plaintiff is entitled to have a full and more careful consideration of his case on appeal than it has received and reluctantly we shall have to remand this case for re-hearing. Therefore we must set aside the judgment of the learned Judge and remand the case to the lower Court now for a determination of the entire appeal. The costs of this appeal will abide the result.

CHAPMAN, J.—I agree.

Case remanded.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3556 OF 1913 AND 400 OF 1914.

May 11, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

RAMJASH AGARWALA—PLAINTIFF IN No. 3556 AND DEFENDANT IN No. 400—APPELLANT

versus

INDIAN GENERAL NAVIGATION AND RAILWAY COMPANY, LIMITED—DEFENDANTS IN No. 400 AND PLAINTIFFS IN No. 3556—RESPONDENTS.

Contract Act (IX of 1872), s. 151—Common carrier, liability of, in respect of goods delivered for carriage—Consignee, right of, to have goods re-weighed before taking delivery—Unreasonable refusal to take delivery, consequences of—Demurrage charges.

The liability of a Steamship Company in respect of goods delivered to it for carriage is that of an insurer; therefore, if there is any shortage in weight during transit, the Company would be liable therefor. [p. 388, col. 1.]

A consignee of goods delivered to a Steamship Company for carriage cannot compel the Company to re-weigh the goods before taking delivery. But the refusal of the Company to re-weigh does not in any way affect the right of the consignee who may weigh the goods himself and claim the price of the shortage in weight. The mere fact that he has accepted delivery and granted a clear receipt does not extinguish his right to compensation, if he proves that a portion of the goods were lost in transit or while in the custody of the Company. [p. 388, col. 2]

When a consignee unjustifiably refuses to take delivery of goods, he cannot claim the price thereof from the common carrier, but on the contrary becomes liable for demurrage charges for the period during which the goods remain in the custody of the common carrier. [p 889, col 1.]

But no demurrage can be charged for the period subsequent to a notice given to the consignee that the goods will be sold away at auction if he fails to remove them. [p. 389, col. 1.]

Appeals against the decrees of the Subordinate Judge, Faridpur, dated the 2nd June 1913, confirming that of the Munsif, Faridpur, dated the 29th March 1912.

Babu *D. L. Kashtgir*, for the Appellant.

Mr. *P. L. Buckland* (Counsel) and Babu *Manmotha Nath Mookerjee*, for the Respondents.

RAMJASH AGARWAL *v.* INDIAN GENERAL NAVIGATION AND RY. CO. LTD.

IN APPEAL NO. 3556 OF 1913.

JUDGMENT.

This appeal arises out of a suit for the recovery of Rs. 1,591-15-10, being the price of goods delivered by the plaintiff for carriage to the defendant, the India General Navigation and Railway Company, Limited. The plaintiff's agent delivered at the defendant Company's Booking Office at Mokamah 150 bags of chillies weighing 130 maunds 8 seers for being conveyed to Goalundo. On arrival of the goods at the place of destination, the plaintiff's servant paid the freight, signed the bill of lading and gave a clear receipt in the delivery register of the defendant Company. He thereupon obtained the delivery order; but did not take actual delivery as he found some of the bags damaged. He asked the booking clerk to re-weigh the goods and then deliver the same. This was refused and, in consequence, the plaintiff's servant refused to remove the goods. Hence this suit for recovery of the price of the goods.

The liability of the defendant Company, a Steamer Company in respect of goods is that of an insurer. If, therefore, there was shortage in weight, the defendant would be liable. As already stated, however, the plaintiff did not weigh the goods and the suit is not for the price of goods which might have been found short in weight. The question for decision in the case is whether the plaintiff could compel the defendant Company to re-weigh the goods before taking delivery and, on the latter's refusal to re-weigh, whether the plaintiff was entitled to treat such refusal as a refusal to deliver goods and claim the price thereof.

It was contended before us that the consignee is entitled as of right to have the goods re-weighed before taking delivery, but no authority has been shown in support of this broad proposition. We were referred to the case of *Wills* v. *Great Western Railway Company* (1). In that case the question was whether non-delivery of a part of a consignment was "non-delivery" of the consignment within the meaning of the contract between the parties. It was a case of short delivery and no question arose as to the consignee's right to have the goods re-weighed by the Company.

(1) (1915) 1 K. B. 199; 84 L. J. K. B. 449.

The question was raised in the case of *Janki Das* v. *Bengal Nagpur Railway Company* (2). In that case 290 bags of rice were consigned, two of which were lost and the remaining bags arrived at the destination in a damaged condition. The consignee demanded a re-weighment and a certificate of shortage and that not being complied with by the Company he refused to take delivery. The Court below held that "the Railway Company is not required by law either to re-weigh or to certify shortage," and this Court observed, "The result then is that of the 290 bags two were not delivered because they were lost, and non-delivery of the rest was due to the fact that the plaintiffs would only take delivery on a condition that they were not entitled to impose." There is no doubt that the matters are made easy for the consignee in a suit, if re-weighment is made by the Company before removal of the goods by the consignee, but it is a matter of evidence only. The refusal of the Company to re-weigh does not in any way affect the right of the consignee. He may weigh the goods himself, and claim the price of the shortage in weight. The mere fact that he has accepted delivery and granted a clear receipt does not extinguish his right to compensation if he proves that a portion of the goods were lost in transit or in the custody of the Company [see *East Indian Railway Company* v. *Sispal Lal* (3)].

The question whether the consignee is entitled to refuse to take delivery in case of short delivery, or the broad proposition that the consignee is not entitled in any case or under any circumstances to have goods, entrusted to a common carrier, re-weighed need not be considered in the present case. In the present case it cannot be said that there was short delivery because the goods were never weighed by the plaintiff, and he is not in a position to say whether there was any shortage.

It appears that it was the practice of the defendant Company to allow consignees to inspect their goods before granting re-

(2) 13 Ind. Cas. 509; 15 C. L. J. 211; 16 C. W. N. 356.

(3) 12 Ind. Cas. 596; 14 C. L. J. 472; 16 C. W. N. 329; 39 C. 311.

ceipt in the delivery book and have their goods re-weighed (if so demanded) in case of suspicion of short weight and enter the short weight in the delivery book. In fact the plaintiff's agent, who went to take delivery of the goods in question, appears to have on two other occasions granted qualified receipts for goods with a remark of short weight. He might have adopted the same course in the present case, and if that course was not open to him because he had given a clear receipt, he might have had the goods weighed himself and claimed the price for the shortage. But he did not avail himself of the opportunity of inspecting the goods before granting receipt, and having granted a clear receipt insisted upon re-weighment and upon the defendant's refusing to re-weigh, he refused to take delivery. We do not think that under the circumstances he was justified in refusing to take delivery of the goods on the ground that they had not been re-weighed by the Company, and to claim the price thereof. The appeal must, therefore, be dismissed.

Appeal from Appellate Decree No. 400 of 1914 arises out of a cross-suit brought by the Company to recover Rs. 519-13-9 on account of godown charges for the period during which the chillies were in the custody of the defendant. If, as we have said, the plaintiff was not justified in refusing to take delivery of the goods, he would be liable for demurrage charges for the period during which the goods were in the possession of the Company. It appears, however, that on the 5th January 1911, the Company wrote to the plaintiff that the chillies would be sold away at auction if the consignee failed to remove them. The Court of first instance held that the Company were not entitled to any demurrage after that date, and, accordingly, allowed only Rs. 153 6-6 as demurrage for the period up to that date and the decree was affirmed on appeal. We think that that decree is correct and this appeal also must be dismissed. We make no order as to costs in either case.

The result, no doubt, is to be regretted. But the plaintiff appears to have refused to take delivery of the goods on the mistaken notion that he could insist upon the defendants' re-weighing the goods before taking delivery, the defendant Company also insisting upon their strict rights to refuse re-weighment.

Appeals dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 434 OF 1916.

May 8, 1917.

Present:—Mr. Justice Mullick.

Maulvi MUHAMMAD ABDUL NAYEEM—PLAINTIFF—APPELLANT

versus

JHONTI MAHTON AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu law—Transfer of Property Act (IV of 1882), s. 123—Gift—Delivery of possession, whether necessary—Registration—Acceptance by donee, express or implied—Settlement deed—Compromise—Family disputes.

Among Hindus gifts made subsequent to the Transfer of Property Act do not require delivery of possession if there is registration. It is essential to a Hindu gift that there should be acceptance by the donee. But acceptance may be express or implied, acceptance being presumed unless dissent is signified. [p. 391, cols. 1 & 2]

A deed of settlement amounts to a compromise of family disputes where an antecedent title in the parties is assumed. [p. 390, cols. 1 & 2.]

Appeal from a decision of the District Judge, Darbhanga.

Messrs. *Murari Prasad* and *Muhammad Hassan Jan*, for the Appellant.

Mr. *A. K. Roy*, for the Respondents.

JUDGMENT.—The property in suit is an area of 6 *cottas* odd appertaining to the occupancy holding of defendant No. 2 Janki Mahton. By his first wife Janki had a son, who died leaving a son named Parmeshwar. After the death of his first wife he married a widow whose son by her first husband is defendant No. 1 Jhonti. Jhonti has two sons named Rameshwar and Rupan. On the 4th of July 1902, Janki executed a *tamliknama* dividing his property in equal shares between his three grandsons, Rameshwar, Rupan and Parmeshwar. On the 25th of November 1911 he revoked that *tamliknama* and on the 14th of March 1912 he executed a deed of sale in respect of the land in suit in favour of the present plaintiff. In the course of the settlement proceedings, which took place before the *tamliknama*, Jhonti

was shown as an under-*raiyat* in respect of the land in suit and the plaintiff now institutes the present action for the purpose of ejecting defendant No. 1 under the provisions of the Bengal Tenancy Act.

Defendant No. 1 alone contested the suit. The Munsif found that the *tamliknama* was a gift, that it was valid and that at the time of the *kcbala* in favour of the plaintiff the defendant No. 2 had no saleable interest in the land in suit. Therefore the plaintiff's suit was dismissed.

On appeal the learned District Judge finds that the document is not a Will. He does not exactly agree with the learned Munsif's view that it is a deed of gift, but thinks that it is a "deed of settlement" of family property. He finds that it was valid and that, therefore, the plaintiff by his purchase bought nothing. He has accordingly dismissed the appeal.

The present second appeal is preferred by the plaintiff.

Now the first question which arises is, what is the construction to be put on the *tamliknama*. I have gone through the document very carefully and I agree with the view of the learned Munsif. It is quite clear that it is not a Will, it effects a present transfer of the donor's interest and does not speak from the death of the testator. It is true that it speaks of the possession of the donees after the death of the donor; but having regard generally to the whole document and in particular to the passages which relate to the power of the donor to transfer the property during his lifetime and also to the condition imposed upon the donees that they shall have no power to divide the property or to sell any part thereof during the lifetime of the donor, it is quite clear to my mind that the intention of the donor was to divest himself of all his present interest in the property and not to create a testamentary devise in respect thereof. The point, therefore, as to the construction of the deed is found against the plaintiff. I am unable to understand how the learned District Judge distinguishes between a deed of gift and a deed of settlement in this connection. Ordinarily a deed of settlement refers to a compromise of family disputes where an antecedent title in the parties is assumed. Here there is no suggestion of any antecedent title in the donees and all that the document does is to transfer the title of the donor to the donees. The deed cannot, in my opinion, possibly be a deed of settlement.

Furthermore, the circumstances of the family at the time of the execution of the *tamliknama* are quite consistent with the view that the deed was intended to operate as a present transfer and not as a testamentary disposition. Parmeshwar was an infant, Janki's wives were dead, the only persons for whom he would have to provide after his death would be his step-son and his three grandsons. The Munsif finds that it is not clear what the exact arrangements between Janki and Jhonti were immediately previous to 1902, but he finds as a fact that after the death of Janki's second wife, Jhonti and his two sons came to live with Janki and Parmeshwar and that they were joint in food and property with him at the time of the execution of the *tamliknama*. The Munsif is of opinion that the Record of Rights showing Jhonti as an under-*raiyat* under Janki in respect of the lands in suit is wrong and that Jhonti's statement that he used to cultivate the lands jointly with Janki receiving one-third share of the produce stands uncontradicted and must be accepted.

The learned Munsif further finds that although 1 *bigha* 2 *cottas* out of the total lands of Janki were recorded in the *zemindar's sherista* as the tenancy of Jhonti, the entry was in reality a *benami* one and the whole 4 *bighas* odd belong to Janki.

The learned Vakil for the appellant before me strongly urges that the learned Munsif has made a case for Jhonti which is inconsistent with the case made by him in the written statement. I cannot agree with this. As I read paragraph 7 of the written statement I do not understand Jhonti to mean that there was a complete separation, indeed such a separation would be unintelligible because there could be no reason why Janki should by oral gift make over 1 *bigha* odd to him. Paragraph 7 is quite consistent with the view that what Jhonti intended to plead was that there was permissive occupation and that nominally he stood recorded as a tenant in the *zemindari sherista* and paid

rent to the *zemindar* through Janki. That this was so is quite clear because at the end of the paragraph, Jhonti supports the gift in favour of the three grandsons and that was the footing on which he resisted the plaintiffs' suit before the Munsif. He did not set up his own title, but he contended that as the gift to the three grandsons was valid and operative the plaintiff had purchased nothing. In my opinion, the learned Munsif's view is correct. His findings of fact were apparently not challenged before the District Judge and, therefore, I must assume that so far as the facts are concerned the findings are final.

The learned Munsif further finds that from 1902 to 1911 the parties continued to live together in spite of the transfer to the three grandsons and it was only when Janki fell out with Jhonti and his two sons that the idea of revoking the gift came into Janki's head. This being the state of affairs, I am quite satisfied that there was nothing unnatural in Janki's making a complete transfer of his rights in the land in suit in favour of the three grandsons.

If then the document is a gift, the next question is whether it is vaild. Now the first objection taken as to validity is that there was no delivery of possession. The learned Vakil for the appellant relies upon the judgment of their Lordships of the Privy Council in *Mirza Sadik Hossein Khan* v. *Hashim Ali Khan* (1).

That was a case between Muhammadans and does not apply here. I think it is quite clear that among Hindus gifts made subsequent to the Transfer of Property Act do not require delivery of possession if there is registration, *Dharmodas Das* v. *Nistrarini Dasi* (2). Their Lordships of the Privy Council had occasion to examine the law before the Transfer of Property Act in *Kali Dass Mullick* v. *Kanhaya Lal Pandit* (3) and came to the conclusion that delivery of possession was not necessary if the donor can be shown to have done all that it was possible for him in the circumstances to do, and that was also the principle accepted in *Joitaram* v. *Ram Kishna* (4). The learned Vakil for the appellant replies that in this case Janki did not do all that was in his power to do, because he did not get the names of the grandsons registered as tenants in the *zemindari sherista*. In my opinion it was not necessary for him to do this. Jhonti's two sons were of full age and could have themselves gone to the *zemindar* and asked him to register their names. But even if it were conceded that delivery of possession is necessary, it is to be noticed that Parmeshwar was an infant and, therefore, Janki was competent to accept delivery of possession on his behalf, so that with regard to Parmeshwar, at any rate, there was no defect on this ground.

The next objection to the gift is that there was no acceptance. Now it is undoubtedly essential to a Hindu gift that there should be acceptance. Here acceptance on behalf of Parmeshwar can be presumed to have been made by Janki. With regard to the other two grandsons the legal presumption of acceptance does not seem to my mind to have been displaced. Lord Halsbury observes in Volume 15, page 418, of his Laws of England: "Express acceptance by the donee is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the donee is to be presumed until his dissent is signified even though he is not aware of the gift, and this is equally so, although the gift may be of an onerous nature, or, of what is called 'an onerous trust.'"

Without going so far as this, I think having regard to the circumstances of this case, an inference may be drawn that Jhonti's two sons did accept the gift, which was a very advantageous one for them, and that the plaintiff has not shown anything to the contrary. In fact the finding that the donees continued to cultivate the property from 1902 to 1911 is strong evidence of acceptance.

There is also the further fact that the deed of gift was in the custody of Jhonti

(1) 36 Ind. Cas. 104; 1 P. L. W. 157; 31 M. L. J. 607; 19 O. C. 192; 18 Bom. L. R. 1037; 21 C. W. N. 130; (1916) 2 M. W. N. 577; 14 A. L. J. 1248; 21 M. L. T. 40; 38 A. 627; 40 L. J. 22; 25 C. L. J. 363 (P. C.).

(2) 14 C. 446; 7 Ind. Dec. (N. S.) 297.

(3) 11 C. 121; 11 I. A. 218; 8 Ind. Jur. 638; 4 Sar. P. C. J. 578; 5 Ind. Dec. (N. S.) 839.

(4) 27 B. 31; 4 Bom. L. R. 754.

for eight or nine years and was produced in Court by a *mukhtear* to whom Jhonti had delivered it for custody. Upon the finding of the Courts below that Jhonti's interest was not adverse to that of his sons his custody was for their benefit. The learned Munsif finds this and the learned District Judge does not displace that finding. In my opinion the learned Munsif is right in holding that there was acceptance by Jhonti's sons.

Finally there is the circumstance that even if the deed was invalid by reason of non-delivery of possession or absence of acceptance as regards Jhonti's sons, there was both delivery of possession and acceptance on behalf of Parmeshwar by Janki and the effect of any invalidity as regards two of the donees simply is that the whole property passes validly to Parmeshwar. So far, therefore, as the plaintiff is concerned his *kobala* would in that case pass no title to him.

The result, therefore, is that from whatever point of view the case is looked at, the decree of the Court below is right and the appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL MISCELLANEOUS APPEALS NOS. 95 AND 96 OF 1916.
January 29, 1917.
Present:—Mr. Justice Oldfield and Mr. Justice Bakewell.
VISHVENDRA THIRTHA SWAMIER OF SODE *Mutt*—PLAINTIFF—APPELLAET IN BOTH
versus
IN C. M. A. No. 95 OF 1916
THE NATIONAL INSURANCE COMPANY, LIMITED, CALCUTTA—DEFENDANTS—RESPONDENTS.
IN C. M. A. No. 96 OF 1916
THE SUN LIFE ASSURANCE COMPANY, CANADA—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Place of suing—Suit to recover money due on Life Insurance Policy—Death of insured, place of.

A suit to recover money due on a Life Insurance Policy can be instituted in the place where the insured died; for death in such cases is part of the cause of action within the meaning of section 20 of the Code of Civil Procedure. [p. 392, col. 2.]

Read v. *Brown*, (1889) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131, *Cailland* v. *Champion*, (1797) 7 T. R. 205; 101 E. R. 933, followed.

Appeals against the orders of the Court of the Subordinate Judge, South Canara, in Original Suits Nos. 88 and 87 of 1914.

Mr. *B. Sitarama Row*, for the Appellant in both.

The Hon'ble Mr. *T. Rangachariar*, Messrs. *V. Ramesam* and *A. V. Seshayya*, for the Respondents in both.

JUDGMENT.—The question is whether plaintiff's suits brought to recover on Policies of Insurance issued by Companies having their offices outside South Canara, were properly brought in the District. The lower Court held that they were not.

It is argued, first, that plaintiff could sue in South Canara, because the Companies' acceptance of the policy-holder's proposals was completed only by their communication to the plaintiff there. The lower Court did not find on the question where the communication took place, because this contention was not relied on before it. For the same reason we cannot consider it in appeal.

Next it is contended that plaintiff could sue in South Canara, because the policy-holder died there, and his death was part of the cause of action in each case. This contention is in accordance with the definition of the term "cause of action" contained in *Read* v. *Brown* (1), which Courts in this country have adopted so frequently that we do not feel at liberty to depart from it. It is, moreover, supported directly by *Cailland* v. *Champion* (2) and is consistent with the reference to a part of the cause of action in section 20, Code of Civil Procedure. We, therefore, accept it.

In these circumstances we do not deal with the alternative suggestion that the cause of action arose in part where the proposal was made by the insured person to the Company, or with the suggestion made in appeal against order No. 96 of 1916 that it was in consequence of a special term in the policy constituted by the payment of the first premium.

(1) (1889) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.
(2) (1797) 7 T. R. 205; 101 E. R. 933.

The appeals are accordingly allowed, the lower Courts' decision being set aside with a direction to accept the plaints on re-presentation and deal with them according to law. Costs in this Court and in the lower Court to date will be costs in the cause and be provided for in the decrees to be passed.

Appeals allowed; Cases sent back.

V.R.P.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 161 OF 1917.

May 14, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Smither.

GANGARAM BHOJRAJ—PLAINTIFF—PETITIONER

versus

DHANMAN SIRDAR AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Admission of claim—Court, power of, to dismiss suit.

In a suit on a hand-note the defendant put in a petition admitting the plaintiff's claim and prayed that he might be allowed to pay the money in two instalments. The Small Cause Court Judge dismissed the suit on the ground that there was no consideration for the hand-note:

Held, that the Court ought to have decreed the suit when the defendant admitted the claim. [p. 393, col. 2.]

Rule against the order of the Judge, Small Cause Court, Darjeeling, in Suit No. 982 of 1916.

FACTS.—This Rule arose out of a decision of the Small Cause Court dismissing the plaintiff's suit, which was based on a hand-note executed by the defendant. The defendant who was the *karta* of a family entered appearance and admitting the plaintiff's claim prayed that he might be allowed to pay the decretal amount in insatlments. The Small Cause Court Judge took evidence adduced by both the parties and found that no money was actually lent by the plaintiff to the defendant at the time of the execution of the hand-note, but that the defendant executed it in consideration of interest which was payable to the plaintiff on account of previous debts due by the defendant's father. He dismissed the plaintiff's suit on the ground that the hand-note on which the plaintiff based his claim was without consideration and recorded that the defendant was a fool to admit the plaintiff's claim. Thereupon the plaintiff moved the High Court for setting aside the decision of the Small Cause Court Judge.

Babu *Tarakeswar Pal Chowdhury*, for the Petitioner.—The hand-note was not barred at the time when the plaintiff brought the suit. As the defendant admitted the plaintiff's claim, the Judge of the Small Cause Court had no jurisdiction to dismiss the suit.

[CHATTERJEA, J.—The hand-note was executed in consideration of interest due on previous hand-notes which were not executed by the defendant, but by his father. How was this defendant liable to pay that interest? If he was not liable, the hand-note executed by him was without consideration.]

Even if no consideration was given for the hand-note in suit, still when the defendant admitted the plaintiff's claim, the Court had no discretion but to give a decree to the plaintiff.

[CHATTERJEA, J.—We are exercising revisional jurisdiction under section 25 of the Small Cause Court Act; you cannot as a matter of right claim that the decision of the Small Cause Court should be reversed by us.]

No doubt your Lordships have got ample discretion in a matter like this. But the decision of the Small Cause Court is wholly illegal, and should not be allowed to stand.

JUDGMENT.—The application, upon which this Rule was issued, arises out of a suit to recover Rs. 120 on a hand-note executed by the deceased father of the defendant on account of arrears of interest due to the plaintiff firm on previous hand-notes.

It appears that the defendant put in a petition admitting the claim of the plaintiff and prayed that he might be allowed to pay the money in two instalments.

The learned Small Cause Court Judge took evidence in the matter and dismissed the suit on the ground that there was no consideration for the hand-note; because it was executed in consideration of interest due on previous hand notes.

We think that the Court below ought to have decreed the suit when the defendant admitted the claim.

The defendant has not appeared in this Court.

The plaintiff agrees to receive the money in two instalments out of the estate of the deceased.

We accordingly direct that a decree be passed in favour of the plaintiff for the amount claimed, to be paid by the defendant one-half within a month of the arrival of the order in the Court below and the balance within another month from the payment of the first instalment. The amount will be realised from the assets left by the deceased father of the defendant.

Revision allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2321 OF 1914.

November 30, 1916.

Present:—Mr. Justice LeRossignol.

MUHAMMAD YAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

PIRAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Diluvion—Re-appearance of submerged land—Right of occupancy tenant—Rights granted before river action, nature of—Custom not ancient, effect of—Mutation proceedings, effect of—Limitation.

In a suit for declaration of occupancy rights it was contended on behalf of the defendants-landlords (*a*) that the plaintiffs had lost all rights on account of the submersion of the land under the river according to the general custom of the district and (*b*) that the suit was barred as mutation had taken place in favour of the defendants on submersion which occurred twelve years before suit. It appeared from the *wajib-ul-arz* of 1880 relied upon by the defendants that the village had become subject to river action only in the previous year whereas the occupancy rights were of a date long anterior to 1880:

Held, (1) that the proprietors had failed to establish a custom whereby diluviated occupancy land on submersion at once became the property of the landlord and was liberated from the previously existing tenant right; [p. 394, col. 2; p. 395, col. 1.]

(2) that the custom propounded by the defendants was *prima facie* inequitable, as rights granted long before river action began could not be subjected to rules obtaining in neighbouring villages which were liable to river action when the tenancy originated; [p. 395, col. 1.]

(3) that the alleged custom having been propounded in the village for the first time in 1879 was not ancient and could not have the force of law; [p. 395, col. 1.]

(4) that mutation being a mere proceeding the suit was not barred, as the land though submerged was in the possession of the plaintiffs-tenants until the defendants took possession of it on its re-appearance above the water-level, which event took place only a short time before suit. [p. 395, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Multan, at Draman (Dera Ghazi Khan), dated the 9th June 1914, reversing that of the Munsif, 1st class, Muzaffargarh, dated the 31st May 1912, dismissing the suit.

Mr. *Abdul Rashid*, for the Appellants.

Mr. *Taj-ud Din*, for the Respondents.

JUDGMENT.—Before this Court are five connected appeals, which will be dealt with in this judgment.

There were originally six suits, all of which were dismissed by the first Court; in five only was an appeal preferred to the District Judge who accepted them and decreed for the plaintiffs.

The main question in these cases is, whether the defendants, who are the proprietors of the land, have established a custom whereby diluviated occupancy tenant land on submersion at once becomes the property of the landlord and is liberated from the previously existing tenant right.

In holding in the negative the learned District Judge has relied on a judgment of this Court No 311 of 1902, to which the present defendants were parties.

For the defendants-appellants it is urged that the *wajib ul araiz* of 1880 and of 1900 are in their favour, that the custom is general in the District as proved by a large number of *wajib-ul araiz* and that in this very village, a large number of mutations have been produced, which prove that the custom has been acted upon in this village.

The suits were instituted on 17th December 1907, and the mutations referred to all bear one of two dates, *viz.*, 1898 and 1910.

The custom propounded by the defendant is *prima facie* inequitable, but may be susceptible of explanation, but as it is *prima facie* inequitable evidence in support of it must be cogent before it can be held proved.

Now the facts are that in the first Settlement, no reference at all to diluvion and the custom now recited was made and the reason for this omission is made clear by the *wajib-ul-arz* of 1880, which recites that

the village had become subject to river action only in the previous year.

Then and then only was the entry cancelling occupancy rights on submersion of the tanancy land incorporated in the *wajib-ul-arz*. So far, however, as the evidence on the record goes, it was only in 1898 that the entry was formally acted upon for the first time.

Now the occupancy rights are of a date long anterior to 1880, and it is *prima facie* inequitable that rights granted long before river action began should be subjected to rules obtaining in neighbouring villages which were liable to river action when the tenancy originated.

It is only when the condition of forfeiture is part and parcel of the tenancy contract that it is equitable.

In this village it was no part of the tenancy condition, and as soon as the *wajib-ul-arz* was acted upon, litigation resulted which ended in the defeat of the proprietors.

I am quite unable to accede to the proposition that the custom is equitable because the only right of the tenant is based on his possession and that on losing possession he loses his right. If the same principle were generally applied, the result would be chaos, when possession is lost not by the laches or action of the possessor but by act of God or *force majeure*; that *per se* is not in law good ground for holding that the right to recover possesion is forfeited.

The statement of custom in the *wajib-ul-araiz* of 1880 and 1900 is an *ex parte* statement and as such is of very little value; further on the face of it, it is a statement of a custom which was propounded in this village for the first time in 1879. Such a custom is not ancient and has not the force of law.

My conclusion is that the custom propounded by the defendants has not been proved.

The next point urged by appellants is that the suits in three of these appeals were barred by section 43 of the Code of 1882, inasmuch as five exactly similar suits were instituted in 1906 and were withdrawn on 8th November 1906, but in three of them, *viz.*, Nos. 519, 520, 522 no sanction for a fresh suit was expressly granted. The previous suit relating to the land with which No. 519 is concerned is not traceable, so that defendants on whom the burden lay have not proved the bar. With regard to the other two cases, I entirely agree with the District Judge's remarks. The Pleader for the plaintiffs was one for all the suits and the defect in the Munsif's order was clearly one of form only.

The final argument was one of limitation.

It was argued that all the suits are barred because mutation took place in favour of defendants on submersion, which occurred twelve years before the institution of the suits. To this I cannot accede; mutation was a mere paper proceeding, the land though submerged was in the possession of the tenants until the defendants took possession of it on its re-appearance above the water-level and that event took place only a short time before the suits were brought.

These facts, however, apply to only four of the suits, the fifth is slightly different in its incidents.

The land with which Suit No. 523 is concerned consists of two areas, one in *Patti* Phatwali, the other in *Patti* Khananwali. The facts of the Khananwali area are the same as in the other suits, but those of the Phatwali area are different. The Phatwali area has been in the defendant's possession since 1887-88 and plaintiff's Counsel admits that his client's claim in respect of that area is barred by time.

The final argument that the first Court had not decided what expenditure had been incurred by defendants on the land was dropped as soon as it was pointed out to Counsel that it had been decided against defendants for want of proof.

The result is that the appeals are dismissed with costs, except in Suit No. 2322 where the appeal is accepted as regards the Phatwali area only; in that case parties shall bear their own costs throughout.

Appeals dismissed;
Appeal No. 2322 *partly accepted.*

RAJAB ALI MIAN *v.* PANDU MULLICK.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2476 OF 1914.

July 2, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

Sayed RAJAB ALI MIAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PANDU MULLICK AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Abandonment—Mortgage, usufructuary, of non-transferable occupancy holding—Tenant leaving village but not for good.

There is no abandonment of an occupancy holding where the tenant after execution of an usufructuary mortgage of a portion of the holding leaves the village but not for good, and his heirs come back and resume possession of a portion of the land. [p. 397, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, Pabna, dated the 2nd May 1914, confirming a decision of the Additional Munsif, Serajgunj, dated the 19th May 1913.

FACTS.—The plaintiff was the appellant, and the appeal arises out of a suit for ejectment of the transferee of an occupancy holding by the plaintiff landlord. One Hajitulla was the tenant in occupation of the holding. He executed an usufructuary mortgage of the whole holding, delivered possession to the mortgagee, and left the village in which the land in suit was situate and went to live in another village. Subsequently, just before the institution of the suit, some of his heirs erected a hut on the land probably with a view to live there. The landlord then brought this suit for ejectment on the ground of transfer of the occupancy holding and its subsequent abandonment by the tenant. The defence was that only a portion of the holding was transferred and that there was no abandonment. The Court of first instance gave a decree for ejectment, but on appeal, the lower Appellate Court reversed the decision of the Munsif, holding that although the tenant left the land after having delivered possession to the usufructuary mortgagee, still as his heirs came to live upon a portion of the land there was no abandonment and so the landlord could not get a decree for ejectment. Hence this second appeal to the High Court.

Babu *Sarat Chandra Roy Choudhury*, for the Appellants.—The original tenant did, as a matter of fact, abandon the holding, and then after several years his heirs came to live upon the land. I submit that under such circumstances there cannot but be abandonment by the tenant. Moreover, the lower Appellate Court has overlooked the admission of the defendant that he was the usufructuary mortgagee of all the lands of Hajitulla.

[CHATTERJEA, J.—Do you contend that in every case of usufructuary mortgage even where the tenant continues to pay rent there can be abandonment ?]

No; not in every case. But here the question is whether where the tenant executes a usufructuary mortgage and abandons the holding and leaves the village the landlord can claim ejectment.

[CHATTERJEA, J.—The finding of the lower Appellate Court that there was no abandonment is a conclusive finding of fact in second appeal.]

The question of abandonment is a mixed question of law and fact. The question is what constitutes abandonment and I can raise that question in second appeal. The finding of the lower Appellate Court was arrived at without a proper consideration of the facts and circumstances of the case.

The fact that the heirs came back after several years will not take away the consequence of the abandonment that had taken place before.

Babu *Basori Lal Sircar*, for the Respondents.—The finding of the lower Appellate Court is a finding of fact and hence conclusive in second appeal. The question whether the tenant did or did not abandon the land is a pure question of fact and hence cannot be challenged in second appeal. See *Monohar Pal* v. *Ananta Moyee Dasya* (1), *Bhupendra Nath Bose* v. *Bansi Tanti* (2). In all the cases in which your Lordships allowed ejectment the tenant left the land for good without any intention to come back. But in this case the heirs of the tenant are occupying the land. Even in the case of an usufructuary mortgage of the whole holding the landlord cannot always claim ejectment, whereas in this

(1) 20 Ind. Cas. 198; 17 C. W. N. 802.
(2) 22 Ind. Cas. 416; 40 C. 870.

case the mortgage was only of a portion of the holding. See *Bhupendra Nath Bose* v. *Bansi Tanti* (2).

Babu *Sarat Chandra* replied.

JUDGMENT.—It is found that the tenant who executed the usufructuary mortgage never left the village for good. As a matter of fact within a short time after the mortgage, his sons came back and they are in possession of a portion of the land. The Court of Appeal below, upon a consideration of these circumstances, has come to the conclusion that there was no abandonment.

That being so, the appeal must fail and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 262 OF 1914.

March 5, 1917.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

ABDUL AZIZ—PLAINTIFF—APPELLANT

versus

NIADAR MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption, suit for—Mortgage for fixed term of years—Clause providing for abridgment of term, interpretation of—Sale of mortgaged property—Notice of sale to mortgagee stating fictitious price, whether proper.

In a suit for redemption it appeared that the mortgage was not redeemable for a period of ten years except under certain conditions embodied in clause 7 of the deed, which ran as follows:—"*Agar mabain miyad das sal main fariq doyam kothi mazkur ko bai karunga to us halat men miyad mundarja bala fiskh ho jawegi, magar shart yeh hai ki jis asli qimat par kothi mazkur bai hogi uski itla tehriri miyadi do hafta fariq awwal ko kar di jawegi. Agar fariq awwal kothi mazkur kharid karna chahega to us qimat par jis par dusra shakhs asal kharidar hoga awwal badast fariq awwal kothi mazkur farokht ki jawegi, basurat inkar tehriri ya jawab na dena ta miyad fariq doyam digar shakhs ke hath farokht kar sakega, aur jo mutalba us waqt ham fariq No. 1 ka wajib-ultalab hoga woh kul wasul karkar kothi mazkur khali kar di jawegi.*" In compliance with this clause the mortgagor, on the 11th July 1911, sent a notice to the mortgagees informing them that he had "finally settled to sell" the property to *A* for Rs. 80,000 and as it was necessary to send them a written notice "*before the completion of the sale*", this notice was being sent in order to enable them to purchase the property, if they so desired, at the price of Rs. 80,000. The notice went on to say that after the expiry of the prescribed period the property would, otherwise, *be sold absolutely to A*. On the 24th July the mortgagees replied, saying that they were willing to purchase the property but that the alleged agreement to sell was not genuine, the price being fictitious. They declared their willingness to purchase it at the fair market price. On the 3rd of August the mortgagor executed a deed of sale in favour of *A* who tendered the mortgage money due to the mortgagees, but that being refused he instituted a suit for redemption. It was found that Rs. 80,000 had not in fact been paid:

Held, (1) that under the clause recited above if the parties desired to abridge the term of the mortgage, it was incumbent on the mortgagor to give the mortgagees notice of his *intention to sell*, thus giving them an opportunity of buying the property themselves at the price fixed and to be paid by the intending purchaser; [p. 399, col. 1.]

(2) that notice of the *actual price* at which the mortgagees were entitled to redeem the property not having been given to them, they were entitled to retain possession for the term of the mortgage. [p. 398, col. 2.]

First appeal from the decree of the Divisional Judge, Delhi, dated the 31st December 1915, dismissing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., Mr. *Kirkpartrick* and Rai Sahib Lala *Moti Sagar*, for the Appellant.

The Hon'ble Pandit *Sheo Narain*, R. B., Messrs. *Gullu Ram* and *Amolak Ram Chopra*, for Respondents Nos. 1 and 2.

Mr. *Suraj Narain*, for Respondent No. 3.

JUDGMENT.—This appeal has arisen out of a suit for redemption brought by the plaintiff-appellant in the following circumstances:—

One *Sheikh* Subhan Bakhsh owned certain property, situate inside the Mori Gate in Delhi, known as "The Northbrook Hotel" which he mortgaged, with possession, to Niadar Mal-Rangi Lal for Rs. 10,000 under a duly registered deed of mortgage dated the 4th April 1903. The mortgage was not redeemable for a period of ten years, except under certain conditions embodied in clause 7 which will be referred to in detail later.

On the 8th September 1903 *Sheikh* Subhan Bakhsh executed another mortgage for Rs. 25,000 in favour of Ram Chand-Banarsi Das, under which this Northbrook Hotel, in addition to three other houses, was mortgaged. Rs. 10,000 out of the said Rs. 25,000 was left with these mortgagees for payment to Niadar Mal-Rangi Lal.

ABDUL AZIZ *v.* NIADAR MAL.

Clause 7 of the first mortgage was as follows:—

"*Agar mabain miyad das sal main fariq doyam kothi mazkur ko bai karunga to us halat men miyad mundarja bala fiskh ho jawegi, magar sharat yeh hai ki jis asli qimat par kothi mazkur bai hogi uski itla tehriri miyadi do hafta fariq awwal ko kar di jawegi. Agar fariq awwal kothi mazkur kharid karna chahega to us qimat par jis par dusra shakhs asal kharidar hoga awwal badast fariq awwal kothi mazkur farokht ki jawegi, basurat inkar tehriri ya jawab na dena ta miyad fariq doyam digar shakhs ke hath farokht kar sakega, aur jo mutalba us waqt ham fariq No. 1 ka wajib-ul-talab hoga woh kul wasul karkar kothi mazkur khali kar di jawegi.*"

In compliance with this clause *Sheikh* Subhan Bakhsh on the 11th July 1911 sent a notice to Niadar Mal-Rangi Lal informing them that he had "finally settled to sell" this property "to Sayad Abdul Aziz (plaintiff-appellant) for Rs. 80,000" who had paid him Rs. 5,000 as earnest money, and that as "In accordance with condition No. 7 of the said deed of mortgage, it is necessary to send you a written notice before the *completion of the sale*" the requisite notice was being sent in order to enable them to purchase the property, if they desired, at the price of Rs. 80,000. The notice went on to say that after the expiry of the prescribed period the property would, otherwise, be *sold absolutely* to the said Sayad Abdul Aziz. From the above it is clear that though it was alleged that an agreement to sell had been entered into, the sale had not been, and was not to be, completed till the period of 14 days had expired. On the 24th July 1911 Niadar Mal-Rangi Lal replied saying that they were willing to purchase the property, but that the alleged agreement to sell was not genuine, the price being fictitious. They declared their willingness to purchase at the fair market-price.

On the 3rd August 1911 *Sheikh* Subhan Bakhsh executed a deed of sale in favour of Sayad Abdul Aziz, the price entered therein being Rs. 80,000. The purchaser redeemed the mortgage in favour of Ram Chand-Banarsi Das, and tendered the mortgage money due under the first mortgage which was refused, with the result that Sayad Abdul Aziz instituted this suit for redemption on the 15th August 1911. The promptness with which this suit was brought was due to the fact that this property was situated on the route to be taken by the Royal Procession at the 1911 Durbar.

Niadar Mal-Rangi Lal contested the suit and pleaded that the price for which the property was really sold was far less than Rs. 80,000 and that as the condition laid down in clause 7 had not been complied with, they were entitled to be left in possession for the whole period of ten years.

The learned Divisional Judge who tried the case held that Rs 80,000 had not been paid, and that the value of the property did not exceed Rs. 40,000, and dismissed the suit on the ground that notice of the *actual price* at which the mortgagees were entitled to purchase the property not having been given to them, they were entitled to retain possession for the term of the mortgage. Against this decision the plaintiff-appellant has preferred this appeal through Counsel and we have heard Mr. Kirkpatrick on his behalf, while Mr. Sheo Narain has addressed us on behalf of the respondents mortgagees.

Mr. Kirkpatrick contended that the sale was a legal and valid one, and that on a proper construction of clause 7, the mere fact of the sale abridged the period of the mortgage and entitled his client to redeem, the condition as to notice merely giving the mortgagees a right to pre-empt, a right that they could have pleaded as a defence, but which they did not advance in the suit, although since the decision of the case they have instituted a suit for specific performance.

On the other side it was urged that the mere fact of the sale did not operate as an abridgment of the term, but that, properly construed, the clause in question provided that if during the continuance of the mortgage it was desired to abridge the term, the mortgagor could carry out his wish by selling the property, but that in that case it was incumbent on him to give the mortgagees notice of his intention to sell and the actual price at which a definite purchaser was willing to buy, whereupon the mortgagees could take over the bargain or allow the sale to be effected, and if they did not take over the bargain the purchaser could redeem without waiting for the termination of the period fixed by the mortgage-deed.

After a consideration of the arguments advanced by Messrs. Kirkpatrick and Sheo Narain in support of their respective contentions we are of opinion that the correct interpretation of clause 7 is that urged by Mr. Sheo Narain. That that was the intention of the parties to the mortgage seems to us to be perfectly clear.

That that was the construction placed upon this clause by *Sheikh* Subhan Bakhsh seems clear from the notice given in accordance with it on the 11th July 1911 (printed at pages 27 and 28), in which it is stated that the notice was necessary "*before the completion of sale*" (page 27, line 40).

Again paragraph 4 of the plaint appears to have been drafted in accordance with this view. In any event the wording of clause 7 seems to us to be perfectly clear and not open to the construction Mr. Kirkpatrick desires to place on it.

We accordingly hold that if the parties to the sale desired to abridge the term of the mortgage, it was incumbent on the mortgagor to give the mortgagees notice of his *intention to sell*, thus giving them an opportunity of buying the property themselves at the price fixed, and to be paid by the intending purchaser. In this view of the matter it is not necessary to discuss Mr. Kirkpatrick's contention that this clause was bad in law as being a "clog on redemption." Suffice it to say that in the present case the term for which the mortgage was to enure, *viz.*, ten years was not a "clog" in itself, and the clause under consideration in no way prevented the mortgagor from selling the property. It was only in the event of his desiring to abridge the period that clause 7 came into operation, and we can see nothing illegal in its terms, and hold that the conditions it laid down were not a "clog" on redemption.

[The rest of the judgment is not necessary for the purposes of the report.]

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 421 OF 1915.

March 12, 1917.

Present:—Mr. Justice Beachcroft and Mr. Justice Walmsley.

KALI NATH CHAKRAVARTY AND OTHERS—APPELLANTS

versus

AMBICA PRASHAD DAS AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 37—Fraudulent preference, essentials of.

Section 37 of the Provincial Insolvency Act requires four conditions for its operation:—(1) the debtor must be unable to pay his debts as they become due, (2) the transfer must be in favour of a creditor, (3) the debtor must have acted with a view to giving that creditor a preference over other creditors, (4) the debtor must be adjudged insolvent on a petition presented within three months from the date of the transfer. [p. 402, col. 2.]

Where in the case of a transfer for a fair value the first, second and fourth conditions stated above are present, the transfer does not become void under section 37 of the Provincial Insolvency Act merely because the transferee did not believe that it was possible for the debtor to pay off all his creditors with the money obtained by the transfer or did not see to the disposal of the money by the debtor. [p. 402, col. 2.]

The question whether there has been fraudulent preference within the meaning of section 37 depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. [p. 403, col. 2.]

Where a transfer in favour of a creditor has been made under pressure, it cannot be said that it was made with the view of giving preference to the creditor. [p. 403, col. 2.]

A creditor by means of pressure upon the debtor stole a march on his co-creditors and got a mortgage for a fair value executed in his favour by the debtor, in consideration of his debts and a fresh advance, shortly before the presentation of a petition for the adjudication of the debtor in insolvency, knowing fully the embarrassed circumstances of the debtor and taking steps to conceal the fact of the mortgage from the other creditors:

Held, that the object of the mortgage was not to give fraudulent preference to the creditor, and that, therefore, it was not void under section 37 of the Provincial Insolvency Act. [p. 403, col. 2.]

Appeal against the order of the District Judge, 24-Pergannas, dated the 25th August 1915.

FACTS material to the report will appear from the judgment.

Babu *Dawarka Nath Chakraburtty* (with him Babu *Girija Prosanna Roy Chowdhury*), for the Appellants.—The mortgage in favour of Ambika was not in good faith and for valuable consideration It comes, therefore, with-

in section 36 of the Provincial Insolvency Act. The mortgage in favour of Pratap comes within section 36 as well as section 37 of the Insolvency Act. Refers to *Nripendro Nath* v. *Ashutosh Ghosh* (1).

Sir *Rash Behary Ghose* (with him Babus *Narendra Chandra Bose*, *Panchanan Ghose* and *Surendra Madhab Mullick*), for the Respondents.—The mortgage in favour of Pratap was for valuable consideration. It was also executed in good faith. One creditor is not bound to share any advantage with other creditors, *Musahar Sahu* v. *Hakim Lal* (2).

Pratap's mortgage does not come within the mischief of section 37 either. Refers to *Nripendro Nath* v. *Ashutosh Ghosh* (3), *Sharp* v. *Jackson* (4). At any rate the onus is on the creditors as they are the appellants and also because the onus of proving fraudulent preference is on the Receiver. Refers to *Wilkinson, Ex parte, Berry, In re* (5), per Jessel, M. R. The money advanced on the mortgage was for the purpose of enabling the insolvent to carry on his business and so the mortgage would not be an act of preference. Refers to *Johnson, Ex parte, Chapman, In re* (6).

JUDGMENT.

BEACHCROFT, J.—This is an appeal against a decision of the Additional District Judge of Alipur in certain insolvency proceedings, by which he refused to annul two transfers of property. One Mani Lal Saha was adjudicated an insolvent on a petition failed on the 18th February 1914 by one of his creditors. In the course of the proceedings the question of annulment of three mortgages came before the Court. These were (1) in favour of one Ambica Prasad Dass for Rs. 10,000 dated 15th July 1913, (2) in favour of one Chandi Charan Saha for Rs. 10,000 dated 14th November 1913 and (3) in favour of one Pratap Chandra Ganguli for Rs. 16,000 dated 15th December 1913. The first two came up for consideration under section 36 of the Provincial Insolvencey Act, the third under sections 37 of the Act. The Judge declared the second mortgage void against the Receiver, but refused to annul the other two. The present appeal is by some of the creditors against the order refusing to annul the two mortgages.

The insolvent was originally a Medical Practitioner but started a rice business and it is his dealings in this business which have landed him in financial difficulties. The immoveable properties shown in his schedule consisted of three separate properties, *viz.*, Nos. 66, 67 and 68, Tollygunge Circular Road, the first two of which were each valued at Rs. 25,000, and the third at Rs. 3,600. His moveable properties consisted mainly of machinery and fittings for the rice business valued at Rs. 15,027; there were also furniture and domestic articles valued at Rs. 500. His assets thus amounted to Rs. 69,127, while the liabilities exceeded Rs. 90,000.

The mortgage in favour of Ambica Prasad Das covered No. 67, Tollygunge Circular Road. The bond recites that a loan of Rs. 3,000 had been taken on the 30th June from Ambica, that amount with interest was deducted from the Rs. 10,000, and the balance Rs. 6,985 was stated to be paid in cash. Particulars of the notes by which the cash was paid were given in the schedule.

The evidence is to the effect that Rs. 6,985 was not paid in cash at the time of the execution of the mortgage, because Rs. 4,000 had been advanced previously on the 12th July. Ambica himself had had to borrow that money from the witness Gopal Chandra Banerjee, a Pleader, as it was too late to get the money from the Bank, when wanted. The money was repaid to the Pleader on the 14th. A great deal is made of the fact that this payment on the 12th contradicts the recital in the bond itself and it is suggested that this story has been invented to meet the report of the Receiver, which shows that Mani Lal had according to his own account book received Rs. 4,000 on the 12th July and

(1) 29 Ind. Cas. 128; 21 C. L. J. 167; 19 C. W. N. 157.

(2) 32 Ind. Cas. 343; 43 C. 521; 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 C. 521 (P. C.).

(3) 33 Ind. Cas. 548; 43 C. 640; 20 C. W. N. 420.

(4) (1899) A. C. 419 at p. 421; 68 L. J. Q. B. 866; 80 L. T. 841; 15 T. L. R. 418; 6 Manson 264.

(5) (1883) 22 Ch. D. 788 at p. 794; 52 L. J. Ch. 657; 48 L. T. 495; 31 W. R. 649.

(6) (1884) 26 Ch. D. 338; 53 L. J. Ch. 763; 50 L. T. 214; 32 W. R. 693.

paid out that amount on that and the following day.

The explanation of the whole transaction seems to me to be a perfectly simple and natural one. The Pleader who drafted the mortgage-bond says that even before the hand-note of 30th June for Rs. 3,000 was executed it was settled that Ambica was to advance Rs. 10,000. Search, however, had to be made in the Registration Office. A draft of the mortgage-bond had to be prepared, and as the notes given by Gopal Chandra Banerjee were entered in the consideration column and there is nothing surprising in that precaution being taker, the clause about receiving consideration was entered. There was apparently some urgency for the money on the 12th and if the draft had already been prepared by them, as to which there is no evidence either way, there is nothing extraordinary in its being allowed to stay as it was.

The evidence as to this is not merely oral. There is a receipt dated 12th July given by Mani Lal to Ambica, in which the numbers of the notes advanced on that date are given and the same numbers are found in the hand-note executed on the 12th July by Ambica Prasad in favour of Gopal Chandra Banerjee. To find in favour of the appellants we must, therefore, not only find that Mani Lal and Ambica entered into a fraudulent arrangement to favour Ambica or benefit the insolvent at the expense of the other creditors, for which there would be no justification on the evidence, but we must also find that the Pleader Banshadhar Bishnu has given false evidence and the Pleader Gopal Chandra Banerjee has not only done the same but abetted a forgery as well.

Finally, Ambica says he did not know Mani Lal before this transaction and there is no evidence to the contrary. In fact the cross examination of Ambica is not what one would expect in the case of a man charged with having got a transfer otherwise than in good faith and for valuable consideration. In regard to this mortgage then I have no doubt that the learned Judge came to the right conclusion.

The mortgage in favour of Protap Chandra Ganguli is beset with greater difficulties But it will be as well at once to correct a misstatement which was made to us, doubtless unintentionally, by the learned Vakil for the appellants, which to a great extent coloured his arguments. It was represented to us that this mortgage covered the whole of Mani Lal's property and it was argued that a mortgage of the entire estate raises a presumption of an intention to defeat creditors. In fact the mortgage-bond does not cover the $8\frac{1}{2}$ *cottah* plot which was previously mortgaged to Ambica, the reference in the bond to No. 67, Tollygunge Circular Road, would appear to be a mistake if the number of the premises as given in the schedule filed by the insolvent is correct. It, however, covers the other two landed properties and apparently also all the machinery and fittings used for the rice business, so that the property mortgaged was in value rather less than two-thirds of the insolvent's property as shown in the schedule.

It has not been suggested that the amount advanced was insufficient as mortgages go, it was not even suggested to Protap himself in cross-examination that he had not given fair value, though it appears Mani Lal at first wanted an advance of Rs. 20,000 from him.

It appears from the recitals in the bond itself that Mani Lal received Rs. 3,782 odd in cash while Rs. 12,217 odd were retained to pay off debts. There was a debt of over Rs. 3,000 due to Protap himself for paddy supplied, three mortgages amounting to about Rs. 5,500, Rs. 1 500 due to a firm of engineers for an engine and boiler, on which they had a lien, and Rs. 2,000 to be paid on a hand-note. All these debts were discharged. In fact Protap had to pay Rs. 413 in excess of the Rs. 16,000 as he explains in his evidence.

But it is said that the Receiver's report shows that Mani Lal's accounts were falsified, and that the sum advanced was not used for the purposes of his business: and it is further argued that Protap could not have believed that all creditors would be paid with the money advanced and the business re-established.

So far as the Receiver's report goes, I do not think we have been quite properly

treated. It was hurriedly read over to us and consisting, as it does, of a mass of figures, difficult to follow, if we were to be asked to draw conclusions from the figures I think some trouble might have been spent in pointing out exactly how they affected the question before us. The value of the report largely depends on the circumstances in which it was made. It was made in June 1914 in consequence of an order of the Court on the Receiver to report how the money advanced on the mortgages had been spent. That was long before the present enquiry, which was instituted after the remand order of this Court in January 1915. The report also appears to have been based, in accordance with the order, only on the accounts of the insolvent. The Receiver was not called as a witness in the present case and though the reading of the report was not objected to in this Court, the value attaching to it can only be the value which attaches to an *ex parte* enquiry into a case on a restricted source of information. And the value of the information to be got from the accounts themselves is further discounted by the opening passages of the report in which the Receiver after setting out his order says: "The account books of the insolvent especially for the year 1320 are not in order, there are many items which have not been entered in the *khatian*, nor are the *khatian* items all totalled. It is difficult to find what is the financial position of the insolvent in the course of the year." In view of this state of the accounts it would hardly be of use to attempt to extract any information from them. In fact they have not been placed before us and it is impossible to follow some parts of the Receiver's report without them. For instance, I may say I entirely fail to understand how the Receiver came to the conclusion expressed in the following passage, "If we exclude Rs. 1,800 taken by insolvent, the amount that was paid to him (I do not know whether this refers to the insolvent or Chuni Lall Dutt) out of Protap Babu's money was not used on account of the business of the *karbar* and paid to any creditor of the insolvent."

However, I shall assume for the purpose of argument that some of the money borrowed was not spent on the business, I do not see that that in any way affects the position of the lender. He is not bound to see to the disposal of the money, nor could his position be affected by the fact, even if true, but which is not proved, that the insolvent falsified his accounts except in so far as falsification of accounts might be evidence of fraudulent preference. The one would not necessarily involve the other and no serious attempt has been made to establish the connection in this case. Nor to protect himself is it necessary that the lender should believe that it is possible to pay off all the creditors with his loan.

Section 37 of the Act, on which section alone appellants rely, requires four conditions for its operation: (1) the debtor must be unable to pay his debts as they become due, (2) the transfer must be in favour of a creditor, (3) the debtor must have acted with a view of giving that creditor a preference over other creditors, (4) the debtor must be adjudged insolvent on a petition presented within three months of the date of the transfer.

It is not disputed that the first, second and fourth conditions are present in this case. The crux of the case is whether the third is.

The strongest point against Protap is his behaviour in what is described as stealing a march on his four co-creditors in getting the mortgage executed. He was the president of the Chatta Rice Dealer Association. At a meeting of this Association on the 15th December there was a discussion about Mani Lal's affairs, as owing to his financial difficulties rice was not being supplied to him by the rice dealers. It was apparently arranged that Protap and two others should try to arrange his affairs and see that he was supplied with rice. Attempts to manage his business for him, however, eventually fell through because as Lall Mohan Dass, one of the three men, says, "He did not behave properly." But on the very day on which this discussion was held the mortgage-bond in favour of Protap was executed. The execution took place at about 2 or 2-30 P. M. The meeting of the committee was held in the evening. It is argued that the fact that the two incidents should have occurred on the same day is suspicious, to say the least of it. The fact that the bond was registered at Behala instead of at Alipur is put forward as

another circumstance of suspicion, but it is perhaps a true explanation that that is due to the fact that at the Alipur Registry Office no document is accepted for registration after 2 P. M.

To take the matter beyond the region of suspicion much reliance is placed on the letter of Mani Lal that was handed in at another meeting of the Rice Dealers Association on 22nd December. In it Mani Lal said: "The said Gangapadhaya Mohasay (*i. e.* Protap) who was my principal adviser in the matter of enquiry secretly advised me to mortgage my rice mill to him, and in that case he said he would arrange matters for properly conducting the business of the mill and for payment of my debts. I have adopted this most valuable advice of his with great respect and fully acted up to it." He then went on to complain that in spite of this mortgage his debts had not been paid and arrangements had not been made for carrying on the business of the mill. At the same meeting Mani Lal signed a letter stating that he would not transfer or charge any of his property till he had paid the rice dealers what he owed them. He also stated that his homestead dwelling-house was unincumbered. In the Association's proceedings of the same day this letter is described as an *ekrar* and a month's time was given to Mani Lal to pay his debts.

The charge that Protap gave Mani Lal secret advice to execute the mortgage-bond in his favour rests only on this letter. Protap was not cross-examined on the point. Mani Lal himself has not been examined. In the circumstances it would be risky to accept this untested statement of Mani Lal complaining against Protap, especially when on the same day he tells the rice dealers that his dwelling-house is not under mortgage although it was covered by the mortgage in favour of Ambica and by the later mortgage in favour of Chandi Charan, which was subsequently annulled by the Court.

Though it is extremely probable that Protap knew how Mani Lal stood with regard to the Chatta Rice Dealers, it does not follow that the transfer to him comes within section 37 of the Act. There is this to be said in favour of Protap against the view that he was stealing a march on the other creditors, that the notices for the meeting of the 15th December were only circulated on the morning of the 15th whereas the negotiations for the mortgage had taken place some days before. The draft had been finally prepared three days previously.

Again the evidence shows that Protap had been pressing Mani Lal to pay his debts. He had threatened to sue him unless he paid within a week or gave security. If Protap knew of the state of Mani Lal's affairs, the story that he pressed Mani Lal to pay is the more probable. When a transfer has been made under pressure, it cannot be said it was made with the view of giving the creditor preference. As was pointed out in the case of *Nripindro Nath Sahu* v. *Ashutosh Ghose* (3), following *Sharp* v. *Jackson* (4), "the question whether there has been fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it."

In the circumstances whatever may be felt in regard to Protap's conduct in taking steps to conceal the fact of the mortgage from his co-creditors, if indeed he did wish to conceal it, and his version is that it was prepared at Mani Lal's house as Mani Lal did not want publicity, a very natural feeling in the case of a man whose business is tottering, it cannot be said that the object of the transfer was to give preference to Protap, and I think the learned Judge is right in coming to the conclusion that it was made for the purpose of trying to escape the Insolvency Court.

I would, therefore, dismiss the appeal with costs. We assess the hearing fee at five gold *mohurs* in the case of each respondent.

WALMSLEY, J.—I agree.

Appeal dismissed.

JUGAL KISHORE SAHAI v. HANUNMAN MAHTON.

PATNA HIGH COURT.
SECOND CIVIL APPEALS NOS. 2302 AND 2466 TO 2471 OF 1913.
January 17, 1917.
Present:—Mr. Justice Atkinson.
JUGAL KISHORE SAHAI AND ANOTHER
PLAINTIFFS—APPELLANTS
versus
HANUNMAN MAHTON—DEFENDANT—RESPONDENT.

Bengal Cess Act (IX of 1880), s. 20 (a)—Land entered in Part I of Road Cess Return as malik's *land—Rent, suit for, maintainability of.*

Where any holding, estate or tenure in respect of which a Return has been made is entered by the maker of the Return in Part I of the Road Cess Return, he is precluded from suing for any rent whatsoever, in respect of any land, holding or tenure forming part of the estate to which the Return relates, unless it is proved that the holding or tenure the rent of which is sought to be recovered was created subsequent to the lodging of the Return. [p. 405, col. 1.]

Appeal against a decision of the District Judge, Patna.

Mr. *Naresh Chandra Sinha*, for the Appellants.

Messrs. *Ganesh Dutt Singh* and *Mrityunjay Lal*, for the Respondent.

JUDGMENT.—These seven Second Appeals. Nos. 2302 and 2466 to 2471 of the year of 1913 are analogous and come before me from the decision of Mr. Collins as District Judge of Patna, reversing a decision of the Munsif granting the plaintiffs decrees for rent in these suits for the years 13 5 to 1317 F. S. The defendants hold three different and distinct denominations of land from the plaintiffs as tenants; some portion of the land bears a *bhauli* rent, another portion bears a *nakdi* rent and a third portion bears a *chowraha* rent. The lands which bear a *chowraha* rent are said by the plaintiffs to have been their *khudkasht* or *bakasht* lands and to have been temporarily settled with the defendants on their undertaking to pay a *chowraha* rent in consideration of their use and occupation of the land. *Chowraha* rent means a rent, as I understand it, payable in a certain quantity of rice per annum. With neither the *bhauli* nor the *nakdi* holdings have we any concern in this case. All these appeals have reference to the respective holdings of the defendents out of which *chowraha* rent is alleged to be payable. The learned Munsif granted decrees in respect of all the three denominations of land, which I have mentioned; but appeals were only filed in respect of the lands out of which *chowraha* rent issued; and it is argued that the *chowraha* rent is not recoverable, having regard to the provisions of section 20, clause (*a*), of the Cess Act (IX of 1880) inasmuch as the return made in pursuance of the Act did not set out these lands as rent-paying lands. It is contended that being rent-paying lands and not being shown in the return as such, no rent can be recovered in respect of them. The learned District Judge who decided this case held that on a true construction of section 20 of the Cess Act the plaintiffs were not entitled to succeed in recovering the *chowraha* rent claimed. The Cess Return, which the plaintiffs were required under the Act to make, was made in the year 1894; and the learned Judge in the lower Appellate Court has found as a fact that prior to 1894, namely, in 1892, the plaintiffs settled these *chowraha* rent-paying lands with the defendants. There was evidence on the record to support that finding of fact; and by that finding of fact I feel myself conclusively bound.

The plaintiffs' contention here is that it does not matter whether the lands are shown as rent paying lands or not, so long as they are mentioned in some part of the Return. Whether they are mentioned in Parts I and II or Part III, the plaintiffs contend, is immaterial: and that all that the Return is intended to show is all lands which are capable of assessment for valuation. The learned Judge finds that the plaintiff has in Part I of the Return described the lands in suit as *bakasht* lands: and the plaintiffs rely upon the note to Part I for the purpose of showing that they were properly mentioned in that part. The note to Part I indicates how the statutory form is to be filled up and Part I is only intended to contain a description of the land in the use and occupation of the maker of the Return. The lands in suit were, at the time of the making of the Return, not in the occupation of the maker of the Return: but they were in fact in the occupation of certain tenants who were under a liability by contract to pay the plaintiffs rent for their holdings calculated

at so many maunds of rice per annum. It is contended that the description given in Part I by the plaintiff is an adequate description in conformity with the requirements of the Road Cess Act. In my opinion, one has only to read the section itself to see that the argument put forward has no real substance, and having heard the very able argument presented to me by the learned Vakil on behalf of the plaintiff I feel myself unable to accede to his contention. It is clear upon the true construction of the section that when any holding, estate or tenure in respect of which the Return has been made is entered by the maker of the Return in Part I of the Return, the maker of the Return is precluded from suing for any rent whatsoever in respect of any land, holding or tenure forming part of the estate to which the Return relates, unless it be proved that the holding or tenure the rent of which is sought to be recovered was created subsequent to the lodging of such Returns. Part II of Schedule A of the Act prescribes that in respect of lands held by *raiyats* the name of the *raiyat* should be specified, the area occupied should be given and the amount of rent payable should be stated. Section 20, clause (*a*), in my opinion, throws upon the person making the Return the duty of giving these details in respect of the land out of which rent is payable. The lands in suit were lands in occupation of tenants in respect of which rent was payable by them; and it was incumbent upon the *zemindar* under the law to make a Return setting out the names of the tenants, the area of the land occupied by each and the rent payable. It matters not that the lands were *zerait* lands of the *zemindar*: if in fact they were in settlement with tenants as tenants, the Return should specify, even in respect of these lands, the tenancy and the amount of rent payable by each tenant. I am fortified in the view that I have taken by two or three cases. The first is *Gouri Saran* v. *Moulvi Mahmed Latif* (1). This was a decision of a Single Judge, Geidt, J., which went on Letters Patent Appeal before Rampini and Woodroffe, JJ. and their Lordships in the Letters Patent Appeal gave expression to their view as to what section 20, clause (*a*), of the Cess Act required. Their Lordships say: "Sub-section (*a*) of section 20 only requires that all the lands for which rent is payable should be entered in the Return;" and they adopt the judgment of Geidt, J., when he says that in that "case all the lands for which rent was payable were entered in the Return." But this point has been more fully discussed and considered in a more recent decision, *Samdani* v. *Kamlakant Jha* (2). In that case the lands of the *zemindars* were let to certain individuals who, the landlords stated, were not tenants but labourers in enjoyment of the lands in consideration of the services rendered by them. However, their Lordships came to the conclusion that the individuals who were in occupation of the lands were, in fact, tenants and that they were not labourers: and then their Lordships dealt with the point which we have to consider in this case At page 425 they say:—"It has been argued that even if the appellants were tenants, they were such tenants of land which, according to the respondents' argument, was *nij jote* or *zerait* land and that such land, whether it is in the actual occupation or cultivation of the landlord, or is let out to tenants, comes under, and should be entered under Part I. In support of this contention reliance is put upon the note appended to that part. But this note must be read subject to what precedes it in the first part and to the provisions of Parts II and III; and the preceding words of Part I show that the details of the lands, which are to be entered in that part, are lands in the actual occupation and cultivation of the persons submitting Returns. If the land is held either by cultivating *raiyats* or by tenure-holders paying rent, in either case, to the person submitting the Return, then the Return should be in the form of Parts II and III to Schedule A." To the like effect is the case of *Rameshwar Singh* v. *Mohendra Narain* (3), where the construction to be put on sub-section (*b*), section 20, of the Cess Act was considered. The only case relied upon in support of the plaintiffs' contention is *Sri Narain* v. *Chulhai Khan* (4). It was a case decided by Mullick,

(1) 11 C. W. N. 211.

(2) 15 Ind. Cas. 424.
(3) 19 Ind. Cas. 249.
(4) 18 C. W. N. 172 (clxxii).

J., sitting alone, in which he held that it was immaterial in what part of the Return the lands were specified so long as they were specified in some part. But with great respect to my learned brother I am quite unable to follow that reasoning. In my opinion the learned Judge in the lower Appellate Court was right in the view he took of section 20 of the Cess Act and he rightly dismissed the plaintiffs' claim for *chowraha* rent.

I accordingly disallow this appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2314 OF 1915.

June 15, 1917.

Present: Mr. Justice Fletcher and Mr. Justice Newbould.

AGHORE NATH SHAHA—PLAINTIFF—APPELLANT

versus

NATABAR BAIRAGI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 67—Mortgage—Usufructuary mortgagee dispossessed of mortgaged property—Remedy.

An usufructuary mortgagee who has been dispossessed of the mortgaged property has no remedy either by foreclosure or sale, but his remedy is confined to a money-decree against the mortgagor, as provided for in the mortgage-bond. [p. 407, col. 1.]

Appeal against the decree of the 1st Additional District Judge, 24-Pergannahs, dated the 13th July 1915, reversing that of the Munsif, 1st Court, at Diamond Harbour, dated the 14th April 1914.

FACTS material to the report will appear from the following extracts from the judgment of the Munsif :—

"Suit was thereafter heard *ex parte* as the defendants did not appear on call.

Suit on a mortgage-bond. It was executed by Nagendra in favour of Priya Nath. Priya Nath was in possession of the mortgaged land up to 1316 as mortgagee and was dispossessed from 1317 by Natabar, a subsequent mortgagee. Plaintiff has purchased the bond from Priya Nath.

The absent defendant was served with summons.

Plaintiff has proved his *kobala* and the other facts of the case including the mortgage-bond.

The claim has been proved.

Suit is decreed with costs. Defendants Nos. 1 and 2 will get five months to pay into Court the decretal amount; in default the mortgaged property would be sold for its realisation. Interest from after period of grace on the decretal amount will run at Rs. 6 per cent. per annum."

Against this decision defendant No. 2 preferred an appeal and the Additional District Judge made the following remarks in disposing of the appeal:—" * * * * *

*Defendant No. 3's mortgage was a usufructuary one only and under section 67 of the Transfer of Property Act nothing in that section can authorise a usufructuary mortgagee or a mortgagee by conditional sale to institute a suit for sale. In the instrument which is the subject-matter of this suit it is recited that 'if you (defendant No. 3) for any reason lose possession of the said land, then you will realise your money by suit against me (defendant No. 1) with interest at the rate of 2 per cent. per mensem from the date of dispossession.' This clause gives to defendant No. 3 no power to bring the property to sale and defendant No. 3 has only his personal remedy (now assigned to the plaintiff) under section 68 of the Act. The cause of action arose on the 1st *Paisakh* 1317; hence the suit having been brought within six years of that date a personal decree can be obtained against defendant No. 1, though there is no remedy against defendant No. 2. I, therefore, allow the appeal of defendant No. 2 with costs. The plaintiff will be granted a personal decree only against defendant No. 1, with interest at the bond rate up to the date of the lower Court's decree and interest at 6 per cent. thereafter up to realisation with costs against that defendant."

Babu *Karunamoy Bose* (with him Babu *Atul Krishna Roy*), for the Appellant.—The plaintiff is a purchaser from the mortgagee, who was in possession of the property and was dispossessed by the mortgagor in collusion with another to whom he sold the property. The purchaser and seller acted in collusion. The mortgagee's right to get the money accrued at once. The question is, should I

get only a money-decree against defendant No. 1 and defendant No. 2 or a decree for property too? I say let me get back the money from the property. I would not have advanced the money unless the property was liable for the money. It was a mortgage on which I advanced the money. I have been dispossessed of the property and I want my money for the property or the property itself.

[FLETCHER, J.—Was there no personal remedy? The question turns upon the form of mortgage].

I have made both defendants Nos. 1 and 2 parties. In any case I pray for withdrawal of this appeal.

Babu *Amarendra Nath Bose* (with him Babu *Sashi Sekhar Bose*), for the Respondent. —As to the question of withdrawal of suit, *vide* Order XXIII, rule 1, Civil Procedure Code. Hardship is not a ground. Under section 68, Transfer of Property Act, he was entitled to one of three remedies—money, property, or additional security. He chose one.

Babu *Karunamoy Bose*, in reply, referred to *Kangaya Gurukul* v. *Kalimuthu Annavi* (1).

JUDGMENT.

FLETCHER, J.—This appeal must be dismissed. The finding of the learned Judge of the lower Appellate Court is that the plaintiff's mortgage is an usufructuary mortgage. That is also what the plaintiff himself says in his plaint and from his statement of the mortgage in his plaint it is quite clear that it is an usufructuary mortgage If it is an usufructuary mortgage, there is no remedy either by foreclosure or by sale, and the plaintiff having brought this suit, he has been given a simple money decree for the amount due on his mortgage. That seems to be the only relief that he can get in this suit.

The other point is that the plaintiff ought to be permitted to withdraw from the present suit with liberty to bring a fresh suit for possession of the mortgaged property. One cannot say generally what ought to be the rule in such a case. All that one can say is whether or not the case under consideration is a proper case in which to exercise that discretion. In this case, we ought not to grant the prayer because the plaintiff deliberately selected the gentleman who conducted this litigation in the Courts below. He instituted the suit in this way. The two defendants met him on the case put forward. He cannot now, when he has deliberately taken this course, be permitted to get out of the whole thing and start the litigation afresh. I think the plaintiff ought, under the circumstances, to get a decree for money against his mortgagor. He can then enforce his decree as he thinks best. The present appeal fails and must be dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed

(1) 27 M. 526 (F. B.).

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 56 OF 1916.

March 28, 1917.

Present:—Mr. Lindsay, J. C.

Raja MUHAMMAD ABUL HASAN KHAN—PLAINTIFF—APPELLANT

versus

Musammat PARKASHI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886*), s.* 47*—Compromise enhancing rent—Enhancement, illegal—Rent, suit for—Landlord, position of.*

A suit to contest a notice of ejectment was settled by a compromise, under which the existing rent was enhanced by nearly half as much and one of the relations of the recorded tenant was admitted as a co-tenant of the holding in suit. Subsequently the landlord sued the co-tenants for recovery of rent on the basis of the compromise:

Held, that the suit could not be decreed at the rate entered in the compromise but only at an enhanced rate allowed by section 47 of the Oudh Rent Act. [p. 408, cols. 1 & 2.]

Lachhman Singh v. *Thakurain Sarfaraz Kunwar*, 33 Ind. Cas. 560; 18 O. C. 361; 3 O. L. J. 126 and *Kristodhone Ghose* v. *Brojo Gobindo Roy*, 24 C. 895; 1 C. W. N. 442, distinguished from.

Appeal from the decree of the District Judge, Gonda, dated the 11th September 1916, upholding the order of the Assistant Collector, 1st Class, Gonda, dated the 11th July 1916.

Syed *Ali Mohammed*, for the Appellant.

Babu *Ramapat Ram*, for the Respondents,

SUBBARATNA MUDALI *v.* BALAKRISHNASWAMI NAIDU.

JUDGMENT.—I think this appeal must fail and the judgment of the lower Appellate Court be upheld. The facts are very simple. One *Musammat* Parkashi was a tenant of the plaintiff holding an area of 5·72 acres in a village called Karanpur. A notice of ejectment was issued against *Musammat* Parkashi in the year 1320 *Fasli*. These proceedings in ejectment were put an end to by a compromise between the Raja plaintiff and *Musammat* Parkashi. Formerly the rent of this holding had been Rs. 20-4-0 and under the new agreement the rent was increased to Rs. 27. Another feature of this agreement was that the second defendant in the case, a man named Gharib who is *Musammat* Parkashi's nephew, was admitted as a co-tenant with a half interest in the holding. The present suit for arrears of rent has been brought on the basis of this new agreement. The plaintiff claimed rent at the rate of Rs. 27. The Courts below have refused to give him relief on this basis, holding that inasmuch as the provisions of section 47 of the Oudh Rent Act prohibit the taking of any enhanced rent in excess of one anna in the rupee the contract for a rent of Rs. 27 was illegal. The Courts below have held that the plaintiff was entitled to enhancement at the rate of one anna in the rupee and they have, therefore, enforced the agreement to that extent.

It is contended in appeal here that section 47 of the Oudh Rent Act did not apply to the case. I am unable to accept the argument. I have been referred to a decision of my own reported as *Lachhman Singh* v *Thakurain Sarfaraz Kunwar* (1), but the facts of that case are easily distinguishable from the facts of the present case. In the former case there was a variation of the area which took the facts out of the operation of section 47. Here admittedly the area is the same. There can, I think, be no doubt that section 47 applies to the case and that the Courts could not enforce an agreement to pay the enhanced rent provided by the agreement. Then it is said in ground No. 2 that if the agreement was illegal, it was not competent to the Courts below to make a new contract for the parties so as to give a decree at the rate of one anna in the rupee in excess of the previous rate. The ruling of the Calcutta High Court in *Kristodhone Ghose* v. *Brojo Gobindo Roy* (2) is cited in this connection and supports the appellant's argument. In that case the defence of the tenant was that the agreement was altogether void and unenforceable and the plea was maintained. In the present case the tenants have not appealed in either Court and the question is whether in the circumstances the appellant should be allowed now to plead the illegality for his own benefit. His object is clear enough. He wishes the Court to declare that the tenancy is one under the old arrangement, so that he may be entitled to take advantage of the declaration and eject the defendants and it is for this purpose that the third plea in the memorandum of appeal is raised. He wishes to have the second defendant discharged from the suit so as to restore the *status quo ante*. He ought not, in my opinion, to be permitted to do so. He made a contract with these defendants which he knew perfectly well to be illegal and admitted them both to the occupation of the land in suit. Now that the fraud upon the law which he committed is brought to light, he cannot be allowed to plead it for his own advantage so as to enable him to disturb the defendants' occupation. I hold that these pleas are not maintainable and dismiss the appeal with costs.

Appeal dismissed.

(1) 33 Ind. Cas. 560; 18 O. C. 361; 3 O. L. J. 126.

(2) 24 C. 895; 1 C. W. N. 442.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1291 OF 1915.

April 3, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

SUBBARATNA MUDALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALAKRISHNASWAMI NAIDU—PLAINTIFF—RESPONDENT.

Custom—Hindu Law—Succession—Dancing girls—Females, rights of.

Succession to the estate of a dancing girl is based more upon usage obtaining in the caste than upon any text of Hindu Law, and according to that usage females take in preference to males. [p. 409, col. 2]

Kamakshi v. *Nagarathnam*, 5 M. H. C. R. 161, *Venku* v. *Mahalinga*, 11 M. 393; 12 Ind. Jur. 421; 4 Ind. Dec.

(N. S.) 274, *Chalakonda Alasani* v. *Chalakonda Ratnachalam*, 2 M. H. C. R. 56, *Muthukannu* v. *Paramesami*, 12 M. 214, 4 Ind Dec. (N. S.) 493, *Narasimma* v. *Gangu*, 13 M. 133, 4 Ind. Dec. (N. S.) 804, followed.

Sivasangu v. *Minal*, 12 M. 277, 4 Ind. Dec. (N. S.) 543, *Subbaraya Pillai* v. *Ramasami Pillai*, 23 M. 171, 8 Ind Dec. (N S.) 518, *Mandaram Nammaiya Chetty* v. *Mandaram Thiruvenkadathan Chetty*, 18 Ind. Cas. 601, 13 M. L. T. 88, 24 M. L. J. 223, *Minakshi* v. *Muniandi Panikar*, 25 Ind. Cas. 957, 27 M. L. J. 353; 1 L. W. 704; (1914) M. W. N. 672; 16 M. L. T. 270; 38 M. 1144, distinguished.

Where, therefore, the succession is to the estate of a dancing girl, a maternal grand-uncle's daughter would be preferred to the maternal grand-uncle's daughter's son. [p. 410, col. 2.]

Second appeal against the decree of the District Court. Trichinopoly, in Appeal Suit No. 256 of 1914, preferred against that of the District Munsif, Karur, in Original Suit No. 82 of 1913.

Mr. *K. S. Ganesa Aiyar*, for the Appellants.

Mr. *T. S. Ramaswami Aiyar*, for the Respondent.

JUDGMENT.—This appeal raises an interesting question as to the succession to the property of a woman of the dancing girl caste. The deceased woman Palani inherited the property in dispute from her mother Nagu, who inherited it from her mother Mottai, who again inherited it from her father Arunachellam. Arunachellam had two brothers Ramaswami and Mathurbhutham, and the question is whether Mathurbutham's daughter Seethai or Ramaswami's daughter's son Maruda Muthu Mudali is the heir of Palani. All the women appear to have followed the profession of a prostitute. That members of this caste are Hindus is certain, though the ancient writers and their modern exponents find some difficulty in fixing them in one of the four castes; but whether they belong to the *Sudra* or fourth caste or to a separate fifth caste is immaterial. That male members of this caste are usually governed by the Hindu Law and usage does not seem to have been questioned; so also when female members marry and have children, as they sometimes do, their family relation is governed by the Hindu Law and presumably the ordinary Hindu Law of inheritance will govern succession to their properties. At the same time their female children may remain unmarried and become professional *dasis* without any degradation or stigma attaching to them so long as they observe the caste customs. It is well known that at least in the Southern Districts they are supposed to be married to the idol of some temple and it is a question not beyond dispute whether after such a marriage, signified by the tying of a *bottu* and *thali* by the *archaka* or priest, they can contract a real marriage with a member of their caste. They are not virgins, are not married women and never become widows. We are led to make these observations for showing that there is no such thing as a dissolution of the natural tie by relationship between the members of the caste who remain unmarried and follow their trade and their married relations who lead a respectable life. Even in the case of married or unmarried women of other castes, who have become degraded by their immoral conduct, it is now settled that the natural relationship is not broken between such common women and their respectable relations and the ordinary rule of the Hindu Law of inheritance applies. But it will be seen at once that that law, which is based on a system of legal marriage and consequential relationship, cannot be applied at all or at least without very considerable modifications to the property of a woman of this caste, who except her own children can ordinarily have relations only through females. The rules as to *stridhan* obviously do not apply to such property and there is no other rule of succession laid down in the *Smritis* or by the commentators prescribing the devolution of the property of women of this caste, except it be the general rule "that to the nearest 'sapinda' the inheritance next belongs." According to Vijnaneswara 'sapinda' connotes merely relationship [see *Acharadyaya Vivahaprakaranam*, pages 31, 32 and 35 of Setlur's Edition Translations, 1 Madras Law Journal 75]. Usage has, therefore, sprung up in this caste which permits affiliation of daughters and gives preference to females in matters of succession.

This was recognised in one of the early cases in this Court, *Kamakshi* v. *Nagarathnam* (1). There the two daughters of a son inherited the *mirasi* office of their grand-

(1 5 M. H. C. R. 161.

mother. On the death of one of them her daughter was held entitled to her share of the office jointly with the aunt. The learned Judges held that the rules of inheritance applicable to paternal property were applicable to succession to the property of the mother, treating the females as if they were males, as that was necessary from the nature of the case. It is to be observed that the females so inheriting the property take an absolute interest therein as a male. Apparently the learned Judges thought they were applying the ordinary Hindu Law of inheritance, with such modification as they thought necessary to suit the circumstances of the case; but we can find no authority in that law for such a manipulation. We think the correct basis was usage. In *Venku* v. *Mahalinga* (2) Muthuswami Iyer, J., after a review of the previous decisions concluded that the civil rights of the members of this class are to be adjudicated upon, in the absence of a positive rule to the contrary, with reference to the custom of the caste and the analogies of the Hindu Law (see page 399). Apparently on that analogy it has been held that a dancing woman and her daughters may constitute a joint Hindu family, *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (3). In *Muttukannu* v. *Paramesami* (4) the same learned Judge held that by custom plurality of adoptions was recognized in the section of the caste whose practices were in question and that the adopted daughter succeeded in preference to and to the exclusion of the son of another deceased adopted daughter. Evidently the right of representation was not allowed to a daughter's son. In *Narasanna* v. *Gangu* (5) it was held that the sister's adopted daughter was entitled to succeed to a deceased dancing woman's property in preference to her brother. This would be in accordance with the principles governing the devolution of the property of the female members of the caste, but the learned Judges based their decision on degradation being a ground of preference. They followed the decision of *Sivasangu* v. *Minal* (6) which, however, was not a case of succession to the property of a woman of the dancing girl caste, but of a married woman who became degraded by becoming a prostitute. This ground of preference to succeed to a prostitute's property is no longer law [*Subbaraya Pillai* v. *Ramasami Pillai* (7), *Mandaram Nammaiya Chety* v. *Mandaram Thiruvengadathan Chetty* (8), *Meenakshi* v. *Muniandi Panikkan* (9)], but it is to be observed that these cases leave the law as to dancing girls as it was before.

Acting then on the analogy of the cases decided in respect of the devolution of the property of dancing girls, we think Seethai was a preferential heir to her cousin's son. She is nearer in relation to the deceased and the ordinary Hindu Law, which excludes females or prefers males to females, has no application to the case of dancing girls. This is also in accordance with the consciousness of the parties, for it is said in the judgment of the District Munsif that the defendants conceded that there was a special custom as regards inheritance to property left by a dancing girl, under which heirs who are also dancing girls take the property of the deceased in preference to male heirs. It is also clear that the ordinary Hindu Law of inheritance is not applicable to these parties, for when the female heirs succeeded they took an absolute estate. The appeal must, therefore, be dismissed with costs

Appeal dismissed.

V.R.P.

(2) 11 M. 393; 12 Ind. Jur. 421; 4 Ind. Dec. (N. S.) 274.

(3) 2 M. H. C. R. 56.

(4) 12 M. 214; 4 Ind. Dec. (N. S.) 499.

(5) 13 M. 133; 4 Ind. Dec. (N. S.) 804.

(6) 12 M. 277; 4 Ind. Dec. (N. S.) 543.

(7) 23 M. 171; 8 Ind. Dec. (N. S.) 518.

(8) 18 Ind. Cas. 601; 13 M. L. T. 88; 24 M. L. J. 223.

(9) 25 Ind. Cas. 957; 27 M. L. J. 353; 1 L. W. 704; (1914) M. W. N. 672; 16 M. L. T. 270; 38 M. 1144.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 10 OF 1916.

July 5, 1917.

Present:—Sir E. Ormond, KT., Offg. Chief Judge, and Mr. Justice Maung Kin.

MAUNG PAN HLA—PLAINTIFF—APPELLANT

versus

MAUNG TUN NYEIN—DEFENDANT—RESPONDENT.

Buddhist Law, Burmese—Property acquired during marriage—Interest of wife, whether attachable,

ABDUL AZIZ *v.* KHIROD CHANDRA DAS.

Property acquired during marriage by the husband becomes the joint property of the husband and wife unless their earnings are kept separate and distinct, and their respective interests in such property are attachable in execution of a decree against one of them.

Mr. *Agabeg*, for the Appellant.

Mr. *Palit*, for the Respondent.

JUDGMENT.—The plaintiff was married to Ma Kin. The defendant had a decree against Ma Kin. The defendant attached certain property and applied for execution. He was allowed to put in execution against the property to the extent of Ma Kin's interest. The plaintiff applied to have that attachment removed and failed. He then sued for a declaration that he was entitled as absolute owner to the whole of the property attached. He failed in the District Court. He then appealed to the Divisional Court, and failed again and then appealed to this Court, when his appeal was dismissed on the ground that the Divisional Court had no jurisdiction to entertain the appeal because the suit was valued at Rs. 5,000 and the appeal lay from the District Court to the Chief Court direct. He then filed a fresh appeal to this Court from the decree of the District Court, and if we deduct the time spent in litigating before the Divisional Court and in the appeal from the Divisional Court's decree to this Court, his appeal is in time. We think that period should be allowed under section 5 of the Limitation Act.

As to the merits of the case the property was acquired by the plaintiff during the marriage. The property stood in the plaintiff's name. His evidence is to the effect that he was a cultivator and his wife kept a cigar shop, and he says they did not work together. He does not say that he kept all his property distinct from his wife's, which would be very unusual. The wife on the other hand says that she kept her money separately, but when asked if she had a goldsmith's shop in Rangoon she says, "No, it belonged to the children who bought it with their own money." When confronted with an affidavit Exhibit 1 put in by her in some other proceeding, she says she was a lady of substance and had two goldsmith's shops, one in Rangoon and the other in Moulmein, and 100 acres of paddy land in the Amherst District. She does not say in her evidence in this case that those 100 acres comprised no part of the paddy land, part of the subject-matter of this suit, but she says she cannot say whether her statements in Exhibit 1 are correct or not, whether she has that property referred to in Exhibit 1 now or not, and whether her statement in Exhibit 1 is a lie or not. The only conclusion we can come to is, that this property belonged to the husband and wife jointly. Only the wife's half interest was attached. Therefore the plaintiff's appeal must be dismissed with costs, three gold *mohurs*.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 470 OF 1915 AND 7 OF 1916.

July 2, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

IN NO. 470 OF 1915

ABDUL AZIZ—DEFENDANT—APPELLANT

versus

KHIROD CHANDRA DAS, RECEIVER OF THE ESTATE OF ABDUL AZIZ—PLAINTIFF—RESPONDENT.

IN NO. 7 OF 1916

JABEDA KHATUN—DEFENDANT—APPELLANT

versus

SIVADAS DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 36—Transfer, avoidance of—Evidence, opportunity to produce, grant of—Procedure.

When a *kobala* produced before an Insolvency Court is impeached on the ground that it is a fraudulent transfer under section 36 of the Provincial Insolvency Act, the Court ought not to come to the conclusion that the document is invalid on a mere perusal of the same and hearing arguments without giving the parties an opportunity to adduce evidence in the matter. [p. 413, col. 1.]

Appeals against the orders of the District Judge, Chittagong, dated the 24th September 1915.

FACTS of the case appear from the judgment.

ABDUL AZIZ *v.* KHIROD CHANDRA DAS.

Babu *Khitish Chunder Sen*, for the Respondent, raised a preliminary objection that under sections 20 and 46 of the Provincial insolvency Act a second appeal did not lie against an order passed by the Receiver in Insolvency. The order that was passed by the Receiver was affirmed by the District Judge. The order appealed against was an appellate order passed by the District Judge in the exercise of his appellate jurisdiction.

Mr. *U. N. Sen Gupta* (with him Babu *Nitish Chandra Lahiri*), for the Appellant.—The District Judge asked the Receiver to submit a report and on the report the District Judge passed the order in question, so that this appeal is directly against the original order of the District Judge and is competent. That is my answer to the preliminary objection. Then as regards merits, the learned Judge should not have summarily disposed of the case without taking evidence, inasmuch as the appellant moved the District Judge for adducing evidence to prove the genuineness of the *kobala* and that it was for consideration. When a transaction is sought to be set aside on the ground of fraud under section 36 of the Provincial Insolvency Act the Judge is bound to take evidence. The transfer was for dower debt and so was for consideration. On the whole the learned District Judge should have decided the case after taking proper evidence as to the *bona fides* of the transaction. The annulment of the *kobala* without taking any evidence is bad in law. See *Amir Ali Sardar* v. *Nazir* (1), *Jagannath* v. *Lachman Das* (2).

[Babu *Khitish Chandra Sen*, for the Respondent —There is nothing on the record to show that the appellant ever sought to adduce evidence before the District Judge when the case was called for hearing; the Pleader for the appellant argued the case before the District Judge on the evidence taken by the Receiver and never asked the Court to take any evidence.]

It may be that there is nothing in writing on the record. But my instructions are that although no written application was made to the Judge, yet the learned Pleader who conducted the case before the Judge verbally asked the Judge to permit him to adduce evidence to show that the *kobala* sought to be annulled was for consideration, but the Court refused to take any evidence inasmuch as it thought that the evidence taken by the Receiver was sufficient and that it was entitled to adjudicate on this point on the basis of that evidence. Here the learned Judge was obviously wrong: Under the provisions of the Provincial Insolvency Act the learned Judge was bound to take evidence and he could do nothing without taking evidence, and any order passed by him must be set aside as being made without jurisdiction. The learned District Judge has assumed that the *kobala* was obviously collusive; he, therefore, thinks it unnecessary to take evidence. Merely on the report of the Receiver the Judge had no jurisdiction to decide the case. When the validity of the *kobala* was impeached, it was incumbent upon him not only to consider the report of the Receiver but also to take into account the effect of any fresh evidence adduced before him to prove the *bona fides* of the transaction. The decision of the learned District Judge is based not upon evidence but upon assumption and probabilities of the case. Simply because the transaction was between husband and wife, therefore, the District Judge takes it for granted that the transaction was obviously collusive. Considering all these circumstances, on the facts of the case and the manner in which the case has been tried in the lower Court, my submission is that the order of the District Judge should be set aside on the authority of the case reported as *Amin Ali Sardar* v *Nazir* (1) and the case should be sent back for decision after taking proper evidence.

Babu *Khitish Chandra Sen*, for the Respondent.—The so-called report of the Receiver was in effect an order passed by the Receiver. It has been contended on behalf of the appellant that the learned District Judge should have decided the case after taking evidence. My submission is that the procedure followed by the District Judge is the proper procedure. Of course, before making an original order it might be necessary for him to take evidence. But the order of the District Judge in this case is an appellate order. The Receiver took evidence, and the

(1) 20 C. W. N. clxxxvii.
(2) 26 Ind Cas. 32; 36 A. 543; 12 A. L. J. 889.

Judge has taken this evidence into consideration. Moreover, the jurisdiction of the District Judge to decide without taking evidence was not at all questioned in the lower Court. There is not a bit of evidence on the record showing that there was any attempt on the part of the other side to adduce evidence to substantiate their case, so the order of the District Judge should not be interfered with. Moreover, these two appeals must fail for defect of parties; in the one case the Receiver has not been made a party, and in the other some of the creditors have been left out.

Mr. *U. N. Sen Gupta* replied.

JUDGMENT.—The appeals are against an order made by the District Judge under the Provincial Insolvency Act, by which he held that the *wakfnama* in respect of some of the properties was invalid to the extent of 2/3rds, and that the *kobala* executed by the insolvent in favour of his wife who is the appellant in Appeal No. 7 of 1916 was invalid. It is contended that no evidence was taken and that the learned Judge came to the conclusion that the *kobala* was invalid on a perusal of the document and hearing arguments.

When the documents were impeached on the ground that they were fraudulent, we think that the appellant ought to have been given an opportunity of adducing evidence in the matter.

The learned Pleader for the respondent has pointed out that the Receiver has not been made a party in Appeal No. 7 of 1916 although he has been made a respondent in Miscellaneous Appeal No. 470 of 1915, and that the creditors have not been made respondents in Appeal No. 470 of 1915 though they have been made respondents in Appeal No. 7 of 1916. They ought to have been made parties in each appeal. The appeals, however, are against the same order and in order to avoid further delay in the hearing of the matter, the learned Pleader for the respondent very properly waives the objections as all the parties are before the Court.

We set aside the order of the Court below and send the cases back to that Court in order that it may allow the parties an opportunity of adducing evidence, and decide the matter on such evidence. The appellant must pay the costs of the respondents in these appeals. We assess the hearing fee at three gold *mohurs* to be devided equally between the two cases, *i. e.*, Rs. 24 in each case.

Case sent back.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 75 OF 1915.

March 13, 1917.

Present:—Mr. Stuart, A. J. C.

ABDUL WAHAB AND OTHERS—DEFENDANTS—APPELLANTS

versus

BASANT LAL AND ANOTHER—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Undivided estate, share in, transfer of—Co-sharers rights of—Partition, subsequent—Transferee, right of, to follow security—Partition Act (IV of 1893*)—Preliminary partition decree—Commissioner selling property—Sale sanctioned by Court—Transfer of Property Act (IV of* 1882*), s* 52—Lis pendens, *doctrine of—Mortgage of undivided share during partition suit—Mortgage, property sold free from—Sale-proceeds divided among co-sharers—Mortgagor undertaking to satisfy mortgage-debt—Mortgagee, remedy of.*

Where a person transfers a share in an undivided estate, which is owned by himself and other persons, the transfer cannot be permitted to affect injuriously the interests of his co-sharers; and, where a non-fraudulent division of the undivided shares subsequently takes place, the remedy of the transferee is to follow the transmuted security, although in cash, in the hands of his transferor. [p. 419, col. 2.]

Mahadin v. *Sheo Prasad*, 20 Ind. Cas. 577; 16 O. C. 161, explained.

One of the co-sharers in an undivided property mortgaged his share in the same, and then filed a partition suit against the remaining co-sharers. During the pendency of this suit the plaintiff co-sharer created a further charge in respect of this very share in favour of his mortgagee. The Court passed a preliminary decree, and in execution thereof appointed a Commissioner to carry out the partition according to his own discretion. The parties to the suit agreed before him in good faith to have the property sold up and the cash proceeds divided among them according to their shares. The Commissioner sold the property free from all encumbrances and submitted his report, which was accepted by the Court. The property was purchased with a full knowledge of the existence of the mortgage and the further charge, on the assurance that the plaintiff co-sharer would meet the liabilities accruing therefrom. The cash proceeds were divided among the co-sharers, and the plaintiff co-sharer was made liable to satisfy his mortgage-debt, for which no real security was taken from him:

ABDUL WAHAB *v.* BASANT LAL.

Held, (1) that the doctrine of *lis pendens* had no application to the further charge, inasmuch as it affected the rights of nobody except the person creating the same; [p. 420, col. 2.]

(2) that, although the Court had not in the preliminary decree authorised the Commissioner to sell the property, yet the Court having fully ratified the sale, which it had power to do under the Partition Act, the sale was good and valid under the final decree; [p. 420, col. 1.]

(3) that the mortgagee's remedy was to enforce his mortgage and further charge against the property in the hands of the purchaser to the extent of the mortgaged share. [p. 419, col. 2.]

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 31st May 1915.

The Hon'ble Syed *Wazir Husan* and Syed *Zahur Ahmad*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, Syed *Shahenshah Husain Rizvi* and Mr. *Muhammad Wasim*, for Respondents Nos. 1 and 2.

Mr. *M. A. Ali*, for Respondents Nos. 5 to 8.

Pandit *Brij Narayan Chakbast*, for Respondents Nos. 5 and 8.

JUDGMENT.—I have heard together First Civil Appeal No. 75 of 1915, Second Civil Appeal No. 205 of 1915 and Second Civil Appeal No. 247 of 1915. The cases out of which these appeals arise have a common history.

A certain Ala Bakhsh died on 23rd August 1903. He was a Sunni Muhammadan. Succession to the estate was governed by the Hanafi Law. He left the following heirs who were entitled to the shares noted against the names of each:

	R.	a.	p.
Musammat Kudsia Jan, his widow ...	0	4	0
Musammat Alfannisa, his sister	0	8	0
Abdul Razzak, his nephew, son of Abdul Ghani, deceased brother ...	0	1	4
Muhammad Afzal, his nephew, son of Abdul Aziz, another deceased brother ...	0	1	4
Abdul Ahad, his brother ...	0	1	4

Ala Bakhsh owned a certain amount of moveable property and some immoveable property. Amongst the immoveable property were two houses with shops attached situated in the Lucknow Chauk, and a third house in Bich-ki-sarae, Lucknow. This property may be called A. Ala Bakhsh also had a house in Pulgawan which may be called B,

On 14th December 1903 Alfannisa executed a deed of simple mortgage in favour of Baldeo Das for Rs. 2,000 by which she hypothecated her 8-annas share in property A.

On 19th December 1903 Alfannisa brought a suit for possession by partition of her share in the property of Ala Bakhsh (including A). She joined as parties to this suit all the remaining heirs of her deceased brother, including Abdul Razzak son of Abdul Ghani.

On 24th January 1904 she executed a deed of further charge in favour of Baldeo Das again hypothecating her 8-annas share in A for Rs. 500.

On 20th April 1904 Abdul Razzak son of Abdul Ghani executed a deed of mortgage for Rs. 300 in favour of Baldeo Das by which he hypothecated his 1-anna 4 pies share in A and B.

On 25th April 1904 Alfannisa executed a second deed of further charge in favour of Baldeo Das for Rs. 500 again hypothecating her 8-annas share in A.

On 1st September 1904 Abdul Razzak son of Abdul Ghani executed a deed of further charge in favour of Baldeo Das for Rs. 99 again hypothecating his 1-anna 4-pies share in A and B.

On 10th September 1904 Abdul Razzak son of Abdul Ghani sold all his rights in Ala Bakhsh's estate to Bashir Hasan and Murtaza Khan.

On 14th September 1904 Alfannisa sold all her rights in Ala Bakhsh's estate to Bashir Hasan and Amjad Ali.

The names of Bashir Hasan and Amjad Ali were then substituted for the name of Alfannisa as plaintiffs in the partition suit, and the names of Bashir Hasan and Murtaza Khan were substituted for the name of Abdul Razzak son of Abdul Ghani as defendants in the same suit. It will be seen that Bashir Hasan was impleaded in the suit in one capacity as a plaintiff and in another capacity as a defendant.

On 16th September 1904 all the parties to the partition suit agreed to compromise. A preliminary decree was passed on 16th

September 1904. The preliminary decree was in the terms of the compromise. It decided that out of all the property left by Ala Bakhsh, Kudsia Jan would receive Rs. 1,100 on account of her dower, that Rs. 52-1-8 should be paid to Government as income-tex, that the house in Pulgawan (that is to say the house that I have called B) and all the property entered in list B attached to the plaint should be given to Kudsia Jan, that the rest of the immoveable property mentioned in list C attached to the plaint and one *pakka* house situated in Pul Motilal, Lucknow, as the moveable property entered in list D should be distributed as follows:—

Amjad Ali and Bashir Hasan as vendees of Alfannisa were to receive 8 annas. Kudsia Jan was to receive 4 annas, Murtaza Khan and Bashir Hasan as representatives of Abdul Razak son of Abdul Ghani were to receive 1 anna 4 pies, and Abdul Ahad, who represented by this time Muhammad Afzal's interests in addition to his own, was to receive 2 annas 8 pies. The parties were to bear their own costs. No sale of anything was provided by the decree but it is clear that on the face of it some sale was necessary, for the amount of cash in the estate was less than Rs. 1,100 and Rs. 1,100 had to be paid to Kudsia Jan.

On 27th September 1904 an application was made for execution. The Court allowed this application and directed in its order that Babu Shama Charan Banerji should be appointed Commissioner and should exercise his own discretion in making the partition. The parties finally agreed that the best way to make the partition would be to sell up the whole of the moveable and immoveable property and divide the cash proceeds amongst the parties according to their shares. If this were done it is obvious that proper arrangements should have been made for satisfying such liabilities as existed in favour of Baldeo Das, and I find that the Commissioner sent for Baldeo Das and made a certain offer to him. He also asked him to make a statement as to what was due to him. On 22nd October 1904 Baldeo Das met the Commissioner and heard the terms of the Commissioner's offer. The Commissioner asked him to take the amount due on the deeds of 14th December 1903, 24th January 1904 and 25th April 1904 up till the 22nd October 1904. Baldeo Das said that he would not take that amount for the following reason. Under the terms of the deeds redemption could not take place till the 14th December 1904. He said that he would take the amount due up to the 14th December 1904, but that he would not take less. The Commissioner refusing to raise his offer, negotiations were broken off. Then the Commissioner proceeded to sell the property free of all encumbrances. It would appear that arrangements to make this sale had taken place before the sale of 22nd October 1904. A certain Abdul Razzak son of Muhammad Husain had purchased property A on 17th October 1904 free of all encumbrances but had not paid up the full amount of the purchase-money. On 22nd October 1904 he made up the full amount of purchase-money. On 1st November 1904 Bashir Hasan applied to the Court under the provisions of section 83, Act IV of 1882, to deposit the money due to Baldeo Das. He does not appear to have made any deposit. Baldeo Das refused to accept the amount. On 5th November 1904 he again applied and Baldeo Das again refused. On 9th November 1904 there seems to have been a third application under section 83. He offered to deposit Rs. 3,673-4-0. The amount was again refused. On 12th November 1904 Babu Shama Charan Banerji submitted his final report, Exhibit A6, which was accepted by the Court and the money was divided in the following way:—

Kudsia Jan received Rs. 7,524-6-3, Abdul Ahad received Rs. 4,282-4-9, Bashir Hasan and Murtaza Khan as representatives of Abdul Razzak son of Abdul Ghani received Rs. 2,141-7-4, and Bashir Hasan and Amjad Ali as representatives of Alfannisa received Rs. 12,848-12-3. Bashir Hasan and Murtaza Khan were left liable to satisfy any claims in respect of debts incurred against the property by Alfannisa.

On 5th May 1914 Basant Lal and Damodar Das the sons of Baldeo Das (who had died in the meanwhile) instituted two suits. The first suit was in the

Court of the Subordinate Judge of Lucknow. It was on the basis of the mortgage of 14th December 1903 and the deeds of further charge dated the 24th January 1904 and 25th April 1904. They joined as defendants to this suit the heirs of Bashir Hasan who had then died, the heirs of Abdul Razzak son of Muhammad Husain who had then died, and a large number of other persons. The second suit was instituted in the Court of the Additional Munsif of Lucknow. It was on the basis of the mortgage of 20th April 1904 and the deed of further charge of 1st September 1904. They joined as parties to shis suit Abdul Razzak son of Abdul Ghani, Murtaza Khan, the heirs of Bashir Hasan, the heirs of Abdul Razzak son of Muhammad Husain, Sajjad Husain who had purchased the house which I have called B from Kudsia Jan, and *Musammat* Sundara to whom he had mortgaged it. In the first case the plaintiffs endeavoured to bring to sale the 8-annas share of Alfannisa's mortgaged property and in the second case they endeavoured to bring to sale the 1-anna 4-pies share of Abdul Razzak son of Abdul Ghani in the mortgaged property. The Subordinate Judge decreed the suit in his Court. The Additional Munsif decreed the suit in his Court. Sajjad Husain and *Musammat* Sundara did not appeal. The heirs of Abdul Razzak son of Muhammad Husain appealed to the District Judge. The District Judge modified the decree of the Munsif. He refused to allow any remedy against the interests of Abdul Razzak son of Abdul Ghani and gave the plaintiffs a decree for Rs. 300 with simple interest at 24 per cent. for two years and Rs. 99 with simple interest at 24 per cent. for 20 months against Murtaza Khan and the heirs of Bashir Hasan. The heirs of Abdul Razzak son of Muhammad Husain have instituted First Civil Appeal No. 75 of 1915 against the decision of the Subordinate Judge. Basant Lal and Damodar Das have instituted Second Civil Appeal No. 205 of 1915 against the decree of the District Judge, and Murtaza Khan has instituted Second Civil Appeal No. 247 of 1915 against the decree of the District Judge.

The case for the heirs of Abdul Razzak son of Muhammad Husain is shortly this. They say that they purchased property A free of all liability and that the encumbrances created by the deeds of 14th December 1903, 24th January 1904 and 25th April 1904 ceased to exist when the property was partitioned as against the 8-annas share of Alfannisa, and that the remedy of the plaintiffs, if any, is against the heirs of Bashir Hasan and Amjad Ali. The case for Basant Lal and Damodar Das is that they are not affected by the partition, and that they have a perfect right to take their remedy against what was mortgaged to their father by Alfannisa and Abdul Razzak son of Abdul Ghani. Murtaza Khan supports their claim in the main. He denies any liability.

Ordinarily the security obtained by a mortgagee under good deeds of mortgage cannot be affected by transfer of the equity of redemption, but the case of the transfer of an undivided share is different. Their Lordships of the Privy Council decided in 1873 in the well-known case of *Bijnath Lall* v. *Ramoodeen Chowdry* (1) that in a case in which a mortgage was made of undivided share in land had subsequently been divided under a revenue partition, the mortgagee could enforce his security against the property which had come into the separate possession of the mortgagor rather than against the undivided share which he had previously held. At page 119 they say: "Now, what was the subject of this mortgage? It was an undivided moiety in two out of three villages forming a joint and undivided estate. The sharers, however, do not appear to have been members of a joint and undivided Hindu family, but to have enjoyed their respective shares (at all events their shares in Gunniporebeja and Pemburinda) in severalty. It is, therefore, clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert

(1) 1 I. A. 106; 21 W. R. 233.

what was an undivided share of the whole into a defined portion held in severalty .....Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that the mortgagee of the undivided share of one co-sharer (and for the sake of argument, the mortgage may be assumed to cover the whole of such undivided share), who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers; but must pursue his remedy against the lands allotted to his mortgagor, and, as against him, would have a charge on the whole of such lands? He would take the subject of the pledge in the new form which it had assumed."

Their Lordships then proceeded to discuss the effect of a possible fraud perpetrated upon the mortgagee. Here I state at once that I find there was no fraud of any kind in these proceedings. They were open and honest proceedings. The parties arrived at what they believed to be a reasonable and satisfactory partition. There was no intention to defraud anybody Undoubtedly the mortgagee's interests were not sufficiently secured. In fact I go so far as to say that they were not secured at all, but there was nothing fraudulent. I, therefore, need not discuss the effect of a possible fraud in these proceedings, for no fraud has been committed. Their Lordships continue that in the absence of fraud or of some equivalent cause of action, it is difficult to see upon what principle the mortgagee could have any remedy against the co sharers or their separated shares which had become distinct estates; and if he did not claim to have such a remedy, but was content to claim, as the subject of his security, that which his mortgagor had received in substitution of the original pledge, it is still more difficult to see what right the mortgagor could have to resist such a claim, or to say, I, being in possession of the new estate, insist on your being limited to the old.

In that case it is to be noted that the mortgagee had himself asked that his mortgage should be executed not against the undivided shares which had originally been mortgaged, but against the distinct estates which had subsequently become the mortgagor's property on partition. Their Lordships were deciding, whether he could be entitled to do so and their decision appears to me in effect to be a declaration that the mortgagee has such a right, with the statement of a further principle that the mortgagor cannot be allowed by his action to prejudice the rights of his co-sharers to obtain the privileges to which they are entitled under their pesonal law, in partition.

In *Hem Chunder Ghose* v. *Thako Moni Debi* (2) it was decided in 1893, following the ruling in *Byjnath Lall* v. *Ramoodeen Chowdry* (1), that where *A* mortgaged to the plaintiff his undivided share in certain land which he held jointly with *B*, and subsequent to the mortgage by a decree in a partition suit to which the plaintiff was not a party, the mortgaged property was allotted to *B*, other property in substitution being allotted to *A*, the plaintiff could not proceed against the mortgaged property which had been allotted on partition to *B*, but could only proceed against that which had been allotted in substitution to *A*, his mortgagor. The point was discussed next in 1895 in *Fullamma* v. *Fradosham* (3). There land having been granted to several persons jointly, disputes arose among them with reference to its allotment. The disputes having been settled by arbitration, one of the grantees sold his share to the plaintiff. Before the arbitration, another of the grantees mortgaged 7 acres of the land to *A*, who did not become a party to the arbitration. *A* subsequently obtained a decree on his mortgage and proceeded to execute it by attachment. The plaintiff intervened in execution, but in 1884 the Court passed an order stating that the plaintiff's land was not attached, and in fact his possession then remained undisturbed. *A* subsequently executed his decree and purchased the land brought to sale by the Court. The plaintiff's possession was disturbed under colour of this purchase,

(2) 20 C. 533; 10 Ind. Dec. (N. S.) 362.

(3) 18 M. 316; 5 M. L. J. 148; 6 Ind. Dec. (N. S.) 569.

and he sued in 1889 to recover the land sold to him. It was held that the plaintiff's vendor had, after the aribtration, a good title against both *A* and his mortgagor, and that the plaintiff was entitled to recover. At page 318 the learned Judges who decided that appeal quoted with approval a passage from the work of Dr. Rash Behari Ghose (now Sir Rash Behari Ghose) on Mortgages. The quotation is mainly from Domat's Civil Law and is as follows :—

"If in an estate belonging in common, without any division or partition, to two or more persons, such as co-partners, co-heirs or others, one of them has mortgaged to his creditor either all his estate or the right which he had to that estate, this creditor will have his mortgage upon the undivided portion of his debtor as long as the estate shall remain in common. But after the partition, the right of this debtor being limited to the portion that has fallen to his lot, the mortgage of his creditor will be also limited to the same. For, although before the partition, the whole estate was subject to the mortgage for the undivided portion of the debtor, and though a right which is acquired cannot be diminished, yet seeing the debtor had not a simple and immutable right of enjoying his share of the estate always undivided, but that his right implied the condition of a liberty to all the proprietors to come to a partition in order to assign to every one a portion that might be wholly and entirely his own, the mortgage, which was only an accessory to the debtor's right, implied likewise the same condition and affected only that which should fall to the debtor's share, the portions of the others remaining free to them. But, if in the partition there was any fraud committed, the creditor might procure a redress of what has been done to his prejudice."

The learned Judges then referred to *Byjnath Lall* v. *Ramoodeen Chowdry* (1), and *Hem Chunder Ghose* v. *Thako Moni Debi* (2).

The next case which has a bearing on the subject will be found in *Amolak Ram* v. *Chandan Singh* (4) decided in 1902. Here a mortgage of an undivided share, which under a partition had been allotted to another co-sharer, was not enforced against the share originally mortgaged but against the share allotted to the mortgagor in lieu of the share mortgaged.

The next case is *Shahebzada Mahomed Kazim Shah* v. *Hills* (5), decided in 1907. This is a Full Bench decision of the Hon'ble High Court of Calcutta. Fateh Mahomed Shah had an undivided share in four houses in Calcutta. He mortgaged this property to a certain R. S. Hills. The property was partitioned and a certain house was declared to be the separate property of Fateh Mahomed Shah, on the condition that he paid in owelty to other parties to the partition an amount of Rs. 46,500. The dispute was whether the mortgagee under the mortgage should be allowed priority against the persons entitled to this charge or whether they should be allowed priority over him. The Full Bench decided in favour of the latter view. Their position was as follows: At the partition the mortgagor's undivided interests had become converted into separate interests in one house subject to a payment of Rs. 46,500 in owelty. The mortgagee's remedy was against the converted interest and nothing else. At page 393 of the judgment there is a passage which is of peculiar interest to me in the decision of the present appeals. It is as follows :—

"There is one argument of Mr. Garth which I ought to notice. It is said that if a transaction of this sort can stand, the result may be that co-sharers may on a partition, knowing that one of them has mortgaged his share, so arrange matters that he should get no portion of the immoveable property on the partition, but receive the whole of his share in cash, the effect of which would be to defeat the rights of his mortgagee. We are not dealing with that case now: there is no suggestion that this partition was unfair, improper, at any rate, there is no evidence of it. If such a case arise, as Mr. Garth suggests, I dare say the Courts will be able to deal with it satisfactorily."

It is to be noted that that hypothetical case

(4) 24 A. 483; A. W. N. (1902) 137.

(5) 35 C. 388; 12 C. W. N. 373.

resembles the case which has arisen in these proceedings.

I have next to refer to a decision of a Judge of this Court, *Mahadin* v. *Sheo Prasad* (6), decided in 1913. In that case it was held that a mortgage of an undivided share in property which under a partition had been allotted to another co-sharer could not, in the absence of fraud, be enforced by the mortgagee except against the share which had been allotted to the mortgagor in lieu of the share mortgaged, and that the same rule applied where the mortgagor had been allotted a cash payment in lieu of his share in the property. Reference is made in that decision to *Byjnath Lall* v. *Ramoodeen Chowdry* (1), *Amolak Ram* v. *Chandan Singh* (4) and *Shahebzada Mahomed Kazim Shah* v. *Hills* (5). In that case Raghubir executed a mortgage of an undivided share in favour of Sheo Prasad. Raghubir and Mahadin partitioned the property. Mahadin took the whole and agreed to pay Rs. 629 to Raghubir. The Court held that the mortgagee's remedy was against the payment to be made by Mahadin to Raghubir. I have looked up the file of the case and I am not in a position to say whether the cash payment was fully secured. But there is nothing to show that it was not fully secured.

I have now to refer to an old English case, *In re Stewart's Trusts* (7), decided in 1852. There land was settled on *A* for life with remainder to her children. In default of *A* having children the remainder was to *B* in fee. The land was taken over in the lifetime of *A* by the Manchester Improvement Trust. The sale-proceeds were paid into Court and invested in consols. The dividends were paid to *A* who had no power to alienate the corpus. *B* predeceased *A*. *A* died childless. *B* had not in his lifetime shown any intention to treat his interest as personalty. It was held in the matter of succession that the consols should descend as the reality of *B*. In other words, the interest in moveable property possessed by B was considered to be represented by the cash for which that property had been sold and that cash was to descend as real rather than as personal property.

(6) 20 Ind. Cas. 577; 16 O. C. 161.
(7) (1852) 22 L. J. Ch. 369; 16 Jur. 1063; 1 W.R. 17.

I have been taken through these decisions by the learned Counsel who have appeared on both sides in the appeals. I wish in passing to recognize the admirable manner in which the arguments have been presented to this Court.

What is the principle to be evolved? It appears to be this: where a person transfers a share in undivided property which is owned by himself and other persons, the transfer cannot be permitted to affect injuriously the interests of his co-sharers and where a non-fraudulent division of the undivided shares subsequently takes place, the remedy of the transferee is to follow the transmuted security in the hands of his transferor. But in order to apply the principles which have been followed uniformly through these rulings, there is one necessary element apart from absence of fraud. There must be a security, though that security is transmuted from its original shape. The difficulty of the case before me is that there is no security worth the name. There certainly was no fraud, but the interests of the mortgagees were practically disregarded. Their security was originally against undivided shares. The successors of Alfannisa and Abdul Razzak son of Abdul Ghani did not obtain at the time of partition separate estates in lieu of their undivided interests. They obtained cash, and, although it was agreed that they should be responsible for satisfying the liabilities of their predecessors-in-title, there was no security taken from them which could be enforced. I am not in a position to say how far the heirs of Bashir Husain, the heirs of Amjad Ali, and Murataza Khan are solvent people, or what remedy the mortgagees could have against them. The remedy may be practically nil. The money may have been spent by now. At any rate it is clear that the mortgagees have practically now no real security for the recovery of their money. This case thus clearly approaches the case stated by Mr. Garth in *Shahebzada Mahomed Kazim Shah* v. *Hills* (5). The co-sharere knew that there had been mortgages. They arranged matters that nobody should get any immoveable property by the partition, and that they should all receive the whole of their shares in cash, and the effect

has been practically to destroy the rights of the mortgagees. I do not go so far as to say that the partition was unfair or improper *per se*, but its effect was strongly against the interests of the mortgagees.

The learned Counsel for Basant Lal and Damodar Das has endeavoured to show that the partition proceedings were null and void. I do not agree with his conclusion. I consider that the partition was a legal partition, and that the sale of the property was a legal sale under the final decree in accordance with the provisions of Act IV of 1893. It is true that in the preliminary decree the lower Court had not authorised the Commissioner to sell the property: but the Court conducting the proceedings fully ratified the sale by the Commissioner and it had a right to do so under the provisions of Act IV of 1893. There is good authority for the doctrine that a Court's decision to sell need not be stated in the preliminary decree, but can be stated up to the time of the conclusion of proceedings—*Hiramoni Dassi* v. *Radha Churn Kar* (8), *Kadir Bacha Saheb* v. *Abdul Rahiman Saheb* (9) and *Bai Hirakore* v. *Trikamdas* (10). It does not appear to me to be a matter of any consequence, whether the Court itself ordered such a sale, or whether the Commissioner ordered the sale and subsequently had his action approved by the Court. The learned Counsel dees not now suggest, that the partition was void because only one Commissioner was appointed.

Having decided these points, it now remains to determine what remedy is open to the mortgagees. The case is between them and the persons or their representatives who purchased property stated to be free of all encumbrances, relying on the personal obligation of certain third parties to meet those liabilities. It has been urged that the mortgagees' predecessor-in-interest brought much of the trouble upon his heirs by refusing to meet the Commissioner or Bashir Hasan in a reasonable manner. I do not find that he did anything that he should not have done. It is clear that the Commissioner and Bashir Hasan both offered him less than what was due. There was no valid tender ever made under section 83, Act IV of 1882, and he was at perfect liberty to hold his mortgages until they were redeemed in a proper manner. The purchasers of the property purchased it with a full knowledge of the existence of the mortgages, relying on the assurances of third parties that they would meet the liabilities, and whatever remedy they might have would be against those third parties. I express advisedly no opinion as to the value of that remedy. I find that the mortgages stand, and are good. To enforce them, as they exist, is not to the disadvantage of the other co-sharers. The interests of the mortgagors have neither been converted into separate properties which the mortgagees can follow, nor into cash security which they can also follow. I do not understand the decision in *Mahadin* v. *Sheo Prasad* (ó) to differ from the view which I am taking. In that case, I gather, there was good cash security and if there had been good cash security here, I should have been able to apply the doctrine laid down in the case regarding Stewart's Trusts. But as there is neither a share in an undivided estate transmuted into a separate estate nor good cash security, the mortgages must stand as against the undivided shares. I express no opinion as to what these undivided shares are worth. They may be worth much or little. When the mortgagees have obtained their decrees it will be for them to execute the decrees as they stand.

I have further to note one more point. It has been urged that both the transfers made by Abdul Razzak son of Abdul Ghani and the two deeds of further charge made by Alfannisa are bad as transfers made *pendente lite*. The doctrine of *lis pendens* has no application in the circumstances of these four transfers. The partition proceedings were contentious but the transfers made by Alfannisa and Abdul Razzak son of Abdul Ghani did not affect the rights of any other party to the proceedings except the party making them.

In accordance with these views I dismiss First Civil Appeal No. 75 of 1915. The appellants will pay their own costs and those of the contesting respondents.

(8) 5 C. W. N. 128.
(9) 24 M. 639.
(10) 32 B. 103; 10 Bom. L. R. 23.

I allow Second Civil Appeal No. 205 of 1915 and Second Civil Appeal No. 247 of 1915. In Appeal No. 205 I restore the decree of the Additional Munsif of 21st November 1914, but the time for redemption will be extended to a date six months from the date of this judgment. With regard to cost of Appeal No. 205 defendants-respondents Nos. 5 to 10 will pay their own costs and those of the plaintiffs-appellants in the Court of the District Judge and in this Court. With regard to the costs of Appeal No. 247 defendants-respondents Nos. 5 to 10 will pay their own costs and the costs of defendant No. 2 in the Court of the District Judge and in this Court. Except as hereby ordered costs will be on parties.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2583 OF 1915.

February 21, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

KRISHNA KUMAR DE—PLAINTIFF—APPELLANT

versus

KALINATH GUHA RAY AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), *ss.* 61, 43, 44—*Goods supplied to a number of persons—Payments made by some of them—Appropriation—Limitation—Pleadings, defective—Claim substantially true—Court, duty of.*

In a suit to recover the price of goods sold and delivered to the defendants, the plaintiff set up an adjustment of account in his plaint. The lower Courts found the claim to be true, but dismissed the suit on the ground that the plaintiff had failed to prove the adjustment of account on which his suit was based:

Held, that the dismissal was wrong as notwithstanding the adjustment set up in the plaint what the plaintiff sued for, was the price of the goods that were supplied to the defendants [p. 422, col. 2.]

Six defendants who were members of a joint family were supplied with goods by the plaintiff. After the separation of the 6th defendant, the plaintiff continued to supply the other five, who remained united and these latter made payments for the goods supplied from time to time without any specific appropriation:

Held, that the plaintiff was entitled to appropriate the payments in discharge of the debts in order of time whether they were or were not barred by the law in force for the time being as to the limitation of suits and whether the payments were made by all the defendants or by some of them without the concurrence of others. [p. 423, col. 1.]

Appeal against the decree of the District Judge, Noakhali, dated the 18th June 1915, affirming that of the Munsif, 2nd Court, Lakhipur, dated the 3rd June 1914.

FACTS.—The plaintiff, a shopkeeper, sued six defendants for price of goods supplied from time to time to the joint family of which the defendants were members. In paragraph 2 of his plaint, the plaintiff stated that accounts were adjusted between him and the defendants on 5th *Kartick* 1319 B. S., showing a balance of Rs. 661 and odd annas due to the plaintiff from the defendants, and the plaintiff dated his cause of action from that date. The defendants denied the alleged adjustment of accounts and their liability. Defendant No. 6 further pleaded that he had separated from the joint family and had opened a separate account with the plaintiff, on his own behalf in *Kartick* 1316 B. S. All the defendants pleaded limitation. The Munsif dismissed the suit, holding that the adjustment of accounts alleged by the plaintiff was not proved and the suit was barred under Article 52 of the Limitation Act. He also observed, "although it has been held that payments made on account by the customer, from time to time, may be applied in deduction of so much of the claim as is barred by limitation [*Baboo Thakoor Pershad Singh* v. *Baboo Mohesh Lall* (1)], the benefit of such appropriation could be given to the plaintiff only if he had brought his suit in the proper manner. * * * * *"

An appeal preferred by the plaintiff against the decision of the Munsif was dismissed by the District Judge, who observed in his judgment: "then we find from the deposition of the plaintiff that defendant No. 6 made purchases on a separate account. There is nothing to show that he is not responsible for some of the old debts and the claim against him is barred by limitation. Accordingly the later payments made by the other defendants cannot be applied to the liquidation of the old debts on the principale stated in *Baboo Thakoor Pershad Singh* v. *Baboo Mohesh Lall* (1). As the

(1) 24 W. R. 390.

payments made within three years are admittedly more than sufficient for the items purchased within that period, the suit must fail."

Upon this there was a second appeal to the High Court.

Babu *Brojendra Nath Chatterjee*, for the Appellant.—The plaintiff's suit was for the price of articles supplied to the defendants. No doubt he alleged an adjustment of accounts which he could not prove, but still the substance of his claim was not affected by the allegation of adjustment of accounts. His claim was a true one and for a mere defect in the plaint the claim ought not to have been dismissed. If necessary, an amendment of the plaint may have been ordered by the Court to meet the ends of justice. I submit that on the plaint as framed there was nothing to prevent the Courts from adjudicating upon it and granting a decree to the plaintiff for the price of the articles, provided, of course, the claim was not barred by limitation. If your Lordships hold that the allegation of adjustment of accounts in the plaint stands in the way of the plaintiff getting a decree. I would ask your Lordships for leave to amend the plaint by striking out that allegation. The business of a Court is not to enforce discipline, but to do substantial justice in spite of defects in pleadings. As regards the question of limitation it has been found that the defendants other than defendant No. 6 made payments on account without any appropriation, and the plaintiff is clearly entitled under the law to apply those payments towards the liquidation of barred debts, even though all the six defendants were liable for those debts. Under the Contract Act, every one of these defendants was liable for the old debts, and the payments made by one or more of those defendants could be regarded as payments towards those old debts. If the defendants Nos. 1 to 5 made payments in excess of their liability for the old debts they may sue defendant No. 6 for contribution. But the plaintiff had every right to appropriate those payments towards the debts in order of time. He referred to Contract Act, sections 43, 44 and 61. *Baboo Thakoor Pershad Singh* v. *Baboo Mohesh Lall* (1), *Hooper* v. *Keay* (2).

Babu *Bipin Chandra Bose*, for the Respondents.—The plaintiff's suit was based on an adjustment of accounts and in the plaint the plaintiff says that his cause of action accrued from the date of the adjustment of accounts. After failing to prove the adjustment of accounts, he cannot now change the nature of his claim by amendment of plaint. Indeed he did not ask for leave to amend the plaint in the lower Court, and he cannot have any such leave here. The claim which is now put forward is entirely different and if such a claim were made in the first Court, appropriate evidence to meet it might have been given by the defendants. The suit as framed cannot succeed, and the payments made by defendants Nos. 1 to 5 cannot be applied to the liquidation of the barred debts. The fact that those payments were made after the defendant No. 6 had opened a separate account with the plaintiff, shows that those payments were not made on account of the old debts for which all the six defendants as members of the joint family were liable, but on account of the debts incurred by the five defendants, who made the payments after their separation from defendant No. 6.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff from a decision of the learned District Judge of Noakhali, dated the 18th June 1915, affirming the decision of the Munsif at Lakhipore. The plaintiff brought his suit to recover the price of goods sold and delivered to the defendants. The plaintiff is a dealer in oil, salt and other commodities and he supplied the defendants, who were members of a joint Hindu family, with these commodities for the use of their household. The plaintiff set up an adjustment of account in the plaint, but, notwithstanding that adjustment, it is quite clear from the plaint that the suit was brought to recover the price of goods sold and delivered. The Munsif found that the case was a true one but, as the suit was based upon an adjusted account, it must fail because the plaintiff had failed to prove the adjustment of the account. That view, in substance, was confirmed by the learned Judge of the lower Appellate Court. In that view I am unable to agree. It is quite clear that what the plaintiff sued for was the price of the goods that were supplied to the defendants.

The other point that is relied upon in the judgment of the lower Appellate Court

(2) (1875) 1 Q. B D. 178: 34 L. T. 574; 24 W. R. 485.

is this. There was a separation in 1315 or 1316 *B. S.* between the defendant No. 6 and the other defendants. After that date, goods were also supplied to the defendants and payments were made to the plaintiff by the defendants other than the defendant No. 6; but no specific appropriation of the money so paid was made by the defendants when they paid to the plaintiff. The learned District Judge considers that, as the payments were made by the defendants other than the defendant No. 6, the plaintiff had no right to appropriate the payments within the meaning of section 60 or section 61 of the Indian Contract Act. There is nothing to support that suggestion. On the contract, each of the defendants including the defendant No. 6 was liable to pay the whole of the price of the goods ordered prior to the separation of the defendant No. 6 and the payment by the defendants other than the defendant No. 6 was a payment by the debtor within the meaning of section 61 of the Indian Contract Act. Therefore, under the terms of the section, the plaintiff had the right to appropriate the payments so made as against the statute-barred debts owing to him in respect of the goods sold and delivered prior to the separation of the defendant No. 6. Under the terms of section 61 of the Indian Contract Act, the payment has got to be appropriated in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits; and applying those payments so made in discharge of the debts in order of time, the plaintiff is entitled to recover the balance remaining due, which it seems to be common ground would not be barred by limitation.

The decree of the lower Appellate Court is accordingly set aside and the case must go back to the Court of first instance for the learned Munsif to find out, after appropriating the payments made under the terms of section 61 of the Indian Contract Act, what sums remain due to the plaintiff in respect of the price of the goods sold and delivered to the defendants and which sums are not statute-barred after appropriating the sums already paid under the terms of section 61 of the Indian Contract Act. Costs will abide the result of the re-hearing by the first Court.

The cross-objection is not pressed and is accordingly dismissed. We make no order as to the costs of the cross-objection.

Decree set aside; Case remanded;
Cross-objection dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 214 OF 1916.
March 7, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

BABU RAM—PLAINTIFF—APPELLANT
versus
ABDHOOT SINGH—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 75, 116—Limitation, commencement of—Bond, suit on—Interest to be paid every year—Money, entire, to be paid within fixed period—Suit instituted after fixed period.

Where a bond provided for the repayment of money with interest within a fixed period and further stipulated that the interest should be paid regularly every year and that in case the interest was not so paid or the entire money due on the bond was not paid within the period fixed, the creditor would have the power to recover the entire principal and interest from the debtor:

Held, that limitation could not start running from the date when a default in the payment of interest was made, if the creditor in pursuance of the contract waived such default and sought his remedy in respect of the default in the payment of the entire money within the fixed period. [p. 424, col. 2.]

Gaya Din v. *Jhuman Lal*, 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510, distinguished.

Where a contract gives a party an express option to sue on one occasion or another, he cannot be compelled to sue when the contract authorises him to wait. [p. 424, col. 2.]

Where a contract provides expressly for waiver, no statutory authority for such waiver is needed. [p. 424, col. 2.]

Where a contract gives the power to elect, it is not within the province of law to say that such election shall not be made. [p. 424, col. 2.]

Appeal from the decree of the Subordinate Judge, Rae Bareli, dated the 1st April 1916, reversing the order of the Munsif, Dalmau, dated the 5th November 1915.

Mr. *H. K. Ghosh*, for the Appellant.

Syed *Ali Mohammad*, for the Respondent.

JUDGMENT.—This was a suit for the recovery of money due on a bond executed by the defendant in favour of the plaintiff on the 7th August 1905. The bond provided for the repayment of the money with interest at 6 per cent. per annum within four years

and further stipulated that the interest shall be paid regularly every year and that in case the interest was not so paid or the entire money due on the bond was not paid within the period fixed, the creditor would have the power (*ikhtiar hoga*) to recover the entire principal and interest from the defendant or his property. The plaintiff alleged that the defendant had paid nothing to him and that the cause of action for the suit accrued on the 7th August 1909, when the period of four years fixed for repayment had expired. The defendant pleaded payment of Rs. 107, partly in 1906, 1907 and 1908 A. D. and partly in 1319, 1320, 1321 and 1322 *Faslis* in cash and kind. The plaintiff admitted the receipt of Rs. 41, but stated that he had received it on account of another bond which he filed.

The Court of first instance found that the payment of Rs. 41 had been made towards the bond in suit and credited that sum in reduction of the money due on the said bond. The other payments alleged were not found to be proved. The payments credited comprised a sum of Rs. 10 paid on *Pus Sudi* 3rd, 1968; Rs. 8 on *Jeth Sudi* 4th, 1969; Rs. 3 on *Jeth Sudi* 7th, 1969; Rs. 10 in *Aghan* 1969 and Rs. 10 in *Baisakh* 1970 *Sambat*. On appeal the learned Subordinate Judge dismissed the entire claim, on the ground that it was barred by limitation inasmuch as the cause of action had accrued, according to him, when the interest for the first year was not paid. It appears to have been ignored that payments had been made almost every year from 1968 to 1970 *Sambat*, which were more than sufficient to cover the interest for each of those years, and that one of the conditions in the bond was that whatever was paid in excess of the interest in any year was to be credited towards the principal money secured by the bond. The appeal was heard by the Court below in the absence of the plaintiff or his Pleader, and as the plea of limitation was taken up for the first time in the Court of Appeal, the plaintiff had no opportunity of showing that the payments aforesaid, if credited towards interest in pursuance of the terms of the bond, were sufficient to save limitation.

The bond aforesaid, moreover, authorised the plaintiff to sue for the recovery of money either when the interest due for any year was not paid or when the period of four years provided for the repayment of the money expired. It was open to him under the contract to waive the default in the payment of interest and to wait for the payment of the money till the period of four years fixed for its repayment expired. The limitation cannot start running, if the plaintiff in pursuance of the contract waives the earlier default and seeks his remedy in respect of a later or alternative default, provided by the contract. Article 116 of the Indian Limitation Act (IX of 1908) provides a limitation of six years for suits for compensation for the breach of a contract in writing registered from the date of the breach, or where there are successive breaches, when the breach in respect of which the suit is instituted occurs. There was a breach of contract when the interest due for any year was not paid, but the contract expressly authorized the plaintiff to waive that breach, if he liked. There was also a breach when the defendant failed to pay the money due on the bond at the end of four years, and if the plaintiff sought to enforce his remedy by reason of that breach, he was entitled to do so, because his contract gave him that authority. The contract gave him express option to sue on the one occasion or the other, and he cannot be compelled to sue when the contract authorized him to wait. Article 75 of the Limitation Act, to which the decision in *Sheo Narain* v. *Ram Din* (1) is confined, provides for waiver in cases of promissory notes or bonds payable by instalments: but where the contract provides expressly for waiver, no statutory authority for such waiver is needed. Where a contract gives the power to elect, it is not within the province of law to say that such election shall not be made. In *Ball* v. *Stowell* (2) where the bond contained a stipulation that it shall be optional with the obligee to claim and, if necessary, to sue for the amount due on the bond on the failure of the defendant to pay the half-yearly interest or to pay the premia on certain policies of

(1) 11 Ind. Cas. 526; 14 O. C. 129.
(2) 2 A. 322; 4 Ind. Jur. 461; 1 Ind. Dec. (N. S.) 763.

insurance given by way of collateral security or on the full expiry of the period of three years provided for payment, it was held that previous default having been waived, the limitation commenced after the expiration of the three years allowed by the bond for the payment of the debt. A similar view was taken in *Narain Babu* v. *Gouri Persad Bias* (3) and *Durga* v. *Tota Ram* (4).

On behalf of the defendant, reliance is placed on the decisions in *Reeves* v. *Butcher* (5) and *Gaya Din* v. *Jhuman Lal* (6), but the facts and circumstances of those cases were not quite similar. The covenant in the former case was that the creditor would not call in his money or any part thereof during the term of five years from the date of the agreement, if the borrower should so long live and duly and regularly pay the stipulated interest for every quarter, and there was a further proviso that if the borrower died before the expiration of the said term, it shall be lawful for the creditor to call in his money upon giving to the executors and administrators of the deceased borrower six calendar months' previous notice in writing of his intention to do so, and that in case the borrower made default in the payment of interest for any quarter for the period of 21 days next after the same became payable, it should be lawful for the creditor immediately upon the expiration of such 21 days to call in and demand payment of his money with the interest due in respect thereof. The condition as to the payment of the money in five years was thus restricted by the qualification that it would only operate, if the creditor lived for that period and paid the interest regularly at the end of every quarter. It was not absolutely independent, and being subject to the other condition, it could not be enforced, if the other was not carried out. In the latter case, the suit was one on a mortgage, which provided for the payment of the principal money by ten yearly instalments and for the payment of interest at the stipulated rate every month, with a proviso that if the interest was not paid in any month or the instalment was not paid in any year, the mortgagee shall be at liberty to recover his entire money with interest at once. The view taken by Richards, C. J., and Tudball, J., was that the suit was barred under Article 132 of Schedule I of the Indian Limitation Act, 1908, the mortgage-money having become due when the first default was made; but Banerji, J., was of opinion that having regard to the provision in the mortgage-bond that if the mortgagee did not sue on the non-payment of interest or in default of payment of any instalment, the interest should continue up to the stipulated period of ten years, the creditor could not be penalized for waiting for the full period stipulated for repayment and that the money did not become payable until that period expired. In view of the different terms and conditions contained in those documents, those decisions cannot apply to the circumstances of the present case. As in the case of instalment-bonds, waiver can prevent limitation from running, whether it be authorized by contract or by Statute.

The appeal is, therefore, allowed and the decree of the lower Appellate Court set aside and that of the Court of first instance restored with proportionate costs throughout. The defendant-respondent will bear his own costs in all the Courts.

Appeal allowed.

(3) 5 C. 21; 4 Ind. Jur. 407; 2 Ind. Dec. (N. S.) 625.

(4) 19 Ind. Cas. 738; 16 O. C. 45.

(5) (1891) 2 Q. B. 509; 60 L. J. Q. B. 619; 65 L. T. 329; 39 W. R. 626.

(6) 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3261 AND 2133 OF 1915.

May 25, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Smither.

Raja SASI KANTA ACHARJEE BAHADUR—DEFENDANT NO. 1—APPELLANT IN BOTH

versus

KUNJA MOHAN MOITRA—PLAINTIFF AND LALIT MOHAN MOITRA AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS IN NO 3261 OF 1915.

LALIT MOHAN MOITRA—PLAINTIFF AND GOLAM MOHAMAD CHOUDHRY AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS IN NO. 2133 OF 1915.

Riparain rights – River changing course Old course,

whether becomes private property—Fishing rights in sheets of water adjacent to river.

When a river has changed its course, its old dry course (in the absence of special circumstances) must be taken to have become private property, and the owner of the soil is entitled to *bheels* or ponds, gulfs or *damooshes* in which water remains but which do not communicate with the river except in the time of floods. [p. 427, col. 1.]

Grey v. *Anund Mohun Maitro*, (1864) W. R. 108, followed.

The owner of a fishing right in a river has no title to fish in sheets of water adjacent to the river with which the river communicates only in the time of flood, unless those sheets are part of land in the bed of the river itself. [p. 427, col. 1.]

Appeals against the decrees of the Additional District Judge, Rajshahi, dated the 25th May 1915, confirming those of the Additional Subordinate Judge, Rajshahi, dated the 27th April 1914.

FACTS of the case appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Bhupendra Chandra Guha*), for the Appellant.—The finding of the Additional District Judge is not sufficient to justify the decree in favour of the plaintiff. The defendants have a right of fishing in the river Mahananda. Therefore they can claim a right of fishing in the three sheets of water called *kopras* which were originally formed in the bed of the river Mahananda. Although the Mahananda has shifted its course, these three *kopras* communicate with the Mahananda during the rainy season; so they are still part of the river. The connection with the main river may not last during the whole year, still the *kopras* cannot be regarded as altogether severed from the river in whose dry bed they have been formed. The Additional District Judge ought to have come to a clear and definite finding on the question whether the *kopras* exist within the banks of the river. One witness said that up to 1317 B. S. the *kopras* were connected with the river during the rainy season, but he does not say what happened after 1317 B. S. It may be that there is a channel between the river and the *kopras* which becomes dry during the dry season, but in the rainy season the river and the *kopras* communicate with each other. If this be the case, then the right of fishery can be claimed in the *kopras* by the defendants, who have a right of fishery in the river. See *Jogendra Narayan Roy* v. *Crawford* (1).

(1) 32 C. 1141; 2 C. L. J. 569.

[CHATTERJEA, J.—Is that the latest case?]

No, the latest case on the point is the Privy Council decision reported as *Srinath Roy* v. *Dinabandhu Sen* (2). In the plaint it is stated that the mouths of the *kopras* are blocked up and they have no connection with the flowing river, but they become fordable during certain seasons of the year. Even the plaintiff did not venture to assert that the *kopras* are absolutely disconnected with the main stream. "They become fordable" must mean that the channels connecting the *kopras* with the river become fordable during certain seasons of the year. There must be a clear finding whether these *kopras* have become completely severed from the river, and until that is found the defendants are entitled to enjoy fishery rights in these *kopras*.

Babu *Dwarka Nath Chakervarty* (with him Babu *Hira Lal Sanyal* and Babu *Phanindra Lal Maitra* for Babu *Girija Prosanna Sanyal*), for the Respondents.—The ground now urged so strongly by my learned friend finds no place in the grounds of appeal given in the memorandum. There can be no question of the finding being insufficient or not supported by evidence. The finding shows that the *kopras* never become connected with the Mahananda. During the rainy season the *kopras* do not become part of the Mahananda, but form a part of the mighty Padma, which overflows the whole country. In order to be entitled to a right of fishery in the *kopras* as incidental to their right of fishery in the Mahananda, it must be proved by the defendants that there is connection throughout the year and that the *kopras* are a part of the river-bed. The finding is that the river Mahananda has entirely changed its course and gone away many miles from its original course. So the *kopras* can by no means be regarded as being in the bed of the river.

Babu *Jogesh Chandra Roy* replied.

JUDGMENT.

S. A. No. 3261 OF 1915.

This appeal arises out of a suit relating to a *jalkar* in certain *kopras* or sheets of

(2) 25 Ind. Cas. 467; 18 C. W. N. 1217 at p. 1234; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 901; 42 C. 489; 42 I. A. 221 (P. C.).

water which once formed the bed of the river Mahananda.

The plaintiffs claim them as part of their *putni*. They allege that these *kopras* have no connection with the present river Mahananda. The defendant claims them as part of his *jalkar* in the Mahananda river. The Courts below have concurred in decreeing the suit. The defendant has appealed to this Court.

It is found that the *kopras* lie within the plaintiffs' *putni*. It is also found that the river has completely changed its course and moved many miles away from the *kopras*, which are now surrounded by culturable lands. The defendants, however, claim a right to the *kopras* on the ground that they are connected with the river at certain seasons of the year. But the learned Subordinate Judge finds: "It is clearly the flood water of the mighty Pudda which inundated the entire country that gets into them and rehabilitates the connection." Several cases have been cited in argument before us.

In an early case on the point, *Grey* v. *Anund Mohun Moitro* (3), the rule of law is thus stated: "If the river simply changed its course, and there is nothing to modify the conclusion which the Court ought to draw from that simple fact, the old dry course of the river must be taken to have become private property. And as incident to and part of the same, the owner of the soil is entitled to all *bheels* or ponds, gulfs or *damoores* in which water remains, but which do not communicate with the river except in the time of floods."

The recent case of *Sarat Chandra Singh* v. *Chandra Mohan Bandhopadhya* (4) shows that a grant of fishery right in a river does not give to the grantee title to fish in sheets of water adjacent to the river with which the river communicates only in the time of flood.

Reliance is placed on behalf of the appellant on the cases of *Ahmadi Begum* v. *Mahasy Taranath Ghosh* (5) and *Jogendra Narayan Roy* v. *Crawford* (1). But in these cases, the *jalkars* were part of, and in the bed of, the river itself.

In *Jogendra Narayan Roy's* case (1) Maclean, C. J., referred to the finding of the learned District Judge, namely, "five or six years ago, the channel in dispute was part of the bed of the river; it lies in *chur* land, which is annually submerged and, in the rains, the current through this channel is strong enough to cut away the bank. When floods go down, the channel continues for a time to be connected with the river, but the connection may dry up in the hot weather. The *damoos* is still so far a part of the river system that it may in a single year form a new mouth or channel of connection with the river, as it did in 1309. In such circumstances I consider that it is in effect still an arm of the river and that the plaintiff, who has also all the general rights of fishery in that part of the Ganges, is entitled to the fishery of the disputed channel", and held that "the disputed water then having been part of the bed of the river and the plaintiff having fishery rights in the adjacent Ganges and the two being connected, a long current of authority would appear to establish that the plaintiff is entitled to the fishery rights he now claims."

In *Ahmadi Begum's* case (5) the *bheels* were no doubt at a distance of some miles from the dry weather stream of the Ganges. But Jenkins, C. J., pointed out: "When the annual rains are established this dry weather stream extends on its southern side as far as that which the defendants describe as the southern high bank of the Ganges, thus covering the *bheels* in suit which lie to the north of the bank."

Then again he said: "To change from a stream, a mile or so in width, to an expense of water 10 miles across is remarkable, but it is nothing unusual in this part of the river Ganges; it is of regular annual occurrence. Nor is the increase in volume so transient as to be negligible for the purpose of considering whether the flood stream is a part of the river; it lasts each year for a couple of months and notwithstanding its expanse, there is a current in it from west to east, though naturally not a strong one. This increase of the volume of water, extending as far as the southern high bank, is not an inundation,

(3) (1864) W. R. 108
(4) 7 Ind. Cas. 140; 12 C. L. J. 216.
(5) 21 Ind. Cas. 233; 17 C. W. N. 1173; 18 C. L. J. 399.

it is the normal flood stream of the Ganges and an integral part of the river."

It was clearly found in that case that the *bheels* lay between the banks of the Ganges and the bed of the river and the case of *Rama Nath* v. *Ishan Chandra Banerjee* (6) and the other cases relied upon on behalf of the appellant were distinguished on the ground that in none of them the *bheel* was actually in the bed of the river over which the claimant had *jalkar* rights.

The case of *Jogendra Narayan Roy* v. *Crawford* (1) was referred to as showing that *jalkar* rights extend to *waters in the river-bed*, though they are not connected with the waters of the flowing stream throughout the year. The learned Chief Justice further observed: "Each case must depend on its own peculiar circumstances. Where the right of fishery is in a river, then the Court has to be satisfied on a consideration of all the material facts and conditions whether it can fairly and reasonably be said that the waters over which the fishery is claimed are a part of the river. In this case I think it may fairly and reasonably be said that the *bheels* in suit are throughout the year a part of the river Ganges. They certainly are such during a part of each year and they lie in that which throughout has been and still continues to be a part of the river-bed."

In the same case Mookerjee, J., also observed: "It is indisputable upon the evidence that from year to year during the rains, the river attains a breadth which varies from 8 to 10 miles and this state of things continues during a period of at least two months. There is no room for suggestion that this is an accidental phenomenon, a flood or an innundation, a temporary overflow due to extraordinary rains or some similar exceptional causes." Referring to the principle that a grant of fishery right in a river does not give to the grantee a title to fish in sheets of water adjacent to the river with which the river communicates in the time of floods, he remarked: "This principle, however, has no application to *jalkars* situated in the bed of the river itself; the grantee of a fishery right in the river is entitled to fish in all waters comprised within the banks of the river, and the circumstance that a particular sheet of water may, during a part of the year, be disconnected from the flowing stream or permanent current, does not affect the rights of the grantee."

In the recent case of *Srinath Roy* v. *Dinabandhu Sen* (2) decided by the Judicial Committee, their Lordships held: "It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the up-stream and down-stream limits of his grant."

In the present case, as has already been stated, the river Mahananda entirely changed its course and moved many miles away from the *kopras*. These *kopras* are completely isolated and are not part of the bed of the river. There is no connection with the river except when the whole country is inundated by the flood water of another river.

It is contended on behalf of the appellant that the case should be remanded for a clear finding as to whether the *kopras* are situated within the banks of the river. We think it unnecessary to do so having regard to the facts found. The river Mahananda is a small river. It has moved many miles away and it was not the case of the defendants that the *kopras* lie in the bed of the river. Their case was that the *kopras* are connected with the river at certain seasons of the year but we have seen that the connection is caused by the inundation of another river Padma.

The appeal fails and is dismissed with costs.

S. A. No. 2133 OF 1915.

It appears that there was an agreement between the plaintiff Lalit and the defendant on the 3rd June 1909 in respect of the *jalkar* in this case. It was agreed that "the estate of Maharaj Kumar Sasi Kant Acharya will be entitled to fishery rights in the river Mahananda beyond the boundary line referred to in paragraph 1 and so long as either mouth of the said river Mahananda remains open to navigation by country fishery boats." But the river having changed its course so completely, the provisions of the agreement cannot apply to these *kopras*. The learned District Judge observes: "It is an unfortunate thing that it was almost about the date

(6) 2 Seves, 463.

of the signing of the document that the river went away but this cannot affect the question of the actual terms of the deed."

We are of opinion that the Courts below have taken the right view and the appeal must accordingly be dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1755 OF 1914.

April 11, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

THENAL AMMAL AND ANOTHER—PLAINTIFFS NOS. 1 and 3—APPELLANTS

versus

SOKKAMMAL AND OTHERS—RESPONDENTS.

Vakil and client—Vakil, authority of, to compromise suit, extent of—Decree passed on compromise—Appeal, whether lies.

An authority given to a Vakil to compromise a suit, if necessary, does not necessarily give him authority to negotiate the terms of the compromise without reference to his client. Such authority must be strictly construed and an appeal lies against a decree passed on a compromise entered into by a Vakil without reference to his client. [p. 429, col. 2; p. 430, col. 1.]

Kollipara Venkamma, In re, 17 Ind. Cas. 391; 23 M. L. J. 381; 12 M. L. T. 348, *Mathews* v. *Munster*, (1888) 20 Q. B. D. 141; 57 L. J. Q B. 49; 57 L. T. 922; 36 W. R. 178; 52 J. P. 260, distinguished.

Jayapati Mudaliar v. *Ekambara Mudaliar*, 21 M. 274; 8 M. L. J. 40; 7 Ind. Dec. (N. S) 550, followed.

Second appeal against the decree of the District Court, Trichinopoly, in Appeal Suit No. 265 of of 1913, preferred against that of the Temporary Subordinate Judge, Trichinopoly, in Original Suit No. 9 of 1912 (Original Suit No. 70 of 1910 on the file of the Court of the Subordinate Judge, Trichinopoly).

Mr. *L. A. Govindaraghava Aiyar*, for the Appellants.

Mr. *T. Narasimha Aiyangar* (with him Messrs. *S. T. Srinivasa Gopalachariar* and *K. S. Ganesa Aiyar*), for the Respondents.

JUDGMENT.—A preliminary objection is taken by Mr. Narasimha Aiyangar that no second appeal lies as the compromise was recorded without protest and as subsequently a decree was passed in terms of the compromise. This objection should be overruled, as the very foundation of the compromise, namely, the authority to enter into it is impeached.

Following *Ayyagiri Veerasalingam* v. *Kovvuri Basivireddi* (1) we hold that the appeal is competent.

The Courts below have held that the plaintiffs were bound by the compromise as the *vakalat* given by them to their Vakil expressly enabled him to enter into a compromise. We do not think that the word *avasiamanal* (if necessary) supports this conclusion. We understand the expression to mean that the Vakil is to do certain acts when and if the occasion arises. The acts themselves are subsequently enumerated. They are (*a*) to sign the petition for entering into the compromise or for withdrawing the suit and to sign the final compromise petition to the Court. These two enumerated powers show that the plaintiff did not intend that the Vakil should have unlimited powers to settle the claim of his clients.

Mr. Narasimha Aiyangar contended that the ordinary power of the Vakil to enter into compromises and to withdraw suits in which he is engaged is inherent in him by the engagement and cites Justice Sadasiva Aiyer's decision in *Kollipara Venkamma, in re* (2) in support of this contention. In *Jagapati Mudaliar* v. *Ekambara Mudaliar* (3) Subramania Aiyar and Benson, JJ. pointed out that the practice prevailing in England by which Counsel and Solicitor are clothed with extensive powers to agree to terms on behalf of the client should not be imported into this country. We are inclined to agree with this view. It is not the ordinary duty of an Advocate to negotiate terms, without reference to his client, with the opposite party. Such an action is calculated to place the practitioner in a false position. We do not think it desirable that such a power should vest in him in the interests of the profession. From the point of view of the client, we think that it is not safe that he should be regarded by engaging a Vakil to have given him authority to dispose of his rights in any way he chooses. Therefore we think that the general power claimed is not in

(1) 25 Ind. Cas. 56; 27 M. L J. 173; 16 M. L. T. 125; 1 L. W. 541.

(2) 17 Ind. Cas. 391; 23 M. L. J. 38'; 12 M. L. T. 348.

(3) 21 M. 274; 8 M. L. J. 40; 7 Ind. Dec. (N. S.) 550.

consonance with the highest ideals of the profession or of justice. For these reasons we think that a very strict interpretation should be placed upon *vakalats* containing powers of this kind. The learned Vakil quoted *Mathews* v. *Munster* (4) to show that Counsel was allowed to settle the amount of the damages awardable to his client. Lord Justice Bowen points out in that case that the client asked the Counsel to do the best he can in the case: such an inherent authorisation might have justified the view taken in that case. It is pointed out by all the Lords Justices that the Court has plenary powers in any case to enquire into the justness or *bona fides* of the settlement reported to it. In this country such a power should be exercised by the Court even more largely than in England. It is for that reason that the intermediate stage of recording the compromise is introduced in the Code. We are afraid that Courts seldom appreciate the significance of this provision. At any rate, we are satisfied that in this case, the importance and necessity of recording the compromise was not realised by the Subordinate Judge.

We must hold that there has not been a sufficient enquiry into the question whether the compromise was authorised by the appellants, especially as we hold that the *vakalat* does not give authority to the Vakil to enter into the compromise without reference to his clients.

We must set aside the decrees of the Court below and remand the case to the Court of first instance for ascertaining whether the compromise is binding on the plaintiffs. If he comes to the conclusion that it is not binding, he must proceed to dispose of the case in the usual way. Costs will abide the result.

Appeal allowed; Case sent back.

V. R. P.

(4) (1888) 20 Q. B. D. 141; 57 L. J. Q. B. 49; 57 L. T. 922; 36 W. R. 178; 52 J. P. 260.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2608 OF 1912.

July 9, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

ALI MEA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NANA GAZI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Appeal—Death of sole respondent—Heirs, some, brought on record, effect of—Abatement of appeal.

A suit for recovery of rent having been decreed, the defendants-tenants appealed. During the pendency of the appeal the respondent died and only some of his heirs were substituted, and others, who were minors, were given up with the result that the appeal as against them was dismissed:

Held, that the appeal, as against the substituted heirs, could not proceed, as on the death of the sole plaintiff-respondent, his rights as landlord devolved on his heirs as a whole, so that the decree which was passed in favour of the plaintiff could not be split up by allowing it to stand in favour of some of the heirs and setting it aside as against the others. [p. 431, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, Chittagong, dated the 18th May 1912, modifying that of the Munsif, second Court, Patiya, dated the 14th September 1911.

FACTS of the case are briefly as follows:—

The defendant was the appellant in this case, and the appeal arise out of a suit for rent. The plaintiff Nana Gazi brought this suit for rent against the defendant-appellant, and the suit was dismissed by the Court of First Instance. Then on appeal, the lower Appellate Court reversed the decision of the Munsif and decreed the appeal. The defendant then preferred this second appeal to the High Court. During the pendency of the appeal Nana Ghazi (the plaintiff) died leaving several heirs, out of whom some are minors. The appellant then substituted the adult heirs of the deceased plaintiff-respondent leaving out his minor heirs, that is, only some of his heirs were brought on the record and the others were left out.

Mr. *U. N. Sen Gupta* (with him Babu *Probodh Kumar Das*), for the Respondent.—This appeal cannot proceed. It has abated inasmuch as all the heirs of the deceased respondent have not been brought on the record. There can be no doubt that as

against those heirs who have not been brought on the record in place of the deceased respondent this appeal has abated. The question then arises whether the appeal can proceed as against those of the heirs who have been brought on the record. I submit, it cannot, inasmuch as the whole appeal has abated. Under section 188 of the Bengal Tenancy Act the joint landlords must exercise their rights jointly; the right is a joint right and it cannot be split up in this way at the instance of the tenant. So far as the liability of the tenants is concerned the liability is joint and several, but so far as the right of the landlord is concerned the right is a joint right. If the appeal succeeds the whole thing will lead to absurdity. See *Raj Chunder Sen* v. *Ganga Das Seal* (1), *Hem Kunwar* v. *Amba Prasad* (2), *Joy Gobind Laha* v. *Monmotha Nath Banerji* (3).

Babu *Tarakeswar Mitter* for Babu *D. L. Kastgir*, for the Appellants.—Though the landlords have got a joint right, every individual landlord can sue the tenant making the other landlords parties to the suit.

[CHATTERJEA, J.—The question is when the landlord-respondent dies and a joint right devolves upon his heirs, can the appeal proceed when only some of his heirs are brought on the record and the others are not brought?]

The appeal as against those who have been brought on the record cannot abate, because an individual heir of the original landlord can sue for rent for his own share.

Mr. *U. N. Sen Gupta*, for the Respondent.—Unless the heirs separate their right by partition or separation, the right continues to be a joint right and it cannot be severed at the instance of the tenant. See *Rajnarain Mitter* v. *Ekadasi Bag* (4).

JUDGMENT.—The suit out of which this appeal arises, was one for recovery of rent and was brought by one Nana Gazi. The suit was decreed by the lower Appellate Court in favour of Nana Gazi (the plaintiff) and the defendant has preferred the second appeal.

During the pendency of the appeal in this Court, the sole plaintiff-respondent died and an application was made for substitution of his representatives. Some of them were minors and they were given up on behalf of the appellant, the result being that some only of the heirs of the deceased plaintiff were substituted and the appeal was dismissed as against the minor heirs.

A preliminary objection has been taken at the hearing of the appeal that the appeal, as now constituted, cannot proceed. We think that this objection must prevail.

Nana Gazi was the sole plaintiff respondent; and his rights as landlord devolved, on his death, on his heirs as a whole. The decree which was passed in favour of the plaintiff cannot be split up; that is, it cannot be allowed to stand in favour of some of the heirs and set aside as against the others. The heirs constitute one body and they should all have been substituted in order that the plaintiff's interests might be fully represented in the appeal.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 31 I. A. 71; 31 C. 487; 8 C. W. N. 442; 1 A. L. J. 145; 14 M. L. J. 147; 8 Sar. P. C. J. 623 (P. C.).

(2) 22 A. 430; A. W. N. (1900) 136; 9 Ind. Dec. (N. S.) 1324.

(3) 33 C. 580.

(4) 27 C. 479; 4 C. W. N. 494; 14 Ind. Dec. (N. S.) 315

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 512 OF 1915.

July 4, 1917.

Present: - Mr. Justice Fletcher and Mr. Justice Newbould.

SHIBA PRASAD ROY CHOWDHURY—PLAINTIFF—APPELLANT

versus

SAMARENDRA NATH BOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Written correspondence varying rent payable under registered lease, whether admissible in evidence—Rent suit—Right of party to rectify registered lease, whether can be gone into—Bengal Tenancy Act (VIII B. C. of 1885), s. 61—Under-lessee of tenant, whether authorised to deposit rent.

The plaintiff held a permanent lease from the Government, which he sublet to the defendants by a registered document. In both the lease and the under-lease there was an undertaking on the part of the tenants to reclaim the land. The reclamation not having taken place in accordance with the terms of the lease, Government served notice upon the plaintiff to quit and threatened to re-enter. On this correspondence ensued between the plaintiff

SHIBA PRASAD ROY *v.* SAMARENDRA NATH BOSE.

and the under-lessees, defendants, with the result that the defendants agreed that if the plaintiff would obtain a fresh lease in place of the original lease, which the Government claimed to have forfeited, the rent payable by the defendants under the under-lease should be enhanced by a corresponding amount to that which the plaintiffs would become liable to pay to Government; and in pursuance of that agreement the plaintiff received from the Government a fresh lease on more onerous terms than those on which the land was held originally by him. In a suit by the plaintiff to recover rent, not as provided for by the registered under-lease, but at the rate as varied by the correspondence that took place between the parties:

Held, (1) that the plaintiff could not recover more rent than what was agreed to be paid under the registered under-lease, as the terms of that document could not be contradicted or varied by subsequent correspondence which was not registered, even though by that correspondence a binding agreement may have been made between the parties for altering the rent payable under the registered sub-lease; [p. 434, col. 2.]

(2) that any case that the plaintiff might have for altering or rectifying the terms of the original registered under-lease in a properly constituted suit, on the ground that the correspondence had given rise to a binding agreement which ought to be enforced in a Court of Equity, could not be gone into in the suit as it was an ordinary suit for rent. [p. 434, col. 2.]

In an ordinary suit for arrears of rent for particular years, the rights of the parties must be governed by the terms of the registered document creating the lease, until those terms are varied by another registered document or by a judicial decision. [p. 434, col. 2.]

Under-tenants who have been directed in their under-lease to keep down and pay the rent payable by their lessor to his superior landlord are persons authorised to make deposit of that rent under section 61 of the Bengal Tenancy Act. [p. 435, col. 1.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 13th September 1915.

FACTS of the case appear from the judgment.

Dr. *Dwarka Nath Mitter* (with him Babu *Hit Lal Guha*), for the Appellant.—The learned Subordinate Judge is wrong in disallowing additional impositions and damages to the plaintiff. The plaintiff-appellant is entitled to the additional imposition for the following reasons:—

(1) By the terms of paragraph 3 of the *kabuliyat* dated 1901. The stipulation in the *kabuliyat* runs thus: "Besides the stipulated rent we shall separately pay like the instalment of rent the customary road and public work cesses and any new assessment or tax that may in future be imposed by Government as well as the amount of *dak* cess that may be fixed year by year." Paragraph 4 of the *kabuliyat* also provides: "We would make the remaining moiety of the area fit for production of crops within 1315 B. S. by constructing embankments; on failure of which you will be able to take *khas* possession" of the entire area mentioned in the *kabuliyat*. So the rent payable by the defendants under the lease should be enhanced to a corresponding amount to that which the plaintiff had become liable to pay to the Government.

(2) By the promise made by the defendants which was properly admissible in evidence, the plaintiff is entitled to recover rent, not as provided for by the registered document which was granted in 1901, but at the rate as varied by the correspondence that had taken place between the plaintiff and the defendants Nos. 1 and 2. The learned Subordinate Judge is wrong in holding that to give effect to the correspondence and the subsequent promise made by the defendants would be to allow the terms of a registered instrument to be varied by an unregistered writing. I rely on *Lall Jha* v. *Negroo* (1). The cases relied on by the lower Court are distinguishable and have no bearing on the facts and circumstances of this case.

[Fletcher, J.—Your contention is that you are entitled to base your claim on the subsequent arrangement.]

Yes. I rely on the contract subsequently made by the parties, which is enforceable.

[Fletcher, J.—The terms of the *ganti* lease do not cover your claim.]

The original lease provides for the payment of additional impositions.

[Fletcher, J.—How can the defendant No. 3, who is merely a purchaser without any notice of this correspondence, be made liable for the new impositions?]

I say, he had notice; at least, he is bound by the doctrine of constructive notice.

[Fletcher, J.—You may get a personal decree as against defendants Nos. 1 and 2 who gave you the letters, but you can have no relief in respect of additional rent in this suit as against defendant No. 3.]

It would be useless for me to take a personal decree.

(1) 7 C. 717; 3 Ind. Dec. (N. S.) 1009.

[FLETCHER, J.—Of course, you are entitled to some relief inasmuch as you acted on the representation of the defendants Nos. 1 and 2, but you cannot get any in this rent suit. You can have your relief in a suit for specific performance.]

That suit may be out of time.

[NEWBOULD, J.—Section 14 of the Limitation Act would apply to your case.]

The case is a very hard one. The plaintiff has performed his part of the agreement by obtaining a new lease at an enhanced rental, and he did this at the instance of the defendants Nos. 1 and 2 and the defendants have undoubtedly been benefited by that. Your Lordships should consider the loss which the defendants would have suffered if the plaintiff had not made the new settlement with the Government.

[FLETCHER, J.—Your remedy lies in a properly constituted suit on that ground and not in a suit for the recovery of rent. You cannot get those matters decided in a rent suit.]

I would ask your Lordships to remand the case for a proper decision of all the essential issues raised in the defence.

[FLETCHER, J.—That would be converting a rent suit into a suit for specific performance of a contract. In this suit the rights and obligations of the parties are to be decided on the basis of the registered document.]

I rely on *Mahomed Musa* v. *Aghore Kumar* (2), *Lakshmi Venkayyamma* v. *Venkatanarasimha* (3).

Then, the learned Subordinate Judge has allowed neither damages nor interest on the arrears of rent. He ought to have allowed either damages or interest.

Babu *Sarat Chandra Roy Choudhury* (with him Babus *Bhudeb Chundra Roy* and *Shib Chandra Palit*), for the Respondents, was not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff to recover rent in respect of certain lands in the Sunderbunds held under a lease by the defendants. The plaintiff claims as the landlord. The case made out is this: The plaintiff's predecessor obtained a lease from the Government for 99 years. That predecessor was named McDougall. McDougall's interest passed to the plaintiff's father and his co-sharers. Owing to certain amicable partition proceedings that took place between the members of the plaintiff's family, the Sunderbunds property had fallen to the lot of the plaintiff. The plaintiff's title is not in contest. Prior to this amicable partition, certain portion of the land which was covered by the lease from the Government to McDougall was on the 31st July 1901 sublet by the plaintiff's mother and the other co-sharers belonging to the plaintiff's family in permanent lease to Jiwan Krishna Ghose and others, the area leased out being 4,000 *bighas*. Then followed a resumption by the Government of a certain portion of the land and this land was settled with the plaintiff on the 13th April 1903. It is not disputed that that was within the powers of the Government. Then the original defendant No. 1 purchased the property comprised in and demised by the under-lease of the 31st July 1901 and the defendant No. 1 entered into a direct obligation with his landlord undertaking to perform the obligation of reclaiming the land, which was a term not only contained in the lease as held from the Government but also in the sub-lease as held from the plaintiff's predecessors. Then, troubles seem to have arisen with the Government on the ground that the reclamation was not taking place in accordance with the terms of the lease and the Government served certain notices and threatened to re-enter. The plaintiff's case is that certain correspondence then ensued between him and the defendants Nos. 1 and 2 and owing to certain arrangements entered into, the defendants Nos. 1 and 2 agreed with the plaintiff that, if the plaintiff would approach the Government and obtain a fresh lease in place of the original lease which the Government claimed to have forfeited, the rent payable by the defendants Nos. 1 and 2 under the under lease should be enhanced to a corresponding amount to that which the plaintiff had become liable to pay to the Govern-

(2) 28 Ind. Cas. 930; 42 I. A. 1; 42 C. 801; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; 21 C. L. J. 231; 28 M. L. J. 548; 17 Bom. L. R. 420; (1915) M. W. N. 621 (P. C.).

(3) 34 Ind. Cas. 921; 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 39 M. 509; 24 C. L J. 279 (P. C.).

ment, and in pursuance of that, the plaintiff says that he did, in fact, approach the Government and received from them a fresh lease on more onerous terms than those on which the land was held originally by the plaintiff. The plaintiff, therefore, sued in this suit to recover rent, not as provided for by the registered document which was granted on the 31st July 1901, but at the rate as varied by the correspondence that had taken place between the plaintiff and the defendants Nos. 1 and 2. The defendant No. 3 has purchased the interest of the defendant No. 1 and whether he had notice of this arrangement contained in the correspondence has not been determined in this suit. No issue was raised on that point and the case must be determined solely on the materials that were before the learned Judge of the Court below. The view that the learned Judge of the Court below took was this:—This was a suit for rent, an ordinary money suit to recover the money agreed to be paid under a registered deed. That being so, the learned Judge said that he was prohibited by the law from allowing the terms of the registered instrument to be contradicted or varied by any unregistered writing and this correspondence which the plaintiff wished to give in evidence was not, under the terms of the law, admissible for the purpose of contradicting or varying the terms of the registered lease on the ground that the correspondence had not been registered. Stated broadly, that proposition is accurate. Dr. Mitter has attempted to escape from the view taken by the learned Subordinate Judge on the ground that these sums were provided for by the original lease. I am quite clear that they were not. This arrangement could never have been within the contemplation of the parties when they executed the lease of the 31st July 1901. Moreover I am clear that the covenant contained in the third clause of the *kabuliyat* (Exhibit 3) does not refer to a variation of the fixed rent but it corresponds with what in England is known as the covenant to pay the outgoings, namely, the rates, taxes, assessments, impositions and the other outgoings payable in respect of the premises and imposed by the Government or some public authority. It does not apply to a sum payable between the parties to the lease in respect of the land. That amount has already been dealt with by the covenant. If that is so, then the money is not payable under the lease, and, not being payable, this correspondence cannot be looked at in this suit for the purpose of seeing whether the plaintiff is, in fact, entitled to have the terms of the lease varied so as to entitle him to any larger sum than he has been awarded by the Judge under the registered lease. The plaintiff's Vakil says that it is a hard case on the ground that, in fact, his client has performed his portion of the bargain contained in this correspondence by approaching the Government and obtaining a new lease at an increased rental and that, unless he had done so at the request of the defendants Nos. 1 and 2, they would have lost their interest in the large sum of money that they had spent in clearing and improving the property. But no such case has been set up in this suit. Any case that the plaintiff has for altering or rectifying the terms of the original lease in a properly constituted suit on the ground that it is a binding agreement and ought to be enforced in a Court of Equity cannot be gone into in this case. There are many issues which are not to be decided in this case including, of course, the position of the defendant No. 3, as to whether or not he had notice of this arrangement between the plaintiff and the defendants Nos. 1 and 2. Any right that the plaintiff has got to have that matter enforced, he can enforce in a properly constituted suit. All that we can say in this case is that it is an ordinary case brought to recover rent for particular years and the contract regulating the rights of the parties is in a registered document, and that registered document must bind and govern those rights until varied by another registered document or by a judicial decision. That disposes of the main point.

Then, a long—I should not say long but considerable—argument has been addressed to us with reference to the learned Judge not having allowed interest in respect of the arrears of rent. The claim made in the plaint as regards this is shown in the schedule—a claim for damages. The plaintiff has not told us what damages

he suffered by reason of being kept out of this rent for a comparatively short period, because he took the rent under protest, and it is difficult to see that a gentleman in the position of the plaintiff could have suffered any damage in having received the sum under protest. He had the money in his pocket and I suppose that the only damage that he had suffered was that he had to keep that money in hard rupees so that if his protest was upheld, he would be in a position to repay that money. This is with regard to the rent of the years 1317 and 1318. With regard to the rent of the years 1319 and 1320, the money was deposited under section 61 of the Bengal Tenancy Act. A point has been raised as to whether the *durgantidars* were persons authorised to make the deposit. I am inclined to think that they were under their lease. The oral evidence in this case like other evidence in many cases in India is not very strong, but the documentary evidence such as appears seems to show that the defendants Nos. 1 and 2 when they let out this property in *durganti*, made a direction to the *durgantidars* to keep down and pay the rent payable to the plaintiff and that direction apparently, according to the terms of the *kabuliyats*, had been acted on by the *durgantidars*. There is ample evidence to show that it has been acted on, although Dr. Mitter says that the *chittas* do not show that payment was made on behalf of the principals of the *durgantidars*. One of them I think clearly does show. But, after all, this is a case for damages. No particulars of the damage have been given and the learned Judge of the Court below did not see fit to exercise his discretion to give damages. What are the grounds shown to us on which we should say that the learned Subordinate Judge was wrong in the exercise of his discretion in declining to award to the plaintiff any damages? That the plaintiff has really suffered any damage in money or value seems to me impossible. The only damage he has suffered is that the money was paid into Court by the *durgantidars*, who are not tenants within the meaning of section 61 of the Bengal Tenancy Act. Of course, the plaintiff may have his own views as to who is the person described as tenant in sections 61 and 62. But obviously this is not a matter that is capable of being appraised in money value. The plaintiff has given no particulars of the damage suffered by him. We have no materials on which we can set aside the exercise by the learned Subordinate Judge of the Primary Court of his discretion declining to award to the plaintiff any damage with respect to the rent due for the years 1319 and 1320. I see no reason in this case to interfere with the judgment of the learned Judge of the Primary Court. Any rights that the plaintiff has, he must enforce in a proper suit to rectify the registered lease under which the present defendants Nos. 2 and 3 now hold the property. The present appeal fails and must be dismissed with costs. The defendant No. 3, who alone has been represented in this Court save and except the minors represented by the Deputy Registrar, will be entitled to the costs. We assess the hearing fee at one hundred rupees.

NEWBOULD, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 82 OF 1915.

April 17, 1917.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

SHAHRUKH RUQAIYA BEGAM—DEFENDANT NO. 1—APPELLANT

versus

SHEO PRASAD, DEAD, AND AFTER HIS DEATH *Musammat* BATASHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pardanashin *lady, deed executed by—Burden of proof—Proof, nature of—Transfer, enforcement of, suit for—Consideration money, whether can be recovered as damages—Transfer of Property Act (IV of* 1882), *s.* 6 (e) *—Damages, right to sue for, transfer of.*

In order to charge a *pardanashin* woman upon an instrument or power purporting to have been executed by her, it is requisite that the person relying on such a document should give satisfactory and conclusive evidence that it was not only executed by, but explained to and understood by, her. [p. 440, col. 2; p. 441, col. 1.]

Where a transferee brings a suit to enforce the transfer, he is not entitled to recover in that suit the consideration money as damages, in case the transfer is found to be such as cannot be enforced under the law. [p. 445, col. 2.]

SHAHRUKH RUQAIYA BEGAM *v.* SHEO PRASAD.

A mere right to sue for damages cannot be transferred under the provisions of section 6 (*c*) of the Transfer of Property Act. [p. 445, col. 2.]

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 3rd September 1915.

The Hon'ble Syed *Wazir Hasan*, Syed *Zahur Ahmad* and Pandit *Brij Nath Shargha*, for the Appellant.

Babus *Bisheshwar Nath Srivastava* and *Prabhat Chandra Gupta*, Syed *Ali Mohammad*, Syed *Mustafa Husain* and Syed *Moazziz Husain*, for the Respondents.

JUDGMENT.

STUART, A. J. C.—The following are the facts. The late Prince Suleman Qadr was a member of the ex-royal family of Oudh. He died at Lucknow in 1910. At some time prior to the annexation he married a lady of the name of Shahrukh Ruqaiya Begam, the defendant-appellant here. He married a second wife Mehdi Begam in 1871. In 1886 the Prince and Mehdi Begam became estranged, and Mehdi Begam instituted on 2nd August 1887 a suit for dower against her husband. Mehdi Begam's dower had been nominally fixed at ten lacs of rupees—a sum considerably in excess of the total property possessed by her husband. The District Judge fixed the dower in accordance with the provisions of the Oudh Laws Act at Rs. 25,000 and gave Mehdi Begam a decree for that amount on 28th March 1888. An appeal was preferred by Mehdi Begam to the Court of the Judicial Commissioner. The Judicial Commissioner's Court by a judgment dated the 11th June 1889 increased the amount awarded. Prince Suleman Qadr appealed to their Lordships of the Privy Council, who by their decision of 8th July 1893 restored the decree of the District Judge. The case is reported as *Suleman Kadr* v. *Mehdi Begum Surreya Bahu* (1). On 19th September 1887, that is to say, after Mehdi Begam had instituted her suit but before the District Judge had delivered judgment, an application was made in the Court of the District Registrar of Lucknow to register a deed purporting to have been executed by Nawab Shahrukh Ruqaiya Begam, defendant-appellant, in favour of her son-in-law Jafar Ali Khan, who is married to her daughter Qudsia Begam. This deed was registered on 20th September 1887 at the residence of Jafar Ali Khan. At this stage of the judgment it will be well not to specify the terms of this deed too exactly. It purported to give Jafar Ali Khan certain rights in the dower of his mother-in-law for certain considerations. Its exact nature will be discussed later. After the execution of this deed no action of any kind was taken by the defendant-appellant or by Jafar Ali Khan towards obtaining satisfaction of the dower due to the defendant-appellant. Twenty-three years passed. Prince Suleman Qadr died. No dower had up to that time been received by the defendant-appellant or by any person on her behalf. After the death of the Prince his property was taken possession of by his wife the defendant-appellant, her daughter Nawab Qudsia Begam the wife of Jafar Ali Khan, and the Prince's son Nawab Humayun Qadr from *Musammat* Afzal Khanam. It appears that for some years prior to the Prince's death Jafar Ali Khan and Qudsia Begam had owing to domestic estrangements been living separately. We understand that they are not yet reconciled. On 29th November 1910 Nawab Qudsia Begam instituted a suit against her mother and her step-brother Humayun Qadr in the Court of the Subordinate Judge of Lucknow. She alleged that she, her mother and her step-brother were in joint possession of the Prince's property, and asked that the Court should administer the property or partition it. She admitted her mother's possession. Her mother in her written statement agreed that Qudsia Begam, Humayun Qadr and herself were in joint possession of the estate and asserted that, as far as she was concerned, she was in possession partly under her rights as her deceased husband's heir, and partly in satisfaction of her claim for dower. It is to be observed that on her allegations she had been admitted into possession on her husband's death in satisfaction of the amount due to her by way of dower in addition to her other claims against the estate. Nawab Humayum Qadr did not challenge the assertion of the defendant-appellant. Two other parties were subsequently joined—a lady of the name of

(1) 21 C. 135; 20 I. A. 144; 17 Ind. Jur. 535; 6 Sar. P. C. J. 347; Rafique and Jackson's P. C. No. 132; 10 Ind. Dec. (N. S.) 722.

Sarwat Mahal and her son Prince Mirza Suraiya Qadr. Sarwat Mahal asserted that she was a *mutai* wife of the Prince. These two latter parties contested the claim of the defendant appellant Shahrukh Ruqaiya Begam, on an allegation that the defendant-appellant was not legally married to the Prince. They did not suggest that, if she was legally married to the Prince, she was not entitled to dower. The hearing of the case was transferred to the Court of the District Judge of Lucknow. His decision is dated the 28th March 1912. He found that the defendant-appellant was the legally married wife of the Prince, that Qudsia Begam and Humayun Qadr were legitimate, that Sarwat Mahal was married to the Prince by the *mutai* form and he divided the property among the parties according to his findings. He awarded to the defendant-appellant the sum of a lac of rupees as dower. From the way in which his judgment is written it might appear at first sight that the defendant-appellant had claimed dower as a debt due from the estate. An examination of the pleadings will show that this was not so. She did not claim it as a debt. She said she was in joint possession of the property left by the Prince, and that if a partition took place the amount of her dower should be decided and apportioned off. Her case was that she was in possession of the property in satisfaction of her dower from the beginning, not that, her claim having remained unsatisfied, it was necessary for her to sue for dower. It is to be observed that she neither claimed a specified amount of dower, nor did she pay Court-fee on such a claim. An appeal was filed against this decision of the learned District Judge of Lucknow to the Court of the Judicial Commissioner. On 28th November 1913 Jafar Ali Khan applied to be declared an insolvent in the Court of the District Judge of Lucknow. In the first statement of his assets he said nothing about any claim to the dower of the defendant appellant, but in a subsequent list he entered such a claim as an asset. He asserted title through the deed which was registered on 20th September 1887, but he did not file the deed. He alleged that he had lost it. He filed a copy of the deed obtained from the registration office by him some years before. The appeal to the Court of the Judicial Commissioner in the administration suit was dismissed on 16th April 1914. The decision is reported as *Suraiya Qadr* v. *Qudsia Begam* (2). Jafar Ali Khan had been in the meantime adjudicated an insolvent. On 26th April 1914 his rights under the deed registered on 20th September 1887 were sold to a certain Sheo Prasad by the District Judge in the insolvency proceedings. A certain Saiyid Mir Jan was also stated to be a vendee. A conveyance of these rights was executed by the Receiver in favour of Sheo Prasad and Saiyid Mir Jan on 6th May 1914. They purchased these rights for Rs 825.

On 22nd May 1914 Sheo Prasad and Saiyid Mir Jan instituted a suit against the defendant-appellant and the Receiver for a three-eighths share in the defendant-appellant's dower in the Court of the Subordinate Judge of Lucknow. The defendant-appellant replied that she had knowledge of the existence of the deed of 1887 but that she had never transferred her right to dower to Jafar Ali Khan and that the whole transaction had been fictitious and collusive. The story that she told in her written statement was as follows. She said that when Mehdi Begam had instituted a suit for dower against her late husband, her late husband considered that it would be an advantage, if the defendant-appellant instituted another suit for dower against himself. His view was that if the defendant appellant, whose dower had been fixed at 25 lacs of rupees, was to bring a suit for her dower, the Court, that was trying Mehdi Begam's case, would reduce the amount of the latter's dower proportionately. That lady's dower as has been stated before was fixed at ten lacs. The suit intended to be brought by the defendant-appellant was to be fictitious and collusive. Whatever decree she might have obtained would not have been realized. In order to avoid the suspicion (which on the facts would have been thoroughly justified) that the suit was fictitious and collusive and brought in pursuance of a conspiracy to deprive Mehdi Begam of a portion of her rights, the late Prince, according to the story,

(2) 24 Ind Cas. 643; 1 O. L. J. 281.

thought that it would look better, if the defendant-appellant did not bring a suit by herself, or ostensibly with her own money. So he directed that she should make Jafar Ali Khan a co-plaintiff to this suit and execute a fictitious deed in favour of Jafar Ali Khan, under the terms of which it would appear that Jafar Ali Khan was financing the defendant-appellant's suit, although as a matter of fact he was advancing nothing. The defendant-appellant asserted that the deed was executed accordingly, that no consideration changed hands, and that she was unaware of what the deed contained, as it had never been explained to her, and she did not understand it. She asserted this much, however, definitely and clearly that the whole transaction was a paper transaction, that no money passed, and that nothing was transferred. She further asserted that her husband subsequently said that it was not necessary to bring such a suit and that nothing was done accordingly, and that Jafar Ali Khan returned the deed which had been torn up. In the course of the proceedings before the Subordinate Judge the defendant-appellant produced no evidence. She did not go into the witness box, and she made no attempt to substantiate the allegations which she had made in her written statement. The learned Subordinate Judge, in view of her omission to support her story and other circumstances, decreed the plaintiffs' suit and awarded them three-eighths of rupees which had come into the hands of the defendant-appellant under the decree of the District Judge. The present appeal is preferred.

I first proceed to examine the document upon which the claim is based. This document is written in Urdu. It is loosely worded and in many places is difficult to understand, not so much because the language is difficult in itself (although it is unnecessarily high-flown and pedantic) but because the grammar is bad and the drafting is slovenly. If this document were a genuine recital of what had occurred between the parties, it would remain a difficult document to interpret. It commences by stating that the lady was in need of instituting a suit for her dower-debt, because her husband's second wife had brought a suit for her dower-debt, and that not being in a position to arrange for the expenses, she has taken Rs. 7,000 from Jafar Ali Khan for the expenses of the suit and other expenses, and in consideration of the receipt of that amount is transferring to him by sale her rights in respect of three-eighths of the amount due to her for dower *on the following conditions.* The conditions are that Jafar Ali Khan should pay her Rs. 3,000 in cash and hand over to her promissory notes for Rs. 4,000 endorsed in her favour, that, as the amount of dower-debt awarded to the lady at marriage is excessive. Jafar Ali Khan and she should fix the amount of dower-debt for which they propose to sue, that she should join Jafar Ali Khan as a plaintiff, that she should not without his consent compromise or withdraw her claim, and that once the Court has passed a decree Jafar Ali Khan should be either entered as a decree-holder or should be paid his share of the money obtained through the Court by her. The object of drafting the deed in the way in which it has been drafted is not clear from the document itself. The plaintiffs-respondents contest that the deed was an out and out transfer of a share in the defendant-appellant's dower. If such be the case, it was unnecessary to enter the greater part of the conditions. It would have been sufficient if the executant had said, "I have received Rs. 7,000 and in consideration of that Rs. 7,000 transfer three-eighths of the rights of my dower." It was not necessary to say anything more. Instead of saying this, the draftsman has dwelt in more than one place on the contingency of a suit being brought to obtain this dower, and the exact status of Jafar Ali Khan as plaintiff in the suit. While entering into the question, he does not conclude it. Various details are left out. To show the slovenliness of the drafting—in one place it is said that the lady has already received Rs. 7,000 and a few lines later it is said that she is still to receive it. The learned Counsel on both sides have argued with great ability as to the meaning of the words of the deed itself. On the one side it is argued that it is an out and out transfer with conditions attached. On the other side it is argued that the deed

contains nothing more than an agreement to bring a certain suit and divide the proceeds, if any, in a particular manner, and each Counsel has been able to put forward a very plausible argument in support of the view for which he was contending. The defendant-appellant is illiterate. Although she is a member of the ex-royal family, she is unable to read or write. We have not the original deed before us but from the copy it appears that the deed was executed by the affixing of a seal, and that that seal was not affixed by the defendant-appellant herself but by some person purporting to act on her behalf. If the interpretation of this deed presents such difficulties that two antagonistic views can be supported by reasonable argument, what was the prospect of this illiterate *pardanashin* lady of nearly 50 years of age, (for that was her age at the time that the deed was executed) who is not shown to have had experience of business transactions, realizing to what she was committing herself when she permitted her seal to be affixed to the document? So much for the deed itself.

I now come to the circumstances of its execution. The defendant-appellant resided during the period when the deed was executed with her husband in a house in Lucknow. For the purpose of the execution of this deed she went to the house of Jafar Ali Khan and her daughter, and the persons surrounding her at the time that the deed was executed were all connections of Jafar Ali Khan. There was no man near the lady whose interests were not the interests of Jafar Ali Khan. There was no man in a position to give her independent advice. The deed shows that its contents were read over to the executant by one Saiyid Abul Hasan Khan. The lady's seal was affixed by Sadiq Ali Khan. The witnesses were Qudsia Begam, Muhammad Ali Khan, Mohsin Ali Khan, and Kazim Ali Khan. Who were these people? Saiyid Abul Hasan Khan who read over the contents to the lady was the general agent of Jafar Ali Khan. Sadiq Ali Khan who affixed the seal is married to Jafar Ali Khan's sister. Qudsia Begam one of the witnesses is the wife of Jafar Ali Khan though daughter of the lady. She was, of course, also *pardanashin*. Muhammad Ali Khan another witness is the brother of Jafar Ali Khan. Mohsin Ali Khan another witness is the son of Muhammad Ali Khan, Kazim Ali Khan the fourth witness is married to Muhammad Ali Khan's daughter. The registration was conducted in a legal manner but in a manner which was not likely to elicit the exact comprehension by the lady of the terms of the deed. As the executant was a *pardanashin* lady of high family, the registration did not take place at the registration office but at Jafar Ali Khan's house. The Registrar did not himself register the document. A certain Muzaffar Husain the registration record-keeper—a superior clerk—was sent to the house by the Registrar and he effected registration there. His endorsement is as follows:—

"The execution and completion of the deed and the receipt of the money entered therein were admitted from behind the *parda* by Nawab Shahrukh Ruqaiya Begam, the vendor, by giving a receipt for Rs. 3,000, bearing one-anna stamp, to Nawab Jafar Ali Khan from behind the *parda* in my presence, and by receiving two Government promissory notes for Rs. 4,000 from the said Nawab. Her admission was to the effect, 'I received the money, and permitted Nawab Sadiq Ali Khan who is my brother to affix my seal.'" It does not appear that as a matter of fact Nawab Sadiq Ali Khan was her brother. He married Jafar Ali Khan's sister. "The contents of the deed were read over word for word to the executant. The said vendee, having put down the word 'sold' on the said notes, in the presence of me, the Commissioner affixed the seal"....."The executant further stated that on 17th September 1887 she received from the vendee, her son in-law, the sum of Rs. 3,000..... for which she executed a separate receipt which she had made over to the vendee just now." The registration is witnessed by the additional witness Saiyid Abul Hasan Khan to whom reference has already been made.

The learned Counsel for the respondents has laid great stress on the fact that the defendant-appellant has not gone into the witness-box to substantiate her own story. Her omission to do so has undoubtedly

considerably hampered her defence, but her learned Counsel has explained to my satisfaction that in the circumstances it would have been unreasonable to expect the defendant-appellant to give evidence in the matter. She is over eighty years of age. She put in a medical certificate to the effect that her health did not permit her to give evidence. That medical certificate purported to be signed by a lady doctor of high qualifications. It is true that the lady doctor in question did not prove the medical certificate. She was called as a witness. She offered to go into the witness-box and prove the truth of that statement, but the plaintiffs objected to evidence being given on this point and the learned Subordinate Judge (for reasons which I am unable to follow) did not permit medical evidence to be taken. Apart from the defendant-appellant's old age there was a good reason why she objected to give evidence in the case. She had been called as a witness in the administration suit, the proceedings in which are before us. She was examined by a Commissioner in that case. She was kept giving evidence on the 16th August, the 17th August, the 21st August, the 22nd August, the 23rd August, the 24th August, the 25th August, and the 26th August 1911. This was a fairly trying ordeal for an old lady nearly eighty. On one or two occasions during this examination she complained of weakness and illness. I find one note of the Commissioner recorded on the 25th August. "The voice of the witness is very weak and she seems to be very uneasy with some pain. On being asked she states that since her bath this morning she has severe pain in her body about the ribs. She does not appear to be fit for cross-examination and, therefore, it is stopped till 3 P. M. with the consent of parties." After this the learned Counsel who was cross-examining her continued to press her. It is to be noted that the greater part of his cross-examination could not have elicited anything of value for the side on whose behalf the cross-examination was being made and the scandal was so great that the learned Judges, who composed the Bench of this Court that heard the appeal, have devoted a considerable portion of their judgment to deserved strictures on the conduct of some of the Counsel concerned. They say, at page 289*: "We have before us a record of cross-examination of ladies extending over days—of vexatious and unnecessary questions directed not to the purposes which legitimate cross-examination is intended to serve, but rather to the raking up of incidents of domestic history which could have no possible bearing either upon the merits of the case or the credit of the witness—and reading the story of what went on from day to day, we are scarcely surprised to find that on one occasion at least the Commissioner had to record that one of the ladies fainted under the stress of the ordeal to which she was being unnecessarily subjected. The Commissioner seems to have been unequal to the responsibility of controlling the cross-examination and the witnesses were badgered regardless of any limits of decorum. It is small wonder if ladies fail to display any alacrity in going into the witness-box while procedure of this kind is allowed and we must condemn in the most emphatic language the unworthy conduct of legal practitioners who conceive themselves to be at liberty to transgress to whatever extent they please the legitimate confines of the right of cross-examination." In these circumstances it is not surprising that the defendant appellant refused to enter into the witness-box in the present case. As she did not do so, however, we can, of course, assume nothing in favour of the allegations which she has preferred to leave unsubstantiated, but I note that, in my opinion, she was not a free agent in the matter. Whatever might have been the value of her evidence she exercised a wise discrimination in refusing to risk her health or possibly her life in endeavouring to substantiate her story.

The law on the subject is clear. The lady being a *pardanashin* lady is entitled to certain protection. Their Lordships of the Privy Council laid down the law unmistakably in *Sudisht Lal* v. *Musammat Sheobarat Koer* (3). In order to charge a *pardanashin* woman upon an instrument or power purporting to have been executed by her, it is requisite that the person relying on such a document should give satisfactory evidence

(3) 7 C. 245; 8 I. A. 39; 4 Sar. P. C. J. 222; 5 Ind. Jur. 270; 3 Ind. Dec. (N. S.) 707.

*Page of 1 O. L. J.—*Ed.*

hat it has been explained to, and understood by, her. There are a large number of subsequent decisions upon the point but the principle laid down in this ruling has never been departed from or modified. It is true that a *pardanashin* lady is only protected: she is not immune from the consequences of her acts. The distinction was clearly set forth in the decision of their Lordships of the Privy Council in *Kali Bakhsh Singh* v. *Ram Gopal Singh* (4). The burden of proof should rest not with those who attack, but those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor—page 381*. Now what attempt has been made by the plaintiffs to show that the defendant-appellant understood what she was doing? Two witnesses were called, Jafar Ali Khan himself and Kazim Ali Khan. Jafar Ali Khan's statement was a remarkable one. He says (o. p. 13), "The sale transaction in suit was negotiated chiefly through Sadiq Ali Khan" (this is the man who married Jafar Ali Khan's sister) "but not in my presence. The first defendant told me to pay her Rs. 7,000 which she would recover, *i. e.*, she undertook to file a suit for recovery of her dower from her husband. This talk took place *some two or three years* prior to the date of the sale-deed." According to this statement, the intention of the defendant-appellant to bring a suit had nothing to do originally with Mehdi Begam's case, for Mehdi Begam had no rupture with Prince Suleman Qadr till July 1886—*vide Suleman Kadr* v. *Mehdi Begum Surreya Bahu* (1)—and this document was executed in September 1887. "This she said in presence of my wife and a few females in her house in Maulviganj. I do not recollect what talk took place (subsequent to the above talk) between me and the first defendant about the sale deed under consideration but a talk took place often." He then denies the allegations made in the defendant-appellant's written statement for he says, "I never had any talk with Suleman Qadr about this sale. I acted neither in concert with nor against the will of Mirza Suleman Qadr in the proposed litigation. The second wife (Suriya Bahu) of Suleman Qadr sued for recovery of her dower and, therefore, defendant No. 1 also considered it advisable to bring a suit for her dower claim. I do not know what was the object of her bringing a suit for dower. There was no ill-feeling between defendant No. 1 and her husband during the period when the sale-deed was executed." Now a Muhammadan lady in the position of the defendant-appellant might, as she alleges, bring a collusive suit for dower against her husband while on friendly terms with him, but I find it difficult to suppose that she would wish to bring a genuine suit for dower against her husband, unless she was determined upon a complete rupture. So far from there being a complete rupture in this case, there was never any rupture at all. The defendant-appellant lived happily with her husband for 23 years after this deed was executed, and up to the date of his death. This circumstance throws grave suspicion upon the truth of Jafar Ali Khan's story. He now comes to explain how the deed came to be drafted. "Mohabbat Rai wrote out the sale-deed at my house 2 or 4 days prior to its registration. Mohabbat Rai brought a rough draft of the sale-deed and Sadiq Ali got it corrected and changed. I do not know what became of the draft. The deed was faired out in my presence. I do not know whether Mohabbat Rai gave the draft deed to Sadiq Ali Khan at his house or at my place." This shows that the preparation of the draft did not take place in the presence of the defendant-appellant. Mohabbat Rai (who, we are informed, is still living) has not been called as a witness. According to this evidence Mohabbat Rai took his instructions from Sadiq Ali Khan and Jafar Ali Khan, and prepared the draft accordingly. The lady was never consulted and no attempt was made to explain to her, at the time the draft was being prepared, the extent of her liabilities under the deed. Later on this witness continues. The first defendant wanted money to sue for her dower whenever she pleased. She did not tell me anything else. I advanced the money as *loan*." Here the witness stopped, saw that he had committed himself and changed his statement

(4) 21 Ind. Cas. 985; 16 O. C. 378; 18 C. W. N. 282; (1914) M. W. N. 112; 12 A. L. J. 115; 15 M. L. T. 130; 19 C. L. J. 172; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147; 36 A. 81.

*Page of 16 O. C.—*Ed.*

abruptly "No, I did not advance the money as loan but paid it in lieu of her 6 annas share in the dower-debt." Shortly afterwards he adds, "Defendant No. 1, if she desired, could have laid out money for the litigation without selling a portion of her dower-claim. She had means to do so. I do not know why she considered it advisable to sell a portion of her share. I do not know if her object in selling the 6-annas share in dower was to show that the money had not been taken from Suleman Qadr." By this admission Jafar Ali Khan has very largely supported the case for the defendant-appellant. To read the deed it would appear that the lady wishing to recover her dower had not been able to finance the litigation herself and was compelled to borrow Rs. 7,000 from him in order to provide herself with the necessary funds. But here we have Jafar Ali Khan stating that the lady had sufficient funds to finance her own litigation. There was no object ordinarily in her selling a portion of her claim. According to the explanation which she has not supported by evidence her motive is comprehensible, but according to Jafar Ali Khan there is no comprehensible motive for the execution of the deed.

The next point to be observed is the nature of the bargain. This lady had a right to sue for a dower of 25 lacs. It may be granted that she had not the slightest chance of recovering such a sum, for it would appear that at the time that Mehdi Begam brought her suit [*Suleman Kadr* v. *Mehdi Begum Surreya Bahu* (1)] Prince Suleman Qadr had only property worth Rs. 60,000 and an income for life of Rs. 2,940 a month. Nevertheless if this were a genuine transaction she was selling her rights very cheap. If Rs. 7,000 represented three-eighths of her dower the whole value of her dower was between 18 and 19 thousand rupees. We have it that Mehdi Begam whose dower had been fixed at ten lacs obtained Rs. 25,000. Why should the lady, who had means to finance the litigation, wish to get rid of a valuable claim for less than what it was worth when she did not want the money? The learned Counsel for the respondents is unable to answer that question.

I now come to the next point—the peculiar conduct of Jafar Ali Khan. Jafar Ali Khan was never a very well-to-do man. He has since become a bankrupt, but his insolvency has been due, it should be admitted, largely to his misplaced trust in his own agent. Be that as it may, if he had really paid Rs. 7,000 to the defendant-appellant he was not in a position to do without the money for a large number of years. He might during this period have been ready to let a settlement stand over owing to his friendly relationships with the lady. It is to be observed, however, that these friendly relationships apparently terminated a good many years ago, for we find him stating in 1915 (o. p. 12), "I and my wife are not on good and peaceful terms since 15 or 16 years and since that time we have been living separately." If he quarrelled with his wife he would hardly have such feelings of forbearance towards his mother-in-law as would prevent him suing for a just debt. If his story is true he had paid Rs. 7,000 and was kept without the interest of that money from 1887 onwards. Why did he never endeavour to substantiate his claim? He can give no reason. The so-called reason which he gives is not a reason. "I had already paid Rs. 7,000 to the first defendant and, therefore, I did not sue for recovery of the dower. I do not know why the first defendant did not sue for her share of the dower. There was no other reason for my not bringing the suit. It was not for want of means. Now I am without sufficient means, *i.e*, since I lost my case against Sadiq Ali Khan. I cannot say why I did not institute a suit prior to my losing the case against Sadiq Ali Khan." The learned Counsel for the respondents has endeavoured to show that Jafar Ali Khan could not have brought a suit on the basis of this deed until the death of Prince Suleman Qadr. His argument is that until Prince Suleman Qadir's death no suit had been brought for dower by the defendant-appellant, that the circumstances show that she was living affectionately with her husband and had abandoned all idea of suing for dower, and that unless she made a demand (which suggests she refused to do) Jafar Ali Khan was helpless. I do not agree with him there. If his contention is true (it is to be noted that it is his contention and not Jafar Ali Khan's), Jafar Ali Khan could have enforced the terms of the deed against the lady. He could

have gone into Court and said, "I have bought three-eighths of your dower on the understanding that you are going to get your dower by suit. You must make a demand if you have not done so already. If you refuse to make a demand you must repay me my money." It is not necessary for me to specify what his remedy would be, but he clearly had a remedy. He took no remedy. According to his own showing he let the matter slide.

It is clear that the bargain was not in the lady's interest. She had no reason for entering into such a bargain. The deed was drafted in her absence. The conduct of Jafar Ali Khan since its execution is against the theory that the transaction is genuine. There is further evidence as to the lady's non-comprehension of the contents of the deed. At the beginning of Jafar Ali Khan's examination-in-chief he said: "The sale-deed was executed at my house in Sarae Mali Khan in presence of Sadiq Ali Khan, Mohsin Ali Khan, Mohammad Ali Khan, myself and others whose names I do not recollect. Kazim Ali Khan was also there. My wife was also there. Mohabbat Rai was the scribe of the deed. It was registered at my place. The deed was read over by Abul Hassan Khan to the first defendant before its registration. Abul Hasan Khan was my *karindā*. He is dead. The first defendant after hearing the deed said, 'I have heard it.'

"Q. Was the document then explained to anybody?

"The defendants' Pleader objects to the question as leading. The question is no doubt a leading one and as such I do not allow it to be asked here in this form."

On his arrival the Sub-Registrar saw and read the document and then asked the first defendant if she heard it. She said 'Yes' and then the deed was registered."

Now the action of the learned Subordinate Judge in refusing to allow this leading question to be put was amply justified but subsequently he took somewhat inconsistent action. He asked the witness himself.—"What happened when the document was read over? Was there any necessity for its explanation?" In other words he put the leading question himself. The witness then said, "Yes. Some words were explained by Abul Hasan Khan who read the deed to defendant No. 1. The sale deed was read first by Abul Hasan and then by the Sub-Registrar before its registration. The Sub-Registrar did not explain the deed to the first defendant." Before I comment upon this I proceed with the evidence of Kazim Ali Khan.

Kazim Ali Khan deposed that he was present as a witness. He said that the document was read over to the defendant-appellant by Abul Hasan Khan, who then asked her whether she had sold a six-annas share out of her dower-claim to Jafar Ali Khan for Rs. 7,000. In reply she said, "Yes". Then the Sub-Registrar asked the defendant-appellant whether she fully understood that by the terms of the sale-deed she had sold a six-annas share out of her dower-debt for Rs. 7,000 and also read over the deed to her. The defendant appellant said that she understood the deed and agreed to its terms. All the time the defendant-appellant remained behind a *parda* close to the place where the Sub-Registrar was seated. This, it is to be observed, is a different story to what Jafar Ali Khan told. He said that the Sub-Registrar explained nothing, and merely read out the deed and according to the deed itself the contents of the deed were read over to the executant by Abul Hasan Khan on 19*th September* and the deed was registered on the 20*th*. The witness Kazim Ali Khan was apparently present on both days, but in his evidence he appears to say that everything took place on the second day. The witness went on to explain his opportunities for knowing the facts. He said, (o. p. 21) "I accidentally passed by the house of Jafar Ali Khan and seeing me, Sadiq Ali Khan called me in and asked me to attest the deed in the afternoon at about 2 P. M. I found the Sub-Registrar present and the sale-deed was in the hands of Abul Hasan Khan. Mohammad Ali Khan, Mohsin Ali Khan besides 4 or 5 other persons whose names I do not recollect had been present there besides the persons named above. On my arrival Sadiq Ali Khan asked me to witness the deed. I took it from Abul Hasan Khan and signed it It already contained the signatures of Mohammad Ali Khan and Mohsin Ali Khan as attesting witness when I signed it." If this statement is true, the statement in the

deed to the effect that it was executed on the 19th September is false, for he is clearly here referring to what happened on the 20th September. "After my signature I returned it to Sadiq Ali Khan. I did not read the deed before signing it. On my arrival Abul Hasan told me on enquiry as to what that document was that it was a sale-deed conveying a six-annas share out of defendant No. 1's dower-debt for Rs. 7,000. After that Sadiq Ali Khan asked me to attest it. I attested the deed and then left the place for my house." ....."I cannot say whether I remained there for more or less than 15 minutes. I left the place after the registration of the deed." A very short consideration will show that, if this witness is telling the truth at all, he came in, was shown something which he did not read, signed it without understanding it, and that is all that he knows about it. Now can it be said even if these witnesses are believed (I do not believe them) that the lady was in any position to know what she was doing? I do not consider that that question can possibly be answered in the affirmative. Thus in no circumstances can she as a *pardanashin* lady be bound by the terms of the deed. The learned Counsel for the respondents has, however, pressed that in any circumstances the lady received Rs. 7,000 and that if this suit is dismissed, she will have obtained Rs. 7,000 without making any return for it. He lays great stress—as he has every right to do—on the Registering Officer's endorsement with regard to the receipt of the consideration. If that endorsement stood alone and there was nothing suspicious about the circumstances his contention might be very strong, although it is to be noted that in the present suit there is no claim for damages of any kind. We are asked to enforce the transfer, not to set aside the deed and put the parties on terms. If there was no legal transfer, the suit ought to stand dismissed on the pleadings in spite of the fact that the plaintiffs have added the usual prayer that they should be allowed any relief to which they may be entitled on facts. But I have grave doubts as to whether any consideration did pass, although undoubtedly there is an entry in the endorsement that the lady stated that she had received the full consideration. **My reasons for this conclusion are as follows:—**

The consideration is divided into two parts —a sum of Rs. 3,000 stated to have been paid before registration and a transfer of two Government promissory notes for Rs. 4,000 at the time of registration. With regard to the first point Jafar Ali Khan is absolutely vague as to how the Rs. 3,000 were paid. He says that Sadiq Ali Khan paid the money out of his funds. "Whatever was done was done by Sadiq Ali Khan, although the money was paid in my presence in my house two or three days before the execution of the sale-deed. Defendant No. 1 wanted the money before and I paid it without asking for reasons.....I cannot say who paid the Rs. 3,000 but it was paid on my behalf." There is one remarkable feature here. If Rs. 3,000 had been paid as Jafar Ali Khan says, and the defendant-appellant had given him a receipt for the money, the receipt would have been in his possession and produced by him at the time of registration. But the Registering Officer says that the receipt of this illiterate lady (in other words, the piece of paper with her seal impressed on it) was produced by her, and no explanation whatever has been given of this circumstance.

With regard to the second item of Rs. 4,000, it is clear that two Government promissory notes standing in the name of Jafar Ali Khan were endorsed by him before the Registering Officer in favour of the lady. But a very peculiar circumstance has since been elicited. Much has been said already with regard to Sadiq Ali Khan. Sadiq Ali Khan is now dead. Sadiq Ali Khan was the confidential agent of Jafar Ali Khan. Jafar Ali Khan allowed Sadiq Ali Khan to manage the whole of his affairs and one day discovered that he had got nothing left. He then sued Sadiq Ali Khan in Suit No. 55 of 1913 for Rs. 71,366. He won his suit in the lower Court but it was dismissed on a point of limitation by this Court, and it is owing to this circumstance that Jafar Ali Khan is now insolvent. Jafar Ali Khan gave evidence in that case, and a copy of his deposition is on the record and was put to him in the present case. It is a very long deposition, in the course of which he goes through practically the whole of his financial history. He makes a reference in this long deposition to his financial

transactions with the defendant-appellant. He says: "I told defendant" (that is to say Sadiq Ali Khan) "to give notes worth Rs. 3,000 to my mother-in-law. Defendant gave her the said notes through me. My mother-in-law gave Rs. 3,000 for those notes to the defendant. I sold notes worth Rs. 4,000 to my mother-in-law, two notes. I took those notes from the defendant and sold them to her and got the money from her." This is the only financial transaction according to his statement with which he was ever engaged with the present defendant-appellant. Now this is a very remarkable fact. He says not one word about having purchased a portion of her claim for Rs. 7,000 but he states another transaction for exactly the same sum. He had sold her, he says, Government promissory notes worth Rs. 7,000 for Rs. 7,000 in two items, one of Rs. 3,000 and one of Rs. 4,000, By an amazing coincidence we find that in this case he now says that he bought a share in her dower and paid for it in two items, one Rs. 3,000 cash and the other by a transfer of two Government promissory notes for Rs. 4,000. This circumstance was put to him in the witness-box and he gives no explanation. The learned Subordinate Judge has brushed this point aside, because he says it is not in accordance with the pleadings of the defendant-appellant. There he is quite right, but it is possible for an old lady of eighty years of age not to give full effect in her pleadings to what happened some thirty years ago and the mere circumstance that the lady's pleadings do not bear out the point does not make the point a bad point in itself. There is only one difficulty about it, which is this. If that was so and this was a prior transaction, why was the endorsement kept waiting until the 20th September 1887? The learned Counsel for the appellant replies on that point that the parties were unbusiness-like people. The notes had been previously transferred, but no endorsement had so far been made, and so it was easy to give colour to the transaction by effecting the endorsement on that date. This is an ingenious explanation and possibly a true one. The circumstances of the case are such that I attach no value whatever to the admission of the receipt of consideration. The lady was, in my opinion, ready to answer any question in the affirmative. This terminates the matter as far as this appeal is concerned. Even if I had found that Rs. 7,000 genuinely passed, I should find that the plaintiffs had no cause of action. As I have already shown, there was no genuine transfer of the share in dower. The lady did not understand the transaction. She did not transfer her right to dower. She would on that hypothesis have borrowed Rs. 7,000 and failed to repay it. As I have already shown I find that she did not receive the money, but, supposing she did, she made no transfer of her dower. What right had Jafar Ali Khan on that? He had a right to recover damages. He never attempted to recover damages, though he had a right to sue for them. What has he transferred to the plaintiffs respondents? The mere right to sue for damages. Such a right cannot be transferred under the provisions of Act IV of 1882, section 6 (*e*)—*vide Abu Mahomed* v. *S. C. Chunder* (5).

For the above reasons I would allow this appeal and direct that the suit of the plaintiffs-respondents stand dismissed and that they should pay their own costs and those of the appellant in both Courts.

KANHAIYA LAL, A. J. C.—I agree with my learned colleague in the conclusion at which he has arrived, and wish only to add that the sale, so far as it was a sale of an actionable claim or of a right to a share in a dower-debt, had become barred by time under Article 103 of the Indian Limitation Act (IX of 1908) as against the estate of the late Prince Suleman Qadr on the date on which the Receiver of the estate of Jafar Ali Khan, insolvent, sold that actionable claim to the plaintiffs. The plaint does not allege any breach of contract. In claiming a remedy not against the debtor, by whom the actionable claim was payable, but against the vendor of it, the plaintiffs rely on Article 62 of the Indian Limitation Act, but the circumstances, in which the sale-deed was obtained from *Musammat* Shahrukh Ruqaiya Begam, if in fact it was understood by her, read with the subsequent conduct of Jafar Ali Khan, show

(5) 1 Ind. Cas. 827; 36 C. 345; 13 C. W. N. 384.

that no sale was really intended, and that the sale-deed, relied on by the plaintiffs, was fictitious and without consideration, and did not pass any title to the vendee. Had it been otherwise, it stands to reason that Jafar Ali Khan would not have, when in a state of pecuniary difficulties, allowed such a valuable right to lapse by reason of limitation and omitted to assert it till *Musammat* Shahrukh Ruqaiya Begam obtained a decree for her dower from the District Judge, which was confirmed by this Court.

I concur, therefore, in allowing the appeal and dismissing the suit with costs here and hitherto.

Appeal allowed.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 775 OF 1916.

March 12, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Smither.

SURENDRA NATH GOSWAMY AND OTHERS—CLAIMANTS—PETITIONERS

versus

RAJANI KANTA DAS—DECREE-HOLDER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 58 (1), *Proviso, applicability of, where Court has no jurisdiction to attach.*

The proviso to rule 58 (1), Order XXI, Civil Procedure Code, applies even to those cases where the Court without jurisdiction becomes possessed, of the property attached in execution by the usurpation of authority. [p. 447, col. 2.]

Rule against the order of the Munsif, 1st Court, Krishnagar, in Objection Case No. 23 of 1916.

FACTS—On 3rd August 1915 the opposite party brought a suit for Rs. 1,500 against one Anath Bandhu Pal in the Court of the Sub-Judge at Nadia. On the same day he applied to attach a sum of Rs. 2,000 due to the said Anath Bandhu Pal from the East Indian Railway, the sum being payable at Kamarkundu in the District of Hooghly. The Court passed an order calling on the defendant to show cause why he should not furnish security. In the meantime, attachment was ordered pending the defendant's showing cause. On the 6th August the Nadia Court asked the resident engineer at Kamarkundu to attach the sum but the said officer refused as the bills of the said Anath Bandhu were not then "squared up." On the 9th August the opposite party made an application to the Court to have the sum attached through the agent, but no order was passed on the application. The notice on the defendant to show cause why he should not furnish security, etc., was not served on the said Anath Bandhu. On the 22nd August Anath Bandhu assigned to the petitioners the monies due to him from the Railway authorities in part satisfaction of a decree which the petitioners had obtained against the said Anath Bandhu.

The Railway Company sent a cheque to the Court at Nadia for Rs. 874 on the 11th November 1915, but under what orders it did not appear from the record. On the 19th January 1916 the opposite party revived their application for attachment before judgment but the application was refused. On the 27th January the opposite party got an *ex parte* decree against the said Anath Bandhu. On the 29th January he applied for endorsement of the cheque for Rs. 874 over to him in part satisfaction of the decree. On 31st January the Court allowed the application and fixed 24th February 1916 for orders. On the 23rd February the petitioners preferred a claim under Order XXI, rule 58, against the monies ordered to be paid to the opposite party. The Court rejected the application, being of opinion that it was presented too late. Against this order the petitioners moved and obtained a Rule under section 115 of the Code of Civil Procedure.

Babu *Rupendra Coomar Mitter* (with him Babu *Asiranjan Chatterjee*), for the Petitioners.—The order of payment is *ultra vires*. There was no attachment of the sum of Rs. 874 in fact or in law. The Court passed a provisional order under Order XXXVIII, rule 5, Civil Procedure Code, but the further order contemplated under Order XXXVIII, rule 6, was never passed. In fact no notice to show cause was served on Anath Bandhu. There is nothing on the record to show how the Railway Company could have sent the money to the Nadia Court. Even if there had been an attachment before judgment in fact, it was without jurisdiction. The Court at Nadia could not attach a fund at Hooghly. Referred to section 136, Civil Procedure

Code, *Begg Dunlop & Co.* v. *Jagannath* (1), *Abdul Gafur* v. *Albyn* (2), *Surendra Nath* v. *Bansi Badan* (3).

The attachment was also not valid in law, because the prohibitory order was not affixed to the Court house. Referred to Order XXI, rule 46, Order XXXVIII, rule 7, *Satya Charan Mukherji* v. *Madhub Chunder Karmokar* (4).

Babu *Tarakeswar Pal Chowdhury* (with him Babu *Nabin Chunder Pal*), for the Opposite Party.—The learned Judge below rejected the application under Order XXI, rule 58, as there was delay in presenting the application. There being that finding the High Court ought not to interfere in revision.

Babu *Rupendra Coomar Mitter*.—The finding would be binding if the Court had jurisdiction in this matter. Here the Court usurped jurisdiction over the money and, therefore, the finding is not at all binding. See *Surendra Nath* v. *Bansi Badan* (3).

[FLETCHER, J.—The English cases cited in that judgment do not support the conclusion arrived at. Those cases were quite different, *e.g.*, where the Criminal Court usurped jurisdiction in divorce matters.]

That may be, but on principle there is no distinction. There may be want of jurisdiction for three causes:—(*i*) if the subject-matter be beyond the local limits, (*ii*) if it be beyond the pecuniary limits, (*iii*) if the nature of the action be such as to exclude the jurisdiction of a particular Court. The cases cited there may fall under the third head and this case under the first head. Anyhow there was want of jurisdiction. See *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (5).

Here there was no attachment in fact. Therefore, when the Court assumed in law that which had no existence in fact and on that foundation passed a particular order which it could not otherwise have passed, it assumed a jurisdiction which it in fact had not. Referred to *Maharaja of Burdwan* v. *Apurba Krishna Roy* (6), *Shew Prosad Bungshidhar* v. *Ram Chunder Haribux* (5).

JUDGMENT.

FLETCHER, J.—This Rule must be discharged. The objection or claim was preferred admittedly under Order XXI, rule 58 of the Code. The Judge has found as a fact that the claim or objection was designedly or unnecessarily delayed; and the proviso to rule 58 prohibits the Court from enquiring into the claim or objection when the claim or objection was designedly or unnecessarily delayed. It is said that there are decisions of this Court to the effect that that proviso can have no application in certain particular cases, where the Court has become possessed of the money in execution by what has been called the usurpation of authority. I do not agree. No decision can cut down the express and clear words used by the Legislature, that where the Court considers that the claim or objection was designedly or unnecessarily delayed no investigation shall be made. That was the preliminary issue for the Court to try as to whether there had been a delay of the nature mentioned in the proviso; and, directly the Court found that there had been such a delay, it was unnecessary for the Court to enter into or consider the other matters that have been complained of. In my opinion, the Rule fails and must be discharged with costs, one gold *mohur*.

SMITHER, J.—I agree.

Rule discharged.

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(1) 11 Ind. Cas. 417; 39 C. 104; 16 C. W. N. 402; 14 C. L. J. 228.
(2) 30 C. 713; 7 C. W. N. 821.
(3) 36 Ind. Cas. 457; 24 C. L. J. 533.
(4) 9 C. W. N. 693.
(5) 23 Ind. Cas. 977; 41 C. 323 at p. 339.
(6) 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 58.

CALCUTTA HIGH COURT.
CIVIL APPEAL NO. 45 OF 1916.
January 23, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

BEATRICE ALICE DE STE CROIX—APPELLANT

versus

PHILIP DE STE CROIX—RESPONDENT.

Divorce Act (IV of 1869), ss. 12, 13, 14—Condonation, what amounts to—Collusion—Desertion on part of husband—Wilful neglect or misconduct.

Condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances and is

a question of fact, not of law. It is a blotting out of the offence imputed, so as to restore the offending party to the position which he or she occupied before the offence was committed; consequently mere forgiveness is not condonation, in order to amount to condonation it must completely restore the offending party, and must be followed by cohabitation. [p. 448, cols. 1 & 2; p. 452, col. 2.]

Where after the wife's confession of adultery, the husband allows her to occupy her bed (which is a separate bed) in the same room and to live in the house as usual for some days, the conduct of the husband cannot be regarded as condonation of the adultery. [p. 448, col. 2; p. 452, col. 2.]

A collusion within the meaning of section 13 of the Indian Divorce Act is held to exist where the initiation of the proceedings for dissolution of marriage is procured, or its conduct provided for, by agreement or bargain between the spouses or their agents. [p. 453, col. 1.]

A mere refusal by the husband, without reasonable cause, of the matrimonial bed does not constitute desertion on his part or such wilful neglect or misconduct as conduces to adultery, and is not an adequate ground for dissolution of marriage. [p. 450, col. 1; p. 451, col. 1; p. 455, cols. 1 & 2.]

Appeal from the judgment of Mr. Justice Greaves, dated the 11th April 1916.

Mr. *A. Avetoom* (with him Mr. *A. K. Ghosh*), for the Appellant.

Mr. *P. L. Buckland* (with him Mr. *Surita*), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal against the judgment of Greaves, J., given on the 11th April 1916, by Beatrice Alice De Ste Croix, who was the respondent in divorce proceedings brought against her by her husband on the ground of her adultery with the co-respondent.

The learned Judge granted a decree *nisi* for the dissolution of the marriage. The adultery was admitted by the respondent, and the appeal was based on allegations:—(1) that the petitioner had condoned the adultery complained of, (2) that the petition was presented or prosecuted in collusion with the respondent, (3) that the petitioner had been guilty of such wilful neglect or misconduct as had conduced to the adultery and (4) that the petitioner had deserted the respondent without reasonable cause.

As regards the first point the learned Judge held that the petitioner had not condoned the offence.

Condonation is a conclusion of fact, not of law, and means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven; see *Bernstein* v. *Bernstein* (1), per Lopes, L. J., at page 303, or as stated by the Judge ordinary in his direction to the Jury in *Keats* v. *Keats* (2), condonation means a blotting out of the offence imputed so as to restore the offending party to the same position he or she occupied before the offence was committed. The forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation and this must be shown by a re-instatement of the wife in her former position, which renders proof of conjugal cohabitation or the restitution of conjugal rights necessary. Section 14 of the Indian Divorce Act, 1869, provides that no adultery shall be deemed to have been condoned within the meaning of the Act unless where conjugal cohabitation has been resumed or continued.

The facts relied upon in this case to show condonation are that when the confession of adultery was made on the night of Friday the 12th November 1915, the wife was allowed to occupy her bed (which was a separate bed) in the same room as her husband and to live in the house as usual until the 17th November (Wednesday.) That inasmuch as the husband and wife had not had any marital intercourse for 9 years previously, the husband, by allowing the wife to occupy the bedroom and to live in the house, had reinstated the wife in her former position and had completely forgiven her.

I do not think this is the right conclusion.

The husband at once, as soon as he was informed of the adultery on the night of Friday, 12th November, asserted his intention to take proceedings to protect the interests of his children and himself. He had been told that his wife was going to have a child (she was in fact confined on the 23rd November), he was obviously very sorry for her, and he had his two girls living in the house.

This happened on Friday, Monday was a holiday on which Solicitors' offices were

(1) (1893) P. 292; 63 L. J. P. 3; 6 R. 609; 69 L. T. 513.

(2) (1859) 1 Sw. & Tr. 334; 28 L. J. Mat. 57; 5 Jur. (N. S.) 176; 7 W. R. 377.

closed, he went to see his Solicitors on Tuesday, and in consequence of their advice he decided she must leave the house though he was anxious to give her shelter in some part of his house, and she consequently left his house on Wednesday, the 17th.

I see no reason for interfering with the learned Judge's finding of fact on this part of the case.

As to what happened afterwards, the facts relied upon by the learned Counsel for the appellant were that at the wife's request she was allowed to visit the husband at his house on his birthday, that she dined with him and the family on that day, and on Christmas day, that he kissed her, that on several occasions she breakfasted with him and had other meetings, and the letters which the respondent wrote to the petitioner are also relied on. In considering the events of this period it must be remembered that on 25th November 1911 the wife wrote, "you say you have forgiven me and yet, Phil, you are taking the matter up," evidently referring to the husband's determination to proceed for divorce: Proceedings were in fact begun on 16th December 1915 and the letters written by the respondent are full of appeals to the husband to discontinue the proceedings and take her back, and may be summarised in her own words used in evidence, "he said he had forgiven me. I did not accept that because he was going on with the suit. What I wanted was, that he should forgive me and take me back. Although he had forgiven me to some extent, he had not forgiven me to the extent that he was willing to take me back." I need not refer to the rest of the facts which are fully dealt with in the learned Judge's judgment: It is sufficient for me to say I see no reason for interfering with his decision of fact that the petitioner had not condoned the respondent's adultery.

As regards the second point, *viz.*, collusion—it is based on two allegations:—

First, that the petitioner had agreed that if the respondent would not defend the case, he would marry her again after the expiration of six months from the decree.

The learned Judge came to the conclusion that the respondent was labouring under a delusion in this matter, and found as a fact that there was no understanding or agreement that if the respondent did not defend the suit, the petitioner would remarry her.

The learned Judge has seen the witnesses and accepted the petitioner's evidence on this part of the case, and on the materials before the Court I am not prepared to interfere with his finding of fact.

Second, it was alleged that it was agreed between the parties that if the wife would not defend the suit, the husband would be a friend to her and would not allow her tc be on the streets and would, if there was no condition against it, give her welcome in his house. This matter is not dealt with by the learned Judge, nor is it referred to in the pleadings and judging from the very careful manner in which he has dealt with the various points, I am constrained to think that much reliance, if any, was not placed on it at the trial. The husband denied that his promise to be a friend to her was conditional upon her not defending the case. I refer to the concluding sentences of the learned Judge's judgment, and I think it is clear that the petitioner was anxious that she should not defend the suit to avoid publicity and scandal, and at the same time intended to help as far as he could the woman who had been his wife for so many years.

The proceedings were in fact defended from the outset, and I find no sufficient ground for holding that the proceedings were either instituted or prosecuted in collusion.

As regards the third point, *viz.*, wilful neglect or misconduct conducing to the adultery.

The allegations relating to this point were :—

(1) that the petitioner had wilfully abstained from marital intercourse with the respondent for a period of about nine years, although there was no physical cause for this and he had no aversion to her,

(2) that he had gone his own way and the wife had done the same.

As regards the first allegation, the mere fact that the husband refrained from marital intercourse, in my judgment, cannot by itself be held to be such wilful neglect or misconduct as conduced to the adultery.

DE STE CROIX *v.* DE STE CROIX.

In *Forster* v. *Forster* (3) Lord Stowell, speaking of a case in which a husband was alleged to have withdrawn himself from his wife's bed, said:

"This species of malicious desertion is a ground of divorce in some countries—certainly not so here—and still less will it justify a wife, in a resort to unlawful pleasures that lawful ones are withdrawn. It is not, however, to be considered as a matter perfectly light in the behaviour of a complaining husband that he has withdrawn himself without cause and without consent from the discharge of duties that belong to the very institution of marriage, and, if he has done so, he ought to feel less surprise if consequences of human infirmity should ensue."

And in *Synge* v. *Synge* (4), the President of the Probate Division and Admiralty Division, in dealing with a case where the wife had refused marital intercourse to the husband, said: "I do not say that the wife has been guilty of conduct conducing to his misconduct within the meaning of the 31st section of the Act, because it appears to me that though no doubt a wife, who behaves as the petitioner in this case behaved, is to a certain extent, as Lord Stowell said in the case to which I have referred, morally responsible and cannot hold herself altogether free from responsibility—still I think it is a very long step—and one I cannot take to say that a wife who refuses matrimonial intercourse has conduced to the adultery of her husband: a husband has no right to commit adultery because she refuses him. I think that would be a low and mean view to take of it. She may perhaps be morally responsible but I do not say that she has been guilty of conduct conducing to his adultery."

I adopt the principle of these decisions and hold that the mere fact that the husband refused marital intercourse to the wife by itself is not such wilful neglect or misconduct as conduced to the adultery.

But it is argued that in this case the refusal of marital intercourse did not stand by itself: for the petitioner had wilfully neglected his wife and allowed her to go her own way while he went his.

The evidence on this point is as follows:— The wife said she had reason to complain of her husband's friendliness for her sister and on one occasion followed him to her house, and after describing what she saw, *viz.*, her husband holding her sister's hand, she said that the next day her husband said, "I do not want you to follow me. You go your own way and I go mine." This was five or six years before the proceedings for divorce.

The Judge's note of the petitioner's evidence is as follows:—"For six years prior to November 1915 I went my way and she went hers: you might say for twelve or fifteen years it has alway been so. We each did as we liked without consultation for twelve or fifteen years." The husband's remark to which the wife speaks may have been in temporary anger at finding himself followed by his wife, but it remains to consider the state of affairs as described in the petitioner's evidence: The wife lived with her husband in the same house, slept in the same room, and was one of the family with her daughters, she had all the comforts of the home, and, under such circumstances, I agree with the learned Judge that the fact that the parties went their own way, in the sense that they had their own friends and interests, cannot be said to be conduct conducing to adultery, even when coupled with the abstinence by the husband from marital intercourse.

Lastly, as to the alleged desertion without reasonable cause: This was based on the same ground as the allegation of wilful neglect conducing to adultery, *viz*, the fact that the husband had abstained from marital intercourse and that he had allowed the wife to go her own way.

The inference which the learned Judge drew from the evidence was that both parties assented to that course, and, if that be a correct inference, it is an answer to the allegation of desertion.

The wife's evidence is as follows:—

"I had no marital intercourse with my husband eight or nine years. I resented this conduct, and he saw my manner towards him."

(3) (1790) 1 Hag. Con. 144 at p. 154; 161 E R. 504.
(4) (1900) P. 180 at p. 207; 69 L. J. P. 106; 83 L. T. 224; 64 J. P. 454; 16 T. L. R. 388; and in Court of Appeal (1901) P. 317; 70 L. J. P. 97; 85 L. T. 83; 17 T. L. R. 718.

DE STE CROIX *v.* DE STE CROIX.

There is no suggestion that the wife ever asked that marital intercourse should be resumed and that he refused, and we are left in the dark as to what her manner was. I am inclined to think that if the wife had had any real resentment against her husband's abstention for all these years, she would have taken some step, more unequivocable than a mere manner, to let him know what her real feelings were, and I think the learned Judge was justified by the evidence in coming to the conclusion which is above mentioned. But whether this conclusion is correct or not, I do not think the facts in this case would justify a finding of desertion on the part of the petitioner.

In *Synge* v. *Synge* (4) the facts were that the husband and wife had been separated for some considerable time: the husband wished to live with his wife as her husband if marital rights were allowed to him: the wife was willing to live with him, but not as his wife, and only if such marital rights were not insisted on.

The learned President held on these facts that the husband did not desert his wife but rather that she deserted him: or, if he did desert her, he did so with reasonable excuse within the meaning of the Act. I gather the learned President came to the conclusion that the separation, which undoubtedly took place between the parties, was due to the wife's conduct, for which she had no reasonable excuse, and that, therefore, she was guilty of desertion. The facts in this case are materially different; the abstaining from marital rights by the husband did not result in the separation of the parties: on the contrary they continued to live together as before, they slept in the same room, though in separate beds, and there is no evidence that during all the nine years the wife ever requested the renewal of marital intercourse, or that the husband refused. The evidence amounts to nothing more than that the husband abstained from marital intercourse, and that, though living together, the parties went their own ways, and followed their own interests, and I am not prepared to hold that under such circumstances the petitioner was guilty of desertion without reasonable cause within the meaning of the Act.

For these reasons, in my judgment, the appeal should be dismissed. On a former application made before the hearing of the appeal, this Court decided that it ought not, under the circumstances of this case, to make an order that the husband should make provision for the costs of the wife's appeal, and I see no reason for acceding to the application which has now been made on behalf of the appellant that the Court should order the respondent to pay her costs of the appeal.

The respondent's Counsel not asking for costs, the appeal is dismissed; no order as to costs.

MOOKERJEE, J.—This is an appeal by the wife against a decree *nisi* for dissolution of marriage, made on the petition of the husband on the allegation of adultery. The facts material for the determination of the questions in controversy are fairly clear on the evidence. The parties were married on the 8th May 1894 They have had three children, two of whom survive, the eldest born on the 16th July 1895 and the youngest born on the 27th October 1905. The parties have lived as husband and wife ever since their marriage, but there has been no marital intercourse during the last nine years; though they used to sleep in the same room, they had different beds. How this was brought about, cannot be determined with absolute certainty; the husband admits that it was due neither to physical causes nor to an aversion to her. An incident is, however, mentioned in the evidence, which may possibly furnish an explanation. The wife was jealous of the visits paid by her husband to her younger sister; on one occasion, she followed him, and when she entered her sister's house, found her husband sitting alongside her sister holding her hand. The next day after this incident, the husband said to the wife, "I don't want you to follow me, you go your own way and I go mine." They continued, however, to live together. The husband was absent from home for a month from the 12th October to the 11th November 1915. The day after his return, which was a Friday, his mother in law informed him that his wife was about to be confined and gave the name of the co-respondent. On this discovery that his wife had committed adultery, he said that he would take proceedings to protect himself and his children. After return home of his wife the same evening, he obtained from her a written confession of her misconduct. She slept in the

house that night and the four following nights, either in his bedroom or with her mother, but it is admitted that he had no intercourse with her. As Monday was a holiday, he consulted his Solicitors on Tuesday the 15th November; as the result of advice which he received from them, the wife was made to leave his house on the 17th November. She was confined six days later. On the 16th December he instituted the present proceedings against his wife and the co-respondent for dissolution of marriage, Mr. Justice Greaves has made a decree *nisi*, and the propriety of that decree is now called in question not on the ground that adultery has not been proved, but for four special reasons mentioned in sections 12, 13 and 14 of the Indian Divorce Act, 1869.

Sections 12, 13 and 14 of the Indian Divorce Act, when analysed, show that to an application for dissolution of marriage on the ground of adultery presented by a husband under section 10, there are four absolute defences and five discretionary defences. The four absolute defences are (1) denial of facts alleged in the petition; (2) connivance; (3) condonation; (4) collusion. The five discretionary defences are (1) adultery of petitioner; (2) unreasonable delay in presenting or prosecuting the petition; (3) cruelty to the other party to the marriage; (4) desertion or wilful separation from the other party, before the alleged adultery, without excuse; (5) wilful neglect or misconduct, such as to have conduced to the adultery complained of. The appellant relies upon the third and fourth of the absolute defences and the fourth and fifth of the discretionary defences. It will be convenient to examine the validity of these objections in the order stated.

As regards condonation, reliance is placed upon the conduct of the husband both before and after the date on which the wife left the house. It has been argued that as the husband suffered his wife to remain in the house after he had been apprised of her misconduct, he must be deemed to have condoned the adultery. It has further been contended that as he is proved to have allowed his wife to return to the house on several days, to have breakfasted with her, to have dined with her on his birthday, on the Christmas day and on New Year's day, and also to have kissed her, the same inference is considerably strengthened. I am unable to give effect to this contention as well founded. As Sir C. Creswell explained in *Peacock* v. *Peacock* (5), condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances and is a question of fact, not of law. This was emphasised in *Keats* v. *Keats* (2), where Lord Chelmsford held that condonation is a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed; consequently, mere forgiveness is not condonation; to be condonation it must completely restore the offending party and must be followed by cohabitation. This view is reproduced in section 14 of the Indian Divorce Act, which requires that no adultery shall be deemed to have been condoned unless where conjugal cohabitation has been resumed or continued. The expression "conjugal cohabitation" need not be given a restricted meaning, for as Lord Chelmsford puts it in *Keats* v. *Keats* (2), to say that condonation requires conjugal cohabitation or connubial intercourse leaves the nature of the cohabitation or intercourse to be adapted to the varying conditions and circumstances of different parties [*Campbell* v. *Campbell* (6), *Anichini* v. *Anichini* (7), *Seller* v. *Seller* (8), *Bernstein* v. *Bernstein* (1)]. Much stress has been laid on two decisions of the House of Lords, *Lord Cloncurry's* case (9) and *Miller's* case (10). The first of these cases shows that the fact that the husband allowed the wife to live in his house after discovery of her misconduct did not disentitle him to a decree for dissolution, when reasonable grounds were assigned for not turning her out immediately on discovery of her infidelity. The second case does not assist the contention of the appellant in any way because the proceedings were discontinued and the bill was abandoned: the facts proved were that the husband, though apprised of his wife's misconduct, nevertheless suffered her to remain in his house for three weeks

(5) (1858) 1 Sw. & Tr. 183; 27 L. J. Mat. 71; 6 W. R. 866.
(6) Deane 285 at p. 288.
(7) (1839) 2 Curt. 210.
(8) (1860) 1 Sw. & Tr. 482; 28 L. J. Mat. 99; 5 Jur. 686; 8 W. R. 5.
(9) (1811) Macqueen H. L. Prac. 606.
(10) (1821) Macqueen H. L. Prac. 627.

thereafter, and they dined together for three days after the disclosure. No special circumstances were made out to explain this conduct on the part of the husband. On the other hand, the decision in *Hall* v. *Hall* (11) shows that the husband need not be "unnecessarily harsh" towards his wife on discovery of her infidelity to entitle him to escape the bar of condonation; this view was affirmed on appeal. *Hall* v. *Hall* (12). As Sir Francis Jeune observed in the case just mentioned, the true position is that if with full knowledge of his wife's misconduct, a man says, I wish to treat my wife just as if it had never happened, he cannot afterwards sue for relief on the ground of the adultery which he has condoned; he cannot blow hot and cold. Now, can it be really suggested that the husband has done so in this case? The answer must obviously be in the negative. From the very moment of the discovery of the misconduct, the husband announced his intention to have recourse to legal proceedings, and he has throughout persisted in that determination He may have treated her kindly and considerately, but he certainly did not intend to restore her to her marital rights. The argument of the appellant ignores the distinction between condonation and forgiveness. Condonation imports forgiveness, but the reverse is not necessarily true; forgiveness is not sufficient, for the reason that the injured party may conclude to forgive the offender and at the same time withhold a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation or intercourse. In my opinion, the defence of condonation cannot be sustained.

As regards collusion, the argument is based on two allegations, *first*, that the husband had promised to re-marry the appellant after the expiry of the statutory period of six months (section 57), if she did not defend the case; *secondly*, that the husband agreed, if she did not oppose the application, to be friendly to her and to provide for her in his house if there was no legal bar. As regards the first allegation, Mr. Justice Greaves has not accepted the testimony of the appellant and I see no reason to doubt the correctness of his conclusion. As regards the second allegation, it is substantially borne out by the evidence. It is thus necessary to consider whether the petition has been presented or prosecuted in collusion within the meaning of section 13 of the Indian Divorce Act. As observed in *Gethin* v. *Gethin* (13) collusion implies an *agreement* or *understanding* between the parties; in other words, collusion is held to exist where the initiation of the proceeding for dissolution of marriage is procured or its conduct provided for by *agreement* or *bargain* between the spouses or their agent. [*Lloyd* v. *Lloyd* (14), *Jessop* v. *Jessop* (15)]. In the present case, there was no understanding or agreement between the parties. No doubt, the husband suggested to the wife that she should not oppose the application, but he did so to avoid publicity, and also on the ground that in view of her confession it would be absurd for her to defend the suit. There was no intention to withhold any relevant evidence from the Court. In these circumstances, it is impossible to sustain the defence of collusion. As Lopes, L. J., explained in *Butler* v. *Butler* (16), the object of the special provision with regard to collusion is to compel the parties to come into the Court of Divorce with clean hands; it is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent their blinding the eyes of the Court in any respect, to oblige them so to act as to enable the Court to be in a position to do justice between the parties [*Bacon* v. *Bacon* (17), *Hunt* v. *Hunt* (18)]. On this principle it has been held that the bar of collusion applies, even though the parties concur in getting up a true case [*Midgley* v. *Wood* (19)] or even if the facts suppressed, though pertinent and material, would not have been sufficient to establish the counter-charge [*Hunt* v. *Hunt* (18)]. Similarly, it was ruled in *Churchward* v *Churchward* (20) that if the

(11) (1891) 64 L. T. 837.
(12) (1891) P. 302; 65 L. T. 206; 60 L. J. P. 73.
(13) (1861) 31 L. J. Mat. 43.
(14) (1859) 1 Sw. & Tr. 567; 30 L. J. P. 97.
(15) (1861) 2 Sw. & Tr. 301; 30 L. J. P. 193; 4 L. T. 308; 7 Jur. (N. S.) 609; 9 W. R. 640.
(16) (1890) 15 P. D. 66; 59 L. J. P. 25; 62 L. T. 344; 38 W. R. 390.
(17) (1877) 25 W. R. 560.
(18) (1877) 47 L. J. P. 22; 39 L. T. 45.
(19) (1860) 30 L. J. P. 57.
(20) (1895) P. 7: 64 L. J. P. 18; 71 L. T. 782, 43 W. R. 380; 11 R. 626.

initiation of a divorce suit be procured and its conduct provided for by agreement (specially if abstention from defence be a term), this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld. It is impossible to bring the present case within the principle thus enunciated, because there was no compact not to defend, and there was no intention to conceal material facts from the Court.

As regards desertion without excuse, the contention is based on the circumstance that the petitioner had deliberately abstained from marital intercourse with the respondent for nine years without any reason to justify such conduct on his part. Reference has been made to the decision in *Synge* v. *Synge* (4) in support of the proposition that refusal of marital intercourse without excuse constitutes desertion in law. In my opinion, this contention is too broadly formulated and is not supported by the decision mentioned. In that case, the wife refused to submit to marital intercourse with her husband; he left her in consequence and subsequently committed adultery. The wife then petitioned for divorce on the ground of adultery and desertion. The Court refused the petition for dissolution of marriage. Sir Francis Jeune held in substance that a wife who, without cause, refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him, if in consequence he refused to live with her. It is important to remember that under section 27 of the Matrimonial Causes Act, 1857, it is necessary for the wife when she petitions for dissolution of marriage to prove adultery coupled with desertion without reasonable excuse on the part of the husband. No doubt, there are observations in the judgment which may tend to support the view that the wife is herself in such circumstances guilty of desertion without reasonable excuse; but I do not think the judgment can be taken as an authority for the broad principle that refusal of marital intercourse without excuse constitutes by itself desertion in law sufficient to justify a decree for dissolution of marriage. The question now in controversy has been the subject of elaborate investigation by the Courts of the United States and has led to considerable divergence of judicial opinion upon the construction of Statutes of substantially the same scope as the Matrimonial Causes Act, 1857, and the Indian Divorce Act, 1869. The prevailing view is that the term desertion as used in the Divorce Statutes does not include the mere unreasonable refusal of one spouse to have with the other matrimonial intercourse which, in the words of Bigelow, C. J., in *Southwick* v. *Southwick* (21), "would be merely a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract" [*Fritts* v. *Fritts* (22), *Pfannebecker* v. *Pfannebecker* (23), *Reynolds* v. *Reynolds* (24)]. Typical statements of the conflicting views may be found in the judgments of Peters, C. J., in *Stewart* v. *Stewart* (25) and of Mc Gill, Ch., in *Watson* v. *Watson* (26). The view of Peter, C. J., amplified is that marriages were encouraged (by Eclesiastical Law) for reasons of public policy and morality. If one party was impotent, that is, incapable of sexual intercourse, the marriage was held voidable, for the other party was not to be held in an unnatural relation, repugnant to sex, injurious to health and promotive of adultery. In our age and country, marriage is encouraged for the propagation of the race and the nurture and education of children in a home as well as the prevention of licentiousness; and the State has no active interest in preserving a marriage where these ends and purposes are defeated. If the impotence of a party defeats the purpose of marriage, it must be conceded that a wilful, continued, and unjustifiable refusal of sexual intercourse will do so, for what is the difference to the complaining party whether the other will not or cannot consent to

(21) (1867) 97 Mass. 327; 93 Am. Dec. 95.
(22) 138 Ill. 436; 28 N. E. 1058; 14 L. R. A. 687; 32 Am. St. Rep. 156.
(23) 133 Iowa 425; 110 N. W. 618; 119 A. S. R. 608; 12 Ann. Cas. 543.
(24) (1910) 68 W. Va. 15; 69 S. E. 381; Ann. Cas. 1912 A. 889.
(25) 78 Maine 548; 57 Am. Rep. 822.
(26) 52 N. J. Eq. 349.

marital intercourse? Chancellor Mc Gill, on the other hand, argues as follws: "It would degrade the marriage relation to hold that it is abandoned when sexual intercourse only ceases. The lawfulness of that intercourse is, perhaps, a prominent and distinguishing feature of married life, but it is not the sum and all of it. The higher sentiment and duty of unity of life, interest, sympathy and companionship have an important place in it, and the thousand ministrations to the physical comforts of the twain, by each in his or her sphere, in consideration of the marriage obligation and without ceaseless thought of pecuniary recompense fills it up. These latter factors may possibly to some extent exist in other relations of life but not in completeness. They are necessary to the perfect marriage relation. My opinion is that our Statute means that divorce may be had when substantially all of the duties and amenities shall have been abandoned by the guilty party, wilfully, continuedly and obstinately, for two years and not until then. In other words, the desertion must be complete, not partial; and when the party accused remains in discharge of any duties which rise in value above mere pretence and form, the desertion which the Statute contemplates does not exist; that is, the deserted party must be deprived of all real companionship and every substantial duty which the other owes to him or her." Upon a careful consideration of these conflicting views, I am unable to accept the conclusion that a mere refusal of the matrimonial bed constitutes desertion and furnishes adequate ground for dissolution of marriage, though text writers of repute have strenuously maintained that position (Bishop's New Commentaries on Marriage, Divorce and Separation, Volume I, sections 1676-1686; Nelson on Divorce, Volume I, section 71). I hold accordingly that the plea of desertion as a bar cannot be supported.

As regards the plea of wilful neglect or misconduct such as has conduced to the alleged adultery, the contention is based on the ground that when a husband has refused marital intercourse to his wife without reason, his conduct may be deemed to conduce to her adultery. Reference has been made in this connection to the decision in *Dixon* v. *Dixon* (27). But there is weighty authority, based on obvious good sense, against this view. I need refer only to the decision of Sir Francis Jeune in *Synge* v. *Synge* (4), where he quoted with approval the well-known observation of Lord Stowell in *Forster* v. *Forster* (3) "that this species of malicious desertion is a ground of divorce in some countries, certainly not so here, and still less will it justify a wife in a resort to unlawful pleasures that lawful ones are withdrawn." This is consistent with the observation of Sir C. Creswell in *Rowe* v. *Rowe* (28): "there is no doubt, after the case of *Orme* v. *Orme* (29), that although this Court enforces conjugal cohabitation it does not pretend to enforce marital intercourse; the reasons why it does not embark in such an attempt are sufficiently obvious." I hold accordingly that the conduct of the husband in this case cannot be held to have been such as conduced to the misconduct of the wife. This plea like the others must be overruled as unsustainable.

On these grounds I agree that the decree *nisi* must be confirmed and this appeal dismissed.

Appeal dismissed.

(27) (1892 67 L. T. 394.
(28) (1865) 4 Sw. & Tr. 162; 34 L. J. P. 111; 12 L. T. 639; 11 Jur. (N. S.) 568; 13 W. R. 1048.
(29) (1824) 2 Addam. 384.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 395 OF 1916.

June 8, 1917.

Present:—Mr. Lindsay, J. C.

SURAJ BARAN SINGH—PLAINTIFF—APPELLANT

versus

PRATAB BALI SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Delivery of property—Possession.

The delivery contemplated by section 59 of the Transfer of Property Act is delivery of property contemporaneous with the execution of the deed. [p. 456, col. 2.]

Appeal from the decree of the District Judge, Gonda, dated the 28th July 1916, confirming the order of of the Munsif, Utraula (Gonda), dated the 17th June 1916.

Mr. *St. C. Thompson* holding brief of Mr. *H. K. Ghosh*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for Respondent No. 1.

JUDGMENT.—The appellant, who was the plaintiff in the Court of first instance, cannot succeed in this case. The suit was for ejectment and was brought against two defendants, Pratab Bali Singh and Jangal Bali Singh. The plaintiff based his case upon a document bearing date the 23rd of July 1904, executed in his favour by the second defendant. That document is a mortgage-deed. It sets out that the executant Jangal Bali Singh had borrowed a sum of Rs. 8 from the plaintiff and had hypothecated certain land by way of security. It was one of the terms of the contract that if payment was not made by the borrower on the due date possession of the land was to be delivered over to the plaintiff. According to the allegations in the plaint possession was delivered to the plaintiff under the bond, and his story was that he had been put out of possession by the defendant No. 1 with the connivance of or at the instigation of the second defendant. The Courts below have dismissed the suit, being of opinion that the claim was not enforcible, the reason being that the bond relied upon was not registered. The learned Judge points out that the document was executed subsequent to the 11th of March 1904, the date on which section 59 of the Transfer of Property Act was amended. Under the section as it stands now, when the principal money secured is less than Rs. 100 a mortgage may be effected either by a registered instrument signed and attested or, except in the case of a simple mortgage, by delivery of the property. It has been found by both the Courts, and the finding is one of fact, that the plaintiff did not get possession of the property before the year 1315 *Fasli*, that is, some three years subsequent to the date of the execution of the bond. In these circumstances I think it is clear that the learned Judge was right in holding that the document sued on by the plaintiff required registration, and as it is not registered the consequence is that the claim for possession cannot be enforced. It has been argued here that the delivery of possession was postponed by agreement of the parties and that consequently it ought to be held that as a matter of law the deed was really not one which became enforcible until the time fixed for delivery of possession. It seems to me that this argument is untenable. Under section 59 one of two things is contemplated, either a registration and attestation of the mortgage-bond or delivery of possession contemporaneous with the execution of the deed. I am satisfied that the decision of the Court below is correct and that the deed sued upon in this case cannot be enforced so as to entitle the plaintiff to a decree for possession. The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 884 OF 1915.

May 11, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

BARODA PROSAD ROY CHOWDHURY

—DEFENDANT—APPELLANT

versus

Rai MANMATH NATH MITRA *Bahadur*

—PLAINTIFF—RESPONDENT.

Evidence – Criminal Procedure Code (Act V of 1898), s. 145, proceedings under and order therein, whether relevant—Appeal, second—Error of Judge in criticising evidence of witness on wrong footing.

The facts of a previous proceeding under section 145, Criminal Procedure Code, and the order passed therein are relevant in a suit between the same parties for recovery of possession of the land on declaration of title, but the reasons for the order are not relevant. [p. 457, col. 1.]

Where the Judge of the lower Appellate Court stated in his judgment that only one of three material witnesses was examined whereas, as a matter of fact, all the three were examined:

Held, that the error of the Judge in criticising the evidence of one of the witnesses on the footing that the other two had not been examined went to nullify his decision based upon the evidence of that witness. [p. 457, col. 2.]

Appeal against the decree of the Additional District Judge, 24-Perganas, dated the 22nd January 1915, confirming a decision of the Subordinate Judge, Alipore, dated the 21st December 1906.

Sir *Rash Behari Ghose* (with him Babus *Sarat Chandra Roy Chowdhury*, *Hemendra*

Chandra Sen and *Satya Charan Sinha*), for the Appellant.

Babus *Narendra Chandra Bose* and *Satyendra Nath Mitter*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant against a judgment of the learned Additional District Judge of the 24-Perganas, affirming the decision of the Subordinate Judge at Alipore. The suit was brought to recover possession of a small piece of land. The question is whether it belongs to the plaintiff or to the defendant's estate. The case has had an unfortunate history. It was heard by a former District Judge of the 24-Perganas and an appeal was preferred to this Court on the 4th August 1911. The appeal was heard and the case was remanded to the lower Appellate Court. Clearly, the litigation has been pending for many years and as regards a small piece of land of this nature the Court would be reluctant to disturb the decision of the learned Judge of the lower Appellate Court, unless there are strong and cogent reasons why the judgment cannot be maintained. The case has been argued before us on these points: First of all, the learned Vakil for the appellant, relying on a statement in the judgment of this Court directing the remand, has urged that certain proceedings under section 145 of the Code of Criminal Procedure were not relevant under the provisions of the Indian Evidence Act and that the learned District Judge in this case has relied upon those proceedings under section 145, Code of Criminal Procedure. I do not agree with that view. The learned Judge was bound to consider as a part of the history of the case, as he has done, these proceedings under section 145, Code of Criminal Procedure. One cannot shut out those proceedings under section 145, Code of Criminal Procedure, and leave that part of the story blank. It is quite obvious that the learned Judge has not relied on the reasons for the order; but the facts of the proceedings and the order, it seems to me, must be taken into consideration as a part of the history of the case.

The next point that has been relied on is that the learned Judge of the Court of Appeal below has misdirected himself in his judgment, because although he states that according to the defendant's story there were three persons owning shops on the land in dispute, only one Nilkamal has been examined as a witness in the case. The learned Judge was clearly in error in so stating. The record shows that all these three shopkeepers were examined and the learned Judge, when he was criticising the evidence of one of these shopkeepers on the footing that the other two had not given any evidence, clearly was in error and this goes to nullify the decision based upon the evidence of Nilkamal.

The next point that was urged was about the observations of the learned Judge about a public school that was erected without doubt by the Court of Wards, when in possession of the defendant's estate, on a portion of the property. That school, there seems to be no doubt from the plaintiff's own pleadings, was erected by the Court of Wards apparently out of the monies coming to their hands as the manager of the defendant's estate. The learned Judge seems to consider that, because under the constitution of the school the committee of management is formed from the residents of both the estates, therefore, the public at large own the school house. That does not follow at all. The school house may have vested and belonged to the defendant's estate, although the committee of management is formed from the residents of both the estates to carry on the school. It seems to me quite clear that the reasons that the learned Judge gives for disposing of this point about the erection of the school house on a portion of the property by the Court of Wards whilst in possession are quite inadequate.

Next it is said that it has not been found that the plaintiff was within twelve years of the institution of the suit in possession of the property. It seems to me quite clear that the plaintiff was not found to be in possession within twelve years of the suit, because the view that is taken is that the plaintiff tried to set up a *hat* on the land but was resisted and proceedings were taken under section 145 of the Code of Criminal Procedure and that these proceedings terminated in favour of the defendant. It is quite impossible to say that an attempt to take possession within twelve years prior to the suit which proved unsuccessful was sufficient

possession to support the plaintiff's suit. It is said also that the property was of a nature of which possession could not be enjoyed, that it was really waste land and, therefore, the principles that are laid down as regards waste lands ought to be followed and the possession must be taken to follow the title. There is no finding in this case as to whether this was waste land or not. There were clearly some buildings on the property at the time. It appears to be so from the judgment. These principles as to waste lands cannot apply to cases where buildings have been erected on the property. In any case, the Judge ought to have given the facts from which it could be found that either the plaintiff was in possession within twelve years prior to the suit or that the property was waste or continued to be waste and, therefore, the possession must be taken to go with the title. I think that, although the case has already been once remanded, the judgment of the learned Additional District Judge is not sufficient to dispose of the case and that, therefore, his judgment ought to be set aside and the case must be remanded to the lower Appellate Court to have the appeal re-heard. Costs will abide the result of the re-hearing of the appeal.

NEWBOULD, J.—I agree.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1055 OF 1912.

April 3, 1917.

Present:—Mr. Justice N R Chatterjea and Mr. Justice Newbould.

AMRITA LALL ROY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI B. C. of 1859), ss. 2, 3, 6, 7, 33, 58—Revenue sale, dates in connection with—"Arrears of revenue", meaning of—Collector's power to purchase estate at highest bid, after making bid of Re. 1—Notices under ss. 6 and 7, whether can be issued by Sub-Deputy Collector for Collectors—"Ground declared and specified," meaning of—Non-service of notice under s. 7, whether invalidates sale—Finding of fact or law.

Per *Curiam*.—An instalment of revenue payable on account of the January *kist*, if unpaid, does not become an arrear of revenue until the 1st of February next following. [p. 459, col. 2; p. 465, col. 1.]

There are three dates to be considered in connection with sales under Act XI of 1859. The *first* is the *kist* or instalment date fixed by the *kistibandi* of each estate. The *second* is the date fixed by the Board of Revenue for each district as the latest day in each quarter for payment of all arrears, and *lastly*, the date fixed for the sale. The question whether an instalment of payment remaining unpaid constitutes an arrear of revenue within the meaning of section 2 of the Act is a question of law and cannot, therefore, be decided by the statement of a witness that it was an arrear of revenue within the meaning of the Act. [p. 459, col. 2; p 460, col. 1.]

Per *Chatterjea, J.* (*Newbould, J.*, dissenting).—Under section 58 of Act XI of 1859, the Collector having made a bid of Re 1 cannot afterwards purchase the estate on behalf of the Government at the highest amount of the bid made by another bidder. [p. 462, col. 1.]

The purchase of an estate so made by the Collector is in contravention of the provisions of section 58 of the Act and cannot confer a legal right on the Government under the purchase. Therefore, the proprietor can recover the estate by a suit in the Civil Court brought for the purpose, even though in his grounds of appeal to the Commissioner such an objection to the sale was not specified. [p. 463, col. 1.]

The words "unless such ground has been declared and specified" in section 33 of Act XI of 1859 do not include the reasons for the ground. Therefore, where an objection to a revenue sale was taken in an appeal to the Commissioner, on the ground that the purchase by the Collector under section 58 of the Act was illegal, the same objection may be taken in the Civil Court though the reason given for it in the appeal may not be the same as that which is urged in the suit. [p. 462, col. 2.]

Where an estate being put up to auction under Act XI of 1859, the peon of the Collector made a formal bid of Re. 1 on behalf of the Government in the presence of the Collector, who did not forbid it:

Held, that as the Collector allowed his peon to make the bid of Re. 1 it must be taken to be his bid, and whether it was a matter of form or not, the legal consequence must ensue, so that the Collector could not purchase that estate on behalf of the Government under section 58 of the Act at the highest bid made by another bidder. [p. 462, col. 1.]

Quære.—Whether notices of sale under Act XI of 1859 issued and signed by the Sub-Deputy Collector "*for the Collector*" invalidate the sale?

Quære.—Whether non-service of notice under section 7 of the Act is not a material irregularity in the conduct of the sale so as to invalidate the sale?

AMRITA LALL ROY *v.* SECRETARY OF STATE.

Per *Newbould*, *J.*—Where an estate is put up to auction under Act XI of 1859, the commencement of the bidding according to the usual practice with a bid of Re. 1 for Government does not prevent the Collector from taking advantage of the provisions of section 58 to purchase the estate on behalf of the Government at the highest bid made by another bidder. [p. 466, col. 1.]

There is a sufficient compliance with the provisions of the Act if the Collector or other authorised officer settles or directs that notices of sale under sections 6 and 7 of the Act should be issued and the notices are signed on his behalf by the subordinate officer to whom the duty of signing them has been delegated. Where such notices were signed by a Sub-Deputy Collector "*for the Collector*", a legal presumption arises that the issue of the notices was directed by the Collector. [p. 466, col. 2.]

Appeal against the decree of the District Judge, Faridpur, dated the 27th January 1912, confirming a decision of the Subordinate Judge, Faridpur, dated the 9th July 1910.

Mr. *Chakerbutty*, Babu *Surendra Chandra Sen* and Babu *Khetra Mohan Ghose* for Babu *Satis Chandra Bhattacharji*, for the Appellants.

Babus *Ram Charan Mitra* and *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.

N. R. CHATTERJEA, J.—This appeal arises out of a suit to set aside the sale of a revenue paying estate under Act XI of 1859. The estate was sold for arrears of revenue for the "January *kist*" of 1908 on the 25th June 1908, and was purchased by the Government for Rs. 50.

The plaintiff No. 1, who was the owner of the largest share in the estate, and the plaintiff No. 2 who was the *patnidar* preferred appeals to the Commissioner, but the appeals were dismissed for default. Thereupon the present suit was instituted for reversal of the sale. The plaintiffs alleged that the estate was worth Rs. 6,000, and it has been found that it is worth Rs. 3,000.

The Courts below dismissed the suits and the plaintiffs have appealed to this Court.

The first contention raised on behalf of the appellants is that the sale was without jurisdiction, as there was no arrear of revenue within the meaning of section 2 of Act XI of 1859, for which the estate could be sold. Section 2 lays down what an "arrear of revenue" is. It says: "If the whole or a portion of a *kist* or instalment of any month of the era according to which the settlement and *kistibandi* of any *mahal* have been regulated be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue". The *kistibandi* of the *mahal* has not been produced in the case. But the various *robokaris* and notices issued by the Collector [Exhibits 6 (*a*), 6 (*b*), 6 (*c*), 4 (*a*), 4 (*b*), 4 (*c*), 4 (*d*), c 1, d 1, to d 4 referred to in the judgment of the Court of first instance] mention Rs. 89-15-9 as arrears of the January *kist* of 1908. If the amount was on account of the January *kist*, it could not, having regard to the provisions of section 2 of the Act, become an "arrear of revenue" until the 1st of February. The learned District Judge says that the last date of payment of the January *kist* was the 12th January. That obviously is wrong. There are three dates to be considered in connection with sales under the Act. The *first* is the *kist* or instalment of payment fixed by the *kistibandi* of each estate That *kist*, if it remains unpaid on the first day of the following month, becomes an arrear of revenue (section 2). The *second* is the date fixed by the Board of Revenue for each district as the latest day (in each quarter) for payment of all "arrears" (section 3), and *lastly*, the date fixed for the sale. The 12th January, no doubt, is one of the dates fixed by the Board of Revenue under section 3 of the Act for payment of arrears of revenue in the district. But if the amount of Rs. 89-15-9 was due for the January *kist*, it did not become an arrear of revenue until the 1st February. It is contended on behalf of the respondent that the expression "January *kist*" in the judgment of the District Judge was a misuse of the words and that what was meant was the *kist* of revenue for a period before January, the last date of payment of which was the 12th of January, in other words, that it was an arrear of revenue payable on that date, and we were referred to the copy of the *Touzi* Ledger of the Collectorate in support of the contention.

The Ledger shows that Rs. 89-15-9 was payable on the 12th January 1908. If, however, the amount was for the January *kist* as the various *robokaris* and notices issued from the Collectorate show, the Ledger would not, in the absence of the *kistibandi*, help the respondent, because the revenue for

the January *kist* did not become an arrear of revenue on the 12th January, and the entry in the register would be in contravention of the provisions of section 2 of the Act. The learned Government Pleader relied on the passage in the judgment of the Subordinate Judge where he refers to the statement of the son of plaintiff No. 2, who said that Rs. 89-15 9 were the arrears of revenue for which the *mahal* was sold, and that the documents of the estate were with the defendant No. 3 and observes that the *patta* ought to have been produced by the plaintiff.

But the estate was sold for Rs. 89-15-9, the alleged arrears of revenue. Whether it constituted an "arrear of revenue" within the meaning of section 2 is a question of law to be decided in the case. The statement, therefore, of the witness cannot prove that it was an arrear of revenue within the meaning of the Act. As for the plaintiffs not producing the *bundobasti patta*, it does not appear that the *patta* was either with the plaintiffs or even with the defendant No. 3, all that the witness said was that the documents of the estate were with the defendant No. 3. The plaintiffs have produced various papers issued from the Collectorate in which the arrear is expressly described as being for "January *kist*," and I think they are entitled to rely upon them. In the 9th paragraph of the written statement the defendant stated that the yearly revenue of the estate is payable in four *kists* and the sum of Rs. 89-15-9 for which the estate was sold was due in respect of the December *kist*. The plaintiffs, as already stated, produced a number of papers stating that the arrears were for the "January *kist*," and the notifications of sale issued under section 6 of the Act described it as arrears of January *talab*. If the words "January *kist*" or "January *talab*" were loosely used, as it is contended on behalf of the respondent, nothing was easier for the defendant than to produce the *kabuliyat* executed by the plaintiffs and which would at once have shown the *kists*. In the absence of the *kistibundi*, the plaintiffs are entitled to rely upon the description appearing in the papers issued from the Collectorate and there is no reason why we should hold that the expression "January *kist*" was used in the papers issued from the Collectorate in a loose way, or that it was used in a sense different from its plain meaning. I have referred to the evidence on the point, only because the learned Government Pleader based his arguments upon it, but we are not entitled to go into evidence in second appeal. Whatever might have been the opinion of the Subordinate Judge, the learned District Judge distinctly refers to the "January *kist*," and as far as the finding of fact goes, we are bound by it. He, no doubt, says that the last date for payment of the "January *kist*" was the 12th January, and that there "unquestionably was an arrear". That, however, is a question of law to be decided with reference to the provision of section 2 of the Act, and is not a finding of fact. In *Haji Buksh Ilahi* v. *Durlav Chandra Kar* (1) the proprietor of an estate stipulated for payment of the whole revenue within 28th June every year, and the revenue remained unpaid on 25th June. The Collector directed the estate to be sold and it was accordingly sold on 16th March 1903 for non-payment of revenue for the June instalment of 1902. The Judicial Committee held that the revenue was not in arrear until the 1st July 1902 and the estate could not be sold till 23th June 1903. I am of opinion that there was no arrear of revenue within the meaning of the Act on the 12th January 1908 and the sale was, therefore, without jurisdiction [see *Balkishen Das* v. *Simpson* (2)]

The next contention is that the purchase by the Collector was in contravention of the provisions of section 58 of the Act and is, therefore, wholly invalid. It appears that at the first sale which took place on the 25th March 1908 there were three bidders and one Chandra Kant Mitra bid Rs. 135 and deposited the 25 per cent. of the purchase-money, but as he defaulted to pay the balance, there was an order for re-sale and it took place on the 25th

(1) 16 Ind. Cas. 821; 16 C. W. N. 842; 23 M. L. J. 206; 12 M. L. T. 385; (1912) M. W. N. 1005; 14 Bom. L. R. 1063; 10 A. L. J. 452; 16 C. L. J. 620; 39 C. 981 (P. C.).

(2) 25 I. A. 151 at p. 158; 25 C. 833; 2 C. W. N. 513; 7 Sar. P. C. J. 363; 13 Ind. Dec. (N. S.) 543 (P. C.).

June 1908. On that date there were three bidders present. The Collector commenced the bid at Re. 1. The highest bid was by one Rajani Kant, and he bid Rs. 50, the Collector enquired whether there were further bids, and as no one offered higher, the estate was purchased by the Government at Rs. 50.

Now, under section 58, the Collector may purchase the estate on behalf of the Government only in two cases. The *first* is where there is no bidder and then he can purchase the estate for Re. 1. Here there were three bidders present, and he, therefore, could not bid. The *second* is where there are bidders, and the highest bid is insufficient to cover the arrears and those accruing up to the date of sale, and in such a case the Collector may take or purchase the estate on account of the Government at the highest amount bid. As pointed out by Brett and Mookerjee, JJ., in the case of *Halim-un-nissa Chowdhrani* v. *Secretary of State* (3) "that the highest bid here referred to is one not arrived at by competition between the Collector and ordinary bidders." They observed: "It appears to be clear that, as in the first class of cases, the Collector is to take no action till he has ascertained that there are no bidders, so also in the second class of cases, the Collector is to take no action till he has ascertained that the highest amount offered by the bidders present is insufficient to cover the amount realizable. We do not think it would be a reasonable construction of section 58 to hold that it is open to a Collector to compete with the other bidders and after he has been defeated and the highest bid determined against him, that he may turn round and claim the benefit of the second part of section 58. If the Collector chooses to enter the ring as an ordinary bidder he must be treated as such, and in order to succeed he must outbid the other intending purchasers. If, on the other hand, he desires to take advantage of the second part of section 58, he must wait and see whether the highest bid is or is not sufficient to cover the demand realizable. In the case before us the first bid of Re. 1 offered by the Collector was clearly not one under the first part of section 58 inasmuch as there was at least one person, the agent of the defaulter, ready to offer bids. When, therefore, the second bid of Rs. 10 was offered, if the Collector desired to purchase the property, the only course open to him was to advance his own bid, like any ordinary bidder. We must hold accordingly that the procedure followed by the Collector and the purchase made by him were not in accordance with the provisions of section 58 of the Revenue Sale Law." The learned Judges further observed that the sale "has been brought about by what must be regarded as an abuse of the provisions of section 58, if indeed it may be regarded as a colourable compliance therewith. The consequence has been that a valuable property has passed into the hand of the Government for a nominal sum while the defaulting proprietor still continues liable for the unsatisfied arrears."

It is contended, however, on behalf of the respondent that in the present case the bid of Re. 1 was the customary (*mamuli*) or *sarkari* bid and that the finding of the lower Appellate Court is that the Collector did not enter the ring as a bidder and the bid was made by the peons as a matter of form. But in the first place, as pointed out by the Subordinate Judge, the peon made a bid of Re. 1 in the presence of the Collector who did not forbid the peon to make that *sarkari* bid, and that the bid of Re. 1 could not have been a *mamuli* one since there was no such bid on the 25th March. The learned Subordinate Judge was of opinion that there was no doubt "that the Collector's acts were illegal as they were not in accordance with the provision of section 58 of Act XI of 1859 and that the sale is tainted by illegality."

The learned District Judge, no doubt, holds that the Collector did not enter the ring as a bidder because, in his opinion, the bid by the peon was made by him as a matter of form. The finding, however, cannot be said to be a finding of fact. The Statute does not recognize any bid of Re. 1 as a matter of form. It

(3) 17 C. 1036; 8 C. W. N. 880.

expressly lays down the case where the Collector may purchase the estate for Re. 1. The peon surely did not make the bid of Re. 1 against the order of the Collector, and if notwithstanding the express provision of the law, the Collector allows his peon to make the bid of Re. 1 it must be taken to be his bid, and whether it be a matter of form or not, the legal consequences must ensue. It may be pointed out that in the case of *Halim-un-nissa* v. *Secretary of State* (3) cited above, there was also a bid of Re. 1 on both the dates of sale. The bids must have been made by the peon and not by the Collector himself, and I am unable to see the force of the observation that the bid in the present case by the peon was not made on behalf of the Collector. If the bid was made as a matter of form that itself shows that it was made on behalf of the Collector, and not by the peon on his own behalf. But the bid sheet itself (which is signed by the Collector himself) shows that the Re. 1 bid was on behalf of the Government. The bids by the Government are shown thus: "Government 1·50" *i.e.*, the bids on behalf of the Government were Re. 1 and Rs. 50. The entry of Rs. 50 is obviously incorrect, because there was no bid of Rs. 50 on behalf of the Government, the estate was only purchased at the highest bid of Rs. 50 by the Collector on behalf of the Government. But as the estate was purchased by the Government for Rs. 50, it appears to have been mentioned as a bid on behalf of the Government, and at the foot of the bids, it was stated that it was "sold to Government for Rs. 50 only." Under the circumstances the mere fact that Rs. 50 was mentioned as a bid cannot detract from the effect of the entry of Re. 1 as a bid on behalf of the Government. The facts in this connection are stated in the judgments of the Courts below, and it is open to us to decide whether the purchase by the Collector was or was not illegal. I am of opinion that the Collector offered the bid of Re. 1, and that being so, he could not purchase the estate on behalf of the Government at the highest amount of bid made by another bidder, Rajani Kant. The purchase, therefore, was in contravention of the provisions of section 58 of the Act.

The question arises, however, whether the ground was taken in the appeal to the Commissioner. The learned Subordinate Judge apparently was under the impression that it was not when he observed: "It is, therefore, that I remarked that it was a pity that the illegality was not declared and specified in the grounds of appeal since section 33, Act XI, precludes the plaintiffs from raising new grounds in the plaint." The ground was not taken in the appeal by the plaintiff No. 1, although he took the general ground that the sale was not held in conformity with the provisions of Act XI of 1859. But it is not open to the plaintiff, in a suit to set aside a revenue sale, to urge, under cover of a general ground taken in his appeal before the Commissioner, specific irregularities other than those urged before the Commissioner. See *Gobind Lal Roy* v. *Ramjanam Misser* (4) and *Sheikh Mohammed Aga* v. *Jadunandan Jha* (5). The ground, however, was taken in the appeal by the plaintiff No. 2 to the Commissioner. The sixth ground of his appeal to the Commissioner runs as follows: – "That it was illegal on the part of the Collector of Faridpur to bid and purchase the property for Rs. 50 on behalf of the Government under section 58 of Act XI of 1859, inasmuch as it does not appear that the bidders had refused to increase their bids." It is contended on behalf of the respondent that the ground now taken on the point was not taken before the Commissioner in that form. That is true. But the invalidity of the purchase on behalf of the Government under section 58 was taken, though the reason given for it is not the same as that which is urged in the present suit. The words "declared and specified," however, would hardly include the reasons for the grounds, and I am of opinion that the objection to the purchase by the Collector under section 58 of the Act was sufficiently taken, though not in the precise form urged in the present case.

(4) 21 C. 70; 20 I. A. 165; 17 Ind. Jur. 536; 6 Sar. P. C. J. 356; 10 Ind. Dec. (N. S. 679 (P. C.).

(5) 10 C. W. N. 137; 2 C. L. J. 325.

Besides the purchase by the Collector being in contravention of the provisions of section 58, no legal rights accrued to the Government under the purchase, and in that view, it need not have been specified in the grounds of appeal to the Commissioner.

It is contended on behalf of the respondent that even if the purchase by the Collector was in contravention of the provisions of section 58, the only person affected was Rajani Kant whose bid of Rs. 50 was not accepted, and that the plaintiff did not sustain any substantial injury by reason of the irregularity complained of. But the amount of the arrears for which the estate was sold was Rs. 89-15 9 (up to December 1907 according to the defendant) and there must have been arrears up to the date of the sale (25th June 1908). The estate was sold for Rs. 50 only, so that it was insufficient to cover the amount for which the plaintiff was liable, and even after the sale of his estate, he is liable for the balance of the arrears, and that certainly is substantial injury to him by reason of the irregularity.

The third contention is that the notification of sale under sections 6 and 7 of the Act not having been signed by the Collector or other officer authorised to hold sales under the Act, the sale proceedings are void. The notices were signed by one B. K D. Gupta, a Sub Deputy Collector (and not a Deputy Collector as stated in the judgment of the Court of Appeal below). It appears from the Collector's general order-book that he was authorised by the Collector to sign processes, and the learned District Judge is of opinion that there is no provision in the Act requiring notices to be signed by the Collector himself, nor is there any rule prohibiting delegation of his duty by the Collector to any of his subordinates. If the issuing of notifications includes the act of signing the notices, the Sub-Deputy Collector certainly was not an authorised person, because under the rules framed by the Board of Revenue it is the Commissioner of Revenue who can authorise any officer subordinate to him to legally exercise the power of a Collector to hold sales of land, and the word "Collector" in section 61 of the Act includes a Deputy Collector or other officer exercising by the authority of Government the powers of a Collector or a Deputy Collector. B.K.D. Gupta was not a Deputy Collector, and he does not appear to have been authorised by the Government to exercise the power of a Collector or a Deputy Collector, nor does he appear to have been authorised by the Commissioner to hold sales under the Act, and the fact that he was authorised by the Collector to sign processes would not authorize him to sign notices of sale under the Act, if that is to be done by the Collector or other officer authorized to hold sales under the Act. We were referred by the learned Counsel for the appellant to a passage in the judgment in the case of *Baijnath Sahai* v. *Ramgut Singh* (6) where Lord Davey observed: "It is unnecessary for their Lordships to point out the necessity there is when power is given to a public officer to sell the property of any of Her Majesty's subject that the forms required by the Act, which are matters of substance, should be complied with." These observations, however, were made in connection with the certificate procedure under the Public Demands Recovery Act, in which there is a distinct provision that the certificate is to be signed by the Collector himself. There is no such provision in Act XI of 1859. The Collector or other officer authorized to hold sales under the Act is required to issue notification, and it is contended on behalf of the respondent that it is sufficient if he settles or directs that notices should be issued and the power of signing the notices may be delegated to a subordinate officer, as was done in the present case by the general order of the Collector.

It is pointed out, on the other hand, on behalf of the appellant, that there is no evidence to show that it was the Collector who directed the notices to be issued in the present case. Here the notices were signed by the Sub-Deputy Collector *for the Collector*, but there is no provision in the Act authorizing the Collector to delegate this function to a subordinate officer. As, however, the appellants must succeed on other grounds, I do not think it necessary to decide finally whether such delegation is permissible.

(6) 23 C. 775 at p. 787; 23 I. A. 45; 7 Sar. P. C. J. 1; 12 Ind. Dec. (N. S.) 514.

The last contention is that the notices under section 7 were served in the Pangsha Police Station, whereas the lands of the estate are situated within the Police Station of Baliakandi where no notices were served at all.

This appears to be so from the returns submitted by the serving peon. The learned District Judge overruled the contention on the ground that the third issue did not specifically raise this point. But the issue should be read with reference to the pleadings in the suit. The plaint (paragraph 5) distinctly raised the question, and the 3rd issue as framed was sufficiently wide to cover it. It was also expressly taken in the grounds of appeal to the Commissioner. The return submitted by the peons bear out the contention, and under the circumstances the Court below ought not to have thrown out the contention. The learned Judge refers to the fact that the ruling in *Rajrani Dasi* v. *Gonesh Prosad* (7) had not been made when the plaint was filed or the issues were framed and observes that "before that ruling the High Court had never made a distinction between admissibility of evidence of service in a wrong *mahal* after the grant of a sale certificate under the Revenue Sale Law. I am, therefore, not inclined to believe that the appellants intended specifically to put this matter in issue."

But as stated above, the plaint distinctly raised it and the non-publication of notices under section 7 referred to in the issue can have reference only to the non-publication complained of in the plaint. The plaintiffs might not have been able to rely on the point if the case in *Rajrani Dasi* v. *Gonesh Prosad* (7) had not been decided in that way before the trial in the present case took place, but that would be no ground for overruling the contention if it was set up in the plaint.

The learned Judge observed that there is a conflict of decisions between that case and the case of *Sheikh Mohammed Aga* v. *Jadunandan Jha* (5) as to the effect of section 8 of Act VII of 1858. But the question whether that section would prevent the plaintiffs from proving that the notice was served in a wrong *mahal* was not considered in the case of *Sheikh Mohammed Aga* v. *Jadunandan Jha* (5). It is unnecessary, however, to discuss this question, because assuming that section 8 of Act VII of 1868 does not cover a case of service of notice in a wrong *mahal*, it has been laid down in several cases that the object of the notification under section 7 of Act XI of 1859 being to give notice to the *raiyats* not to pay rent to defaulting *zemindars*, non-service of such notices cannot occasion any loss to the defaulter and cannot be a ground for invalidating the sale. Had the matter been *res integra*, I would have been prepared to hold that although the direct object of the notice under secton 7 might be to give notice to the *raiyats* not to pay rent, such notice has the effect of giving great publicity to the fact that the sale is going to take place, and making it known to the *zemindars* and other people in the neighbourhood who would naturally be more interested in purchasing the estate, and the non-service of the notice under section 7 is a material irregularity. As, however, a contrary view has been taken in a series of cases [see *Gabind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (8), *Mahomed Azhar* v. *Raj Chunder Roy* (9), *Azimuddin Patwari* v. *Secretary of State for India* (10), *Sheikh Mohammed Aga* v. *Jadunandan Jha* (5)], it must be held that the non service of notice under section 7 does not invalidate a sale.

The plaintiffs, however, I think, are entitled to succeed on the first two grounds stated above. The sale must, therefore, be set aside as invalid, and the suit decreed accordingly, by setting aside the decrees of the Courts below.

NEWBOULD, J.—This is a second appeal by the plaintiffs against a decree dismissing a suit to set aside a sale of an estate for arrears of revenue under the provisions of the Bengal Land Revenue Sales Act, XI of 1859.

The first point urged at the hearing of the appeal is based on the decision of the Judicial Committee in the case of *Haji Buksh Elahi* v. *Durlav Chandra Kar* (1). It is contended that in the present case as in that case, the estate was put up to sale for an arrear of revenue before

(7) 5 Ind. Cas. 650; 14 C. W. N. 626; 37 C. 407.

(8) 13 C. L. R. 1.

(9) 21 C. 354; 10 Ind. Dec. (N. S.) 867.

(10) 21 C. 360; 10 Ind. Dec. (N. S.) 871.

the latest date fixed for its payment and that the sale was consequently without jurisdiction. The liability of an estate to sale under the Act depends on three dates. The first is the date on which the instalment of revenue is payable under the terms of the settlement. If it is not paid on this date, under section 2 of the Act it does not become an arrear of revenue until the first of the following month which is the second date. And though the unpaid sum has become an arrear of revenue the estate is not liable to sale under the Act unless this arrear of revenue remains unpaid on the latest day of payment. This, the third date under section 3 of the Act, has to be determined for each district by the Board of Revenue. In the Faridpur district where the estate is situated the dates fixed under section 3 as the latest days of payment are 28th June, 28th September, 12th January and 28th March of every financial year. The estate was first put up to sale on the 25th March 1908. It was subsequently re sold on account of default by the purchaser but this is irrelevant to the present argument. Whether the sale on the 25th March 1908 was with or without jurisdiction depends on whether there was or was not an "arrear of revenue" as defined by section 2 previous to the 12th January 1908, the "latest day of payment" under section 5 previous to the sale. Whether there was such an arrear depends on whether there was an instalment of revenue due according to the terms of settlement before the 1st January. The difficulty in this case arises from the fact that at the trial neither party have any evidence as to the terms of the settlement and there is consequently no finding as to the actual date when the unpaid instalment of revenue was primarily payable. The plaintiffs-appellants rely on certain *robokaris* and notices issued by the Collector—Exhibits 6 (*a*), 6 (*b*), 6 (*c*), 4 (*a*), 4 (*b*), 4 (*c*), 4 (*d*), C 1, D and D1 to D4, which mention the January *kist* of 1908. But as remarked by the learned Subordinate Judge, some of these documents also refer to January 12th, 1908, as the latest day of payment. Relying on this and on the fact that the plaintiffs have not produced the Government *band bisti pattah*, he has held that what is called the January *kist* was in reality the December *kist* as alleged in the written statement, for which the latest date of payment was the 12th January. The learned District Judge in his appellate judgment has not gone into these details, but has held that the last date of payment for the January *kist* was the 12th January. As his is a judgment of affirmance he must be held to have supported the finding of the learned Subordinate Judge that the sum of Rs 89-15-9, which both Courts find to have been arrear of revenue on the 12th January, was payable for the December *kist*. The findings of the two lower Courts amount to this that what might be expected to happen, has happened. As the proprietor is safe provided he pays his revenue before the latest day of payment, the earlier date on which it is payable under the terms of settlement has been lost sight of in practice and the later date on which the *kist* must be paid is called the *kist* date. That is to say, the *kist* referred to as the January *kist* is not the *kist* payable in January under the *kistibandi* but the *kist* for which the latest day of payment falls in January. Whether an unpaid instalment of revenue is an arrear of revenue is a question of law, so far as it depends on the application of the provisions of Act XI of 1859. But whether the unpaid amount Rs. 89-15 9 was payable according to the terms of the settlement in December 1907 or January 1908 is a question of fact. The Court of first instance has found that it was payable in December and as this finding has not been reversed by the lower Appellate Court, it is binding on us as a Court of second appeal. On this finding it follows that that there was an "arrear of revenue" on the 1st January 1908 and as this arrear was unpaid on the "latest day of payment" the 12th January 1908, the sale on the 25th March 1908 was not without jurisdiction. I, therefore, hold that the first contention of the appellants fails.

The second point taken by the appellants is that as the bidding opened with a bid of Re. 1 on behalf of the Secretary of State, the Collector was not legally entitled to purchase the property for Government at the highest bid that was made. It is found by the lower Appellate Court that when the sale was finally held a peon opened

the bidding with a bid of Re. 1 as a matter of form according to custom. Even if it be held that this was a bid on behalf of the Collector, I cannot see why this should deprive the Collector, of his statutory right under section 58 of Act XI of 1859 to purchase the estate on account of the Government at the highest amount bid, if the highest bid be insufficient to cover the arrears. The real meaning of the preliminary bid of Re. 1 is that the Collector gives notice that he intends to exercise his powers under section 58. If there is no bid the Collector would purchase the property at Re. 1 under the first provision of the section. If there were a bid of Re. 1 only the Collector would still purchase the property at that price under the second provision of the section. Consequently it would be useless for an intending bidder to make a bid not exceeding Re. 1 and the calling out by the peon of a Government bid of Re. 1 merely announces that. The facts of the case of *Halim-un-nissa Chowdhurani* v. *Secretary of State* (3) can be distinguished from the facts of the present case and cannot be held to lay down as a principle of law that the commencement of the bidding according to the usual practice with a bid of Re. 1 for Government prevents the Collector from taking advantage of the provisions of section 58. If the sale is conducted fairly as was done in the present case, I can see no objection to this practice.

I am further of opinion that the plaintiffs appellants are prevented by the provisions of section 33 of the Act from raising this contention. This was not declared and specified in the appeal of either plaintiff to the Commissioner. The only ground that has any reference to section 58 is the sixth ground in the appeal to the Commissioner of the second plaintiff Surja Kumar Lahiri, the *patnidar* of the estate sold. This ground is as follows: "That it was illegal on the part of the Collector of Faridpur to bid and purchase the property for Rs. 50 on behalf of Government under section 58 of Act XI of 1859 inasmuch as it does not appear that the bidders had refused to increase their bid." Had this ground been set out with the omission of the final portion commencing from the words "inasmuch as", it might perhaps be held to cover the point now urged. But when a ground which has been found to be untenable was specified, an entirely different ground, though covered by the preliminary ground, must be held to have been excluded. As pointed out by me in my judgment in *Shamanta Radha Charan Das* v. *Sharfuddin Hossein* (11), the effect of the Privy Council decision in the case of *Gobind Lal Roy* v. *Ramjanam Misser* (4) is to annul to a very great extent the distinction between illegalities and irregularities in applying the provisions of section 33 and I hold that the present objection to the legality of the Collector's action under section 58 was one that could not be raised in a civil suit if it had not been specified in the grounds of appeal to the Commissioner. I, therefore, hold that this second contention of the appellants fails both on the merits and on the ground that section 33 of the Act precludes the plaintiffs from raising it in this suit.

The third point taken by the appellants is that the sale proceedings were void as the notices under sections 6 and 7 of the Act were signed by a Sub-Deputy Collector instead of by the Collector or other officer authorised to hold sales under the Act. The arguments on both sides are fully set out in the judgment that has just been delivered by my learned brother and it is unnecessary for me to repeat them. It is enough to state that I accept the contention on behalf of the respondent that there has been a sufficient compliance with the provisions of the Act if the Collector or other authorised officer settles or directs that the notices should be issued and the duty of signing the notices on his behalf may be delegated to a subordinate officer. As these notices were signed by the Sub-Deputy *for the Collector*, a legal presumption arises that the issue of the notices was directed by the Collector. I, therefore, decide this point also against the appellants.

The fourth and last point argued is that the sale is invalid on account of the notices under section 7 having been published in the jurisdiction of the Pangsha Police Station instead of in that of the Baliakandi Police Station. The authorities cited by learned brother are conclusive against this contention.

(11) 20 Ind. Cas. 423; 41 C. 276 at p. 284; 17 C. W. N. 1135.

I regret my inability to agree with the decision of my learned brother more particularly as the case is one of undoubted hardship, an estate found to be worth Rs. 3,000 having been sold for the inadequate price of Rs. 50. But on careful consideration I find myself unable to hold that the sale is invalid on any of the grounds urged and would, therefore, dismiss this appeal with costs.

BY THE COURT.—As we are unable to agree in this case, under section 98, Civil Procedure Code, the decree of the lower Appellate Court is confirmed and the present appeal dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 350 OF 1916.

May 24, 1917.

Present:- Pandit Kanhaiya Lal, A. J. C.

GHUTUR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

ANGAD PANDE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Oudh Laws Act (*XVIII of* 1876), *s.* 9—*Pre-emption—Lapse of successful pre-emptor's right by time, whether amounts to sale.*

Where the right of a successful pre-emptor lapses by reason of his failure to apply for execution of his decree within the time permitted by law, such lapse, whether intentional or accidental, does not amount to a re-sale of the pre-empted property, so as to give rise to a right of pre-emption on its own account under section 9 of the Oudh Laws Act. [p. 467, col. 2.]

Lakhrani Kuar v. *Dhanraj Singh*, 32 Ind. Cas. 634; 14 A. L. J. 102, distinguished from.

Appeal from the decree of the District Judge, Gonda, dated the 17th July 1916, reversing that of the Munsif, Utraula (Gonda), dated the 30th May 1916.

Babu *Aditya Prasad*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption, under somewhat peculiar circumstances. Sugrina, a co-sharer of the village Dehorli, sold his 18-pies share to defendants Nos. 1 to 4 on the 15th January 1910. Defendant No. 11 instituted a suit for pre-emption, in respect of that sale, and a similar suit was filed by the present plaintiffs, along with two other persons, for the same purpose. It was held in these suits that defendant No. 11 had a preferential right to pre-empt the property as against the present plaintiffs. His claim was accordingly decreed, subject to the payment of Rs. 700 to the defendants-vendees. Defendant No. 11 thereupon paid the pre-emption money but omitted to take out execution of his decree within the time permitted by law. He subsequently applied for possession, but the Court executing the decree rejected his application on the ground that it was barred by time. The defendants-vendees thereupon refunded the pre-emption money paid by the defendant No. 11, which they had already realized. The plaintiffs in the present suit allege that the omission of the defendant No. 11 to execute his decree for possession was merely a subterfuge or device to defeat the plaintiffs' right of pre-emption and what was really intended was a re-sale of the property by the defendant No. 11 to defendants Nos. 1 to 4 in lieu of Rs. 700, which was the amount which the former had paid in enforcement of his pre-emptive right.

The Court of first instance dismissed the suit, holding that no sale was established but the lower Appellate Court allowed the appeal, holding by way of inference, from the circumstances of the case, that a re-sale was really intended.

There is, however, a considerable amount of difference between the sale of a subsisting right and the lapsing of it by reason of the operation of the law of limitation. The right in the present case had lapsed by reason of the failure of defendant No. 11 to apply for the execution of his decree within the time permitted by law. The failure may have been deliberate, or accidental. If it was deliberate, it may be taken into consideration as a circumstance evidencing an intention to forego the property or to relinquish the right acquired by the decree. It would not necessarily be proof of an intention to sell the property so as to give rise to a right of pre-emption on its own account. Section 9 of the Oudh Laws Act allows a right of pre-emption in case of a sale of proprietary or under-proprietary tenure. But a sale is distinguishable from a mere relinquish-

ment of a right, and the inference drawn by the learned District Judge is, in the circumstances of the case, not necessarily justified. If the failure to apply for the execution of the decree, within the time permitted by law, was accidental, the right of the plaintiffs to sue for pre-emption would be still weaker. The learned District Judge does not say that the failure was deliberate or intentional, and in the absence of evidence to show that a sale was really intended, the decree passed by the Court below cannot be sustained. The learned Counsel for the plaintiffs respondents relies on a decision, *Lakhrani Kuar* v. *Dhanraj Singh* (1), wherein it was laid down that a person who has obtained a decree for possession and has not executed it within limitation, can maintain a fresh suit for possession without offending the provisions of sections 11 and 47 of the Code of Civil Procedure. One of the findings in that case, however, was that the decree-holder had privately obtained possession, and was subsequently ousted constituting a separate cause of action. It is not suggested here that the defendant No. 11 had privately obtained possession. His right to apply for possession became barred by time on the expiry of three years from the date of the payment of the pre-emption money. He had, therefore, no subsisting right left in the property which he could have sold to the defendants-appellants, when he took back his pre-emption money. The receipt granted by defendant No. 11 does not evidence any contract of sale and no other evidence bearing on the matter has been pointed out.

The appeal is, therefore, allowed and the plaintiffs' claim dismissed with costs throughout. The defendants-appellants will get their costs from the plaintiffs in all the Courts.

Appeal allowed.

(1) 32 Ind. Cas. 634; 14 A. L. J. 102.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 234 OF 1915.

March 1, 1917.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

NAND LAL PAL—APPELLANT

versus

NARESH CHANDRA DEB GOSWAMI AND OTHERS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *s.* 11—Res-judicata—Ex parte *decree—Decision on issue not necessary to be determined—Co-defendants*—Pro forma *defendant, what is—Transfer of Property Act* (*IV of* 1882), *s.* 54—*Contract for sale of property, whether creates interest in property—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 11, *applicability of—Appeal, right of, by person who ought not to have been made party to suit.*

Per *Mullick, J.*—An *ex parte* decree can operate as *res judicata*, but a decision on an issue which is not necessary to be determined cannot so operate. [p. 469, col. 2; p. 470, col. 1.]

In order that a decision may operate as *res-judicata* between any co-defendants, it is necessary that there should be a conflict distinctly and expressly raised between them and the decision of that conflict as between them should be necessary for the disposal of the suit [p. 470, col. 1.]

In order that a person may have a right of appeal it must be shown that he was adversely affected by the decree. [p. 470, col. 2.]

If a person who ought not to have been made a defendant is impleaded as such, he is not a person who ought to be allowed to figure as an appellant. [p. 471, col. 1.]

A *pro forma* defendant is not known to law. [p. 471, col. 1.]

Article 11 of the Limitation Act has no application to a case where an objection against an attachment of property has not been disposed of on the merits. [p. 471, col. 2.]

Per *Jwala Prasad, J.*—No person has a right of appeal from a decision unless his interest is prejudicially affected by it. [p. 472, col. 1.]

Obiter.—Under section 54 of the Transfer of Property Act a contract for the sale of a property does not of itself create any interest in or charge on the property itself. [p. 472, col. 1.]

Where in a suit for declaration of title to and recovery of possession of certain landed property, a person in whose favour a contract to sell the property in consideration of a sum of money, which was alleged to have been received by the plaintiffs, was impleaded as a defendant, and the suit was dismissed on appeal and the plaintiffs did not appeal to the High Court:

Held, that the defendant, with the said contract in his favour, had no such interest in the property in suit as to entitle him to maintain an appeal. [p. 470, col. 2; p. 472, col. 1.]

Appeal from a decision of the District Judge, Manbhum, dated the 3rd November 1914.

NAND LAL PAL *v.* NARESH CHANDRA DEB.

Sir *Ali Imam* and Mr. *Lalmohan Ganguly*, for the Appellant.

Messrs. *P. R. Dass* and *Sivanarayan Bose*, for the Respondents.

JUDGMENT.

MULLICK, J.—This second appeal arises out of a suit brought by one Narendra Nand Deb Gowswami and by a minor named Hemangini Debi, daughter of Upendra Nand Goswami the brother of the aforesaid Narendra, for declaration to a two-thirds share in *Mouzah* Baragaria. The plaint describes defendants Nos. 1, 2 and 3 the sons of one Janardan Pal as the principal defendants, and defendants Nos. 4, 5 and 6 as *pro forma* defendants. We are not concerned with Nos. 4 and 5, but the last defendant No. 6 plays an important part in this appeal.

It appears that in 1892 Bhagbat the brother of Upendra and Narendra mortgaged *Mouzah* Hanabantia to Janardan Pal. Janardan got a decree upon that mortgage and in execution attached *Mouzah* Baragaria on the 10th of May 1899, as his judgment debt was not satisfied by the sale of the mortgaged property. On the 12th of May 1899 Bhagbat, Narendra and Upendra jointly mortgaged the whole of *Mouzah* Baragaria to one Sri Manta Lal Dutt. The execution in respect of Baragaria in Janardan Pal's decree, however, proceeded; the 16 annas of that *mouzah* were brought to sale and Janardan obtained possession on the 21st of November 1899 in spite of an objection preferred by Upendra, which was disallowed on the 25th of July 1899.

We next find that Srimanta brought a suit upon his mortgage impleading Bhagbat, Upendra and Narendra. That suit was numbered 17 of 1914. Janardan was also added as a co-defendant. The result of that suit was that by a judgment dated the 25th of January 1905 the Court held that the one third share of Baragaria belonging to Bhagbat did not pass by the mortgage and plaintiff got a decree for the sale of the remainder of the *mouzah*. That decree was satisfied and Janardan continued to remain in possession of the whole *mouzah*.

We next find the three brothers again mortgaged the whole *mouzah*; this time to the Midnapore Zemindari Company, who obtained a preliminary decree for foreclosure upon the mortgage. The present defendants Nos. 1, 2 and 3 as the successors of Janardan thereupon brought suit No 3 of 1911 against Bhagbat, Upendra and Narendra and the Midnapore Zemindari Company praying for a declaration that the mortgage decree in favour of the Midnapore Zemindari Company was not binding on them. In that suit none of the defendants filed a written statement and an *ex parte* decree was made on the 21st of June 1911 and when the Midnapore Zemindari Company applied to make their preliminary decree absolute, the successors of Janardan objected and the Subordinate Judge excluded Baragaria from foreclosure. It appears, therefore, that since the 21st of November 1899 Janardan and his successors, the present defendants Nos. 1, 2 and 3, had remained in undisturbed possession of the *mouzah*. The present suit was brought on the 18th of November 1911, that is, three days before the expiry of 12 years' limitation from the 21st of November 1899 for declaration of title to and recovery of possession of two-thirds of *Mouzah* Baragaria.

Written statements were filed by defendants Nos. 1 to 3 and by defendant No. 6, with the result that the suit was decreed in the Court of the subordinate Judge but dismissed on appeal by the District Judge.

The present second appeal is preferred by defendant No. 6 as sole appellant.

The first point urged by the learned Counsel on behalf of the appellant is that the learned District Judge has committed an error of law in holding that the decree in suit No. 2 of 1911 operates as *res judicata* against the defendants Nos. 1, 2 and 3. It will be remembered that that suit was brought by the sons of Janardan Pal the present defendants Nos. 1, 2 and 3 against Bhagbat, Upendra and Narendra and the Midnapore Zemindari Company and the decree in that suit was that the preliminary decree obtained by the Midnapore Zemindari Company was not binding upon the plaintiffs the present defendants Nos. 1, 2 and 3. There can be no doubt that an *ex parte* decree can operate as *res judicata*. But the point is whether in that suit it was necessary for the Court to adjudicate on the title of Narendra and Upendra and to determine what was their share in *Mouzah* Baragaria. We have examined the judgment and the

proceedings in that suit as well as the decree and we do not find that it was in any way necessary in that suit for Narendra and Upendra to establish affirmatively the nature and extent of their title in *Mouzah* Baragaria. They did not appear in the suit because they were not concerned to resist the declaration that the decree of the Midnapore Zemindari Company was not binding upon the plaintiffs. There was no contest in that suit nor was it necessary to determine in that suit as between the heirs of Janardan and them what interest, if any, they had in *Mouzah* Baragaria. In my opinion the question now at issue was not litigated and was not necessary to be litigated in that suit and, therefore, the judgment and the decree do not operate as *res judicata*.

The next point taken on behalf of the appellant is that the learned Judge is wrong in his decision as to *res judicata* in another matter, namely the judgment and decree in the suit brought by Srimanta in 1904. Now in that suit the plaintiff was Srimanta the mortgagee and the defendants were Bhagbat, Upendra and Narendra on the one hand and Janardan Pal the previous auction-purchaser on the other. It is true that the Court decided that Janardan Pal's interest in the property amounted to one-third and to that extent the mortgage was not good, but the Court nowhere decided as between Janardan on the one hand and Upendra and Narendra on the other what was the share of Upendra and Narendra in the property. In order that a decision may operate as *res judicata* between any co-defendants, it is necessary that there should be a conflict distinctly and expressly raised between those co-defendants and that the decision of that conflict as between the defendants should be necessary for the disposal of the suit. Here it was not in any way necessary for the Court to decide affirmatively what was the interest of Upendra and Narendra. For all that mattered to the Court, Upendra and Narendra need not have had any interest in the property at all. The Court was merely to give the mortgagee a decree upon the mortgage and to determine which of the defendants were bound by the mortgage. In my opinion, therefore, the learned District Judge was right in his decision as to *res judicata* in connection with the proceedings of 1904.

The appellant, therefore, succeeds on his first and fails on his second grounds.

But on behalf of the respondents various grounds have been taken for dismissing the appeal which I will now proceed to consider.

The first ground is that the defendant No. 6 is not competent to maintain the appeal. That defendant No. 6 has no present interest in the property is admitted, but the plaintiffs say in their plaint that they have impleaded him because they are under a contract to sell the property to him in consideration of a sum of Rs. 3,500 which they have received from him. Defendant No. 6 in his written statement says that he believes that the plaintiffs have a two-thirds shares in the *mouzah*; that in this belief, by a registered agreement, he has lent Rs. 3,500 to the plaintiffs in consideration of a promise to sell their share of the *mouzah* to him within a certain time; and that he is entitled to have a decree in his favour for costs in the suit. The question is whether a defendant in this position is entitled to maintain an appeal. In my opinion he is not. This is a suit for declaration of title and recovery of possession. The defendant has neither title nor possession nor any interest in the property. We do not know even whether his right to obtain specific performance in respect of the alleged contract is still alive. But even if it is alive, I do not think that the defendant has such an interest in the property as would entitle him to maintain the appeal.

Is the defendant adversely affected by the decree? That is the test to be applied.

In this connection *Doorga Pershad* v. *Radha Mohun* (1) is very much in point. There a Hindu widow jointly with her sons who were the reversioners sued for confirmation of title and the suit was dismissed. She did not appeal and when the sons sought to maintain the appeal, the Court held that the only person who had a claim to the property was the widow and that the reversioners had no title so long as to give them a right of appeal

(1) 15 W. R. 536.

against the decree. That is also the test applied in *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* 2). Woodroffe, J., in delivering judgment laid down the proposition that the question where a party is ag grieved by a decree is a question of fact to be determined in each case according to its peculiar circumstances. That test was also accepted in *Secretary of State* v. *Swaminatha Koundan* (3). In that case the suit was dismissed and the defendants desired to appeal on the ground that one of the findings in the suit would operate as *res judicata* against them. It was held that the defendants were not adversely affected by the decree itself and that they were not competent to maintain the appeal. A further ground for the decision of the Court was that the decree operated as *res judicata* and even if that test was applied the defendant had no grounds in his favour. Here there is no question of *res judicata* at all. The defendant No. 6 has no right of suit against defendants Nos. 1, 2 and 3, and the only question is whether he is adversely affected by the decree obtained by defendants Nos. 1, 2 and 3 against the plaintiffs. It will be observed that defendant No. 6 is described in the plaint as a *pro forma* defendant. This is not known to the law and clearly the Court's duty was to examine why this defendant had been brought upon the record. The suit being one for declaration of title and possession, the plaintiffs had no cause of action as against this defendant and he should at once have been struck out of the suit. And it would seem to follow that if he is a person who ought not to have been made defendant, he is also not a person who ought to be allowed to figure as an appellant. Indeed his case is very much weaker than that of the reversioners in *Doorga Pershad* v. *Radha Mohun* (1), who were held incompetent to maintain the appeal.

I am quite satisfied, therefore, that defendant No. 6 is not competent to maintain the appeal.

I will next refer to the question of limitation. Learned Counsel for the respondents reminds us that the property now in suit was attached by Janardan and that Upendra's objection to the attachment was dismissed on the 15th of July 1899, and contends that the present suit is barred under Article 11 of the Limitation Act having been brought more than one year after the attachment. It appears, however, that there was no investigation into the merits of the objection and according to the decisions of the Courts in India the order dismissing the objection was not an order made under the provisions of the Civil Procedure Code so as to make Article 11 applicable.

The next ground taken in regard to limitation is that as the sale in execution of Janardan's decree took place more than one year from the institution of the present suit, Article 12 applies and the present plaintiffs are not competent to ask for recovery of possession without first setting aside that sale. Reliance is placed upon the case of *Malkarjun* v. *Narhari* (4). On the other hand the respondents rely upon *Moti Lal* v. *Karrabuldin* (5), but in the latter case the sale was held to be a nullity and, therefore, a suit for recovery of possession lay within twelve years of the dispossession. In my opinion the principle on which *Malkarjun's* case (4) proceeded would apply to this case, if it could be established that the present plaintiffs are bound by Janardan's sale. Now that sale was not held in their presence and they can only be bound by it if Janardan was their representative. That depends on the question whether Bhagbat was the *karta* of any joint family of which they were members. Upon this point there is no clear finding by the learned District Judge and I am unable to see that it has been conclusively determined that Bhagbat was their representative. Indeed if Bhagbat was in fact the *karta* of the joint family there is an end to the suit apart from any question of limitation, because then Janardan's auction-purchase would pass the 16 annas of *Mouzah* Baragaria, and, therefore, also the right and interest of Upendra and Narendra.

The respondents, therefore, fail on all the points except that of maintainability, in re-

(2) 9 C. W. N. 584.

(3) 12 Ind. Cas. 167; 37 M. 25; 10 M. L. T. 291; (1911) 2 M. W. N. 303; 21 M. L. J. 947.

(4) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

(5) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639; 7 Sar. P. C. J. 222 (P. C.).

gard to which I have held that defendant No. 6 is not entitled to maintain the appeal.

The result, therefore, is that the appeal is dismissed with costs.

JWALA PRASAD, J.—I agree. This appeal arises out of a suit brought by the plaintiffs for declaration of their title to and for recovery of possession of two-thirds share in *Mouzah* Paragaria. The suit has been dismissed by the lower Court, it being held that the plaintiffs' interest in the property was sold in a public auction and purchased by the ancestor of the principal defendants Nos. 1, 2 and 3 in 1899 and that the plaintiffs have failed to prove any subsisting title to the property in suit. The plaintiffs have not preferred any appeal from the decree of the Court below dismissing their suit. Defendant No. 6 only has appealed. He was named in the plaint as a *pro forma* defendant, on the allegation that he advanced Rs. 3,500 to the plaintiffs in lieu of which the plaintiffs had executed a registered agreement for the sale of their interest in the property in his favour. The deed of agreement in favour of the defendant-appellant confers upon him no interest in the property beyond a contract by the plaintiffs for the sale of the property. Under section 54 of the Transfer of Property Act, a contract for the sale of a property does not of itself create any interest in or charge on the property itself. The appellant, therefore, has no interest in the property in suit.

The decision of the case or the result of the present litigation cannot in any way affect the appellant. His claim is at best to bring a suit for a specific performance of the contract or for damages against the plaintiffs. No person has a right of appeal from a decision unless his interest is prejudicially affected by it. The appeal by defendant No. 6 is, therefore, incompetent. As has already been said, the plaintiffs who are solely affected by the decision of the Court below have not preferred any appeal. This is sufficient to dismiss the present appeal and I do not think there is any necessity for me to give my views regarding the other questions raised in the appeal and disposed of by the decision of my learned brother.

I, therefore, agree that the appeal should be dismissed.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 542 OF 1915.

February 1, 1917.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Beachcroft.

ISWAR CHANDRA DEY AND OTHERS—APPELLANTS

versus

MURARI LAL DUTT AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (*VIII of* 1885), *s.* 182, *applicability of*—Ryot, *widow of, holding homestead for residence—Transfer, whether permissible.*

A *ryot* died while in possession of an agricultural *jote*. His widow paid rent to the *zemindar* for a period of two years, and built herself a homestead which she used as her own dwelling:

Held, that the widow must be taken to have been a *ryot* as regards the homestead, so that section 182 of the Bengal Tenancy Act applied to it, with the result that except with the landlord's consent she had no right to transfer it in the absence of any custom entitling her to do so. [p. 473, col. 1.]

Appeal against the decree of the Subordinate Judge, Birbhum, dated the 15th December 1914, affirming that of the Munsif, 2nd Court, Rampurhat, dated the 23rd August, 1913.

Babu *Jitendra Lal Banerjee*, for the Appellants.

Babus *Ram Chandra Majumdar* and *Baranshibashi Mukerjee*, for the Respondents.

JUDGMENT.

WOODROFFE, J.—This is a dispute over a small piece of land which is said to be about 45 feet square and is valued at Rs. 3. The suit is an action in ejectment and both the Courts have found in favour of the plaintiffs. A large number of defences of varying character have been taken, which have all been decided against the present appellants.

Before us the main point which has been argued is this: It has been found as a fact that the husband of the appellants' vendor died in the year 1897 or 1898; that he was in possession of an agricultural *jote*. It is found that his widow inherited this property and actually paid rent to the landlord for this *jote* for a period of two years. Then, in 1898 to 1899 she appears to have built herself a homestead, and according to the finding of the first Court, which has been confirmed in appeal by the lower Appellate Court, she used this homestead as

her own dwelling and lived there. This homestead, therefore, was acquired at a time when according to the finding of the Court she was a *raiyat*.

It has been contended, therefore, that in the absence of any special custom or usage which has not been proved, section 182 of the Bengal Tenancy Act applies and that she must be taken to be a *raiyat* as regards this homestead. The lower Appellate Court finds her to be a non-occupancy *raiyat* and that as such she had no right to transfer the land to the appellants, no custom having been proved which would entitle her to do so. Therefore, no title passed to the appellant.

The main argument has been that, even accepting these facts, they are not sufficient to bring the case within the provisions of the Bengal Tenancy Act, because it has not been shown that she was holding and inhabiting this homestead for agricultural purposes, or, in other words, that the homestead land was held ancillary to an agricultural purpose, in which case only it is contended that section 182 of the Bengal Tenancy Act would apply. I do not find in the numerous arguments addressed to the lower Court any reference to this particular point; but it would seem to me to be concluded by the findings of fact which we do find in the judgment, and to follow as a natural inference from these facts; and these facts are, as I have said, that the appellants' vendor's husband did possess this agricultural *jote* and she herself paid the rent for these two years and the allegation of abandonment has been held to be not proved. It is true that there is a finding in the judgment of the first Court that the appellants' vendor worked for sometime as a maid-servant. That, however, would not in itself stand in the way of the fact that the homestead might also be held in connection with the agricultural land. Through a servant she might be cultivating lands; nor is the fact of payment of rent by the nephews sufficient. The lower Appellate Court in its judgment says this: "It is not in evidence under what arrangement they, that is, the vendor's nephews have been paying rent. Certainly the landlord did not enter upon the holding or let it out to another tenant. It might be that the Baishnabi made some arrangement under which they (the nephews) have been paying rent."

Under these circumstances I think that the concurrent findings in the judgments of the Courts below must be affirmed.

This appeal is therefore dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 88 OF 1916-17.

April 16, 1917.

Present:—Mr. Fagan, F. C.

ABDUL QADIR AND ANOTHER—APPLICANTS

versus

Musammat RABIA—RESPONDENT.

Punjab Land Revenue Act (XVII of 1887), ss. 111, 115, 117—Custom—Joint holding—Widow, right of, to demand partition—Procedure—Question of title.

A widow in the enjoyment of a life-estate in an undivided or unseparated share of a holding has a *locus standi* under section 111 of the Land Revenue Act before a Revenue Officer for claiming, that is, for applying for partition which she may or may not be entitled to obtain in virtue of her life-estate. [p. 475, col. 1.]

Buta v. *Musammat Jiwani*, 82 P. R. 1898 (F. B.), *Dan Singh* v. *Musammat Sukhan*, 11 P. R. 1895 Rev., followed.

Agricultural custom in the Punjab, however, does not concede to such a widow the right to obtain partition. [p. 475, col. 2.]

Such a widow is in all cases entitled to separate possession of her share as distinguished from a definite partition, but such separate possession must be obtained and enforced by the decree of a Civil Court. It cannot be given by a Revenue Officer under the provisions of Chapter IX of the Land Revenue Act. [p 476, col. 1.]

Case-law discussed.

In cases where a widow in possession of her life-estate in a joint holding applies for partition, it is generally desirable that the Revenue Officer should proceed under section 117 of the Land Revenue Act rather than under section 115, due attention being paid to the instructions contained in paragraph 8 of Financial Commissioner's Standing Order No. 27. The Revenue Officer should thus treat the question of the widow's right to obtain partition as one of title. Where he has *prima facie* ground for thinking that the widow is being obstructed by her co-sharers in the due and reasonable enjoyment of her life-interest in a share of the undivided holding and the co-sharers object to partition, the Revenue Officer should himself proceed, in the exercise of the discretion allowed him by section 117, to decide the question of title as a Civil Court, the burden of proving the widow's right to obtain partition being placed upon her. Where, on the other hand, there is no such *prima facie* ground and the co-sharers object

the Revenue Officer should decline to grant the application for partition until the question has been determined by a Civil Court, the proceedings being filed with leave to the widow to have them re-opened after decision of the Civil suit in her favour. If and when the Civil Court should find on the question of title that the widow has a right to obtain partition, then the mere fact of her widowhood would no longer constitute as against her "a good and sufficient cause" under section 115 for refusing partition. [p. 476, col. 2.]

Case forwarded for orders by the Commissioner of Jullundur, with his opinion, dated the 15th December 1916.

Mr. *Obedullah*, for the Applicants.

Mr. *Nur Din*, for the Respondent.

ORDER.—This is a case in which the respondent, *Musammat* Rabia, a widow who enjoys a life-interest in the share of her sonless deceased husband in a joint holding, applied to the Assistant Collector for partition of such share. The applicants for revision, who are her co-sharers and apparently the reversioners of her interest, denied her right to obtain partition. The Assistant Collector treating the question as one of title under sections 116 and 117 of the Land Revenue Act directed the applicants to file in his Court a Civil suit to have their contention judicially established. The Collector, who was the Settlement Officer, concurring with the Assistant Collector, dismissed the applicants' appeal. The Commissioner has forwarded the case for revision, with the recommendation that for the reasons stated in his order the partition should be refused without referring applicants to a Civil suit.

2. The case raises some rather intricate and at the same time dubious questions regarding the nature and scope of a widow's ordinary life-estate and its bearing on her right to claim and obtain partition if that estate comprises an undivided share in a joint holding. The applicability of section 115, Land Revenue Act, to a case of this kind has also to be considered. Thus to put the matter more explicitly, should it appear that, unless and until the contrary is judicially proved in any particular case, a widow's life-estate or interest under agricultural custom includes within its scope a right to claim and obtain partition, it would seem to be very questionable whether the mere fact of her widowhood is a "good and sufficient" cause within the meaning of section 115 for absolute disallowance of partition. On the other hand if agricultural custom does not concede the widow a right to obtain partition, then the fact of widowhood may constitute such a cause in the absence, in any particular case, of a judicial finding in favour of such right. It will be convenient to note at this point that the issue whether the question of the widow's right to obtain partition is a question of title or not was fully discussed in *Buta* v. *Musammat Jiwani* (1) and decided in the affirmative. I see no reason for dissenting from that conclusion.

3. The nature of the widow's ordinary life-estate, and more especially the general question whether such estate carries with it a right to obtain partition, has been the subject of a long series of Civil rulings which are, it appears to me, in some degree mutually conflicting. The leading revenue ruling on the subject is *Dan Singh* v. *Musammat Sukhan* (2), in which several of the previous relevant Civil rulings are cited. In that case the Financial Commissioner (Sir Mackworth Young) held that a widow with a life-estate in a share of a joint holding being undoubtedly a "landowner" under section 3 (2) of the Land Revenue Act was, *therefore*, a "joint owner" for the purposes of section 111 and as such entitled, subject to the conditions (*a*) to (*c*) of that section, to *apply* for partition of the share. After discussing the previous Civil rulings and especially the dictum of Plowden, J., in *Ranjha* v. *Musammat Rajji* (3) that a widow with a life estate has not an interest, which gives her the right to compel partition at her pleasure, the Financial Commissioner went on to hold that partition of a widow's share was *prima facie* undesirable and that a Revenue Officer in the exercise of the discretion given him by section 115 should allow such partition only under certain specified conditions. It should be observed that in effect the above ruling did dot definitely decide, and apparently did not purport to decide, the question whether by agricultural custom a widow's life estate does or does not include

(1) 82 P. R. 1898 (F. B.).
(2) 11 P. R. 1895 Rev.
(3) 22 P. R. 1878.

as incidental to such estate the right to obtain or compel partition. It merely found that a widow with a life-estate in an undivided share of a joint holding is one of the persons specified in section 111 of the Land Revenue Act as entitled *to apply* for partition, that is, in other words, to set in motion the machinery provided by Chapter IX of the Act with the object of enforcing any right of partition which the incidents and scope of her life-estate may include. This view is practically identical with that taken in *Buta* v. *Musammat Jiwani* (1). In that case the learned Judge of the Chief Court, while criticising the identification of the terms "landowner" and "owner" in *Dan Singh* v. *Musammat Sukhan* (2), held that a widow with a life-estate was an "owner" and, therefore, a "joint owner" if her estate comprised an undivided share of a holding, and further, therefore, entitled under section 111 to apply for partition. It appears to be a ground common to the two rulings cited that section 111 does not deal decisively and definitely with the question whether a widow has right to obtain or compel partition, it merely concedes to her a *locus standi* before a Revenue Officer for claiming, that is, for applying for, partition which she may or may not be entitled to obtain in virtue of her life-estate. This conclusion I accept and it is, I think, desirable that the point should be made clear as there appears to have been some confusion and ambiguity regarding it in the past.

4. It remains to consider whether in the light of established agricultural custom anything can be affirmed regarding the nature and incidents of the widow's life-estate which should affect the exercise of the discretion conferred by section 115, Land Revenue Act. It is at this point that a conflict of judicial decisions presents itself. The rulings on the question, whether a widow's life-estate carries with it as an incident the right to enforce partition, are quoted in a convenient form at page 60 of Mr. T. P. Ellis' recently published "Notes on Punjab Custom." See also page 54 of the same work. The conclusion which I reach from a consideration of those cases is that the trend of decisions has been that with reference to the usual custom of the province the reply to the above question is in the negative and that the burden of proving the affirmative in any particular case lies on the widow. See especially *Daulat Khan* v. *Musammat Mahtab Bibi* (4). Such at least appears to have been the general result up to the passing of the decision published as *Musammat Bhag Bhari* v. *Wazir Khan* (5). With all deference to the learned Judges in that case I am disposed to think that there recurred in it the confusion, to which I have already alluded, between the right to claim or apply for partition given by section 111, Land Revenue Act, and the right to obtain or compel partition as an incident of a widow's life-estate. The learned Judges held that the widow has "a clear, unequivocal statutory right . . . to demand partition." As to this there is, of course, no question. They went on, however, to hold further that the burden of proving a custom by which a widow is restrained from obtaining partition of a joint holding lies on the co-sharer who asserts its existence. To the latter conclusion the terms of section 111 appear to me to be irrelevant. Apart from the reference to that section the learned Judges in the above ruling, as I understand it, confined themselves to the expression of an opinion that it was generally desirable that partition of her share should be allowed to the widow. I am disposed to agree with this view, but the question is not its desirability but whether as a matter of fact one of the ordinary legal incidents of joint ownership, that is, the right to obtain partition, is in the case of the agricultural widow's life-estate abrogated by custom. On this point, apart from *Musammat Bhag Bhari* v. *Wazir Khan* (5), which was not followed in the subsequent ruling *Mukandi* v. *Bakhtawar Singh* (6), the published judicial decisions, as already remarked, have been in favour of the view that agricultural custom generally does not recognize the existence of the widow's right to obtain partition; by partition being understood an entire separation of estate.

(4) 4 Ind. Cas. 1016; 155 P. W. R. 1909; 100 P. L. R. 1909.

(5) 14 Ind. Cas. 45; 70 P. R. 1912 91 P. W. R. 1912; 124 P. L. R. 1912.

(6) 19 Ind. Cas. 215; 219 P. W. R. 1913; 210 P. L. R. 1913.

5. At the same time it has been held in several reported decisions (Ellis op. cit., page 60) that the widow is in all cases entitled to separate possession of her share as distinguished from a definite partition. The rulings, however, contemplate that such separate possession is to be obtained and enforced by the decree of a Civil Court, not by means of a partition under Chapter IX of the Land Revenue Act. See *Buta* v. *Musammat Jiwani* (1), *Sher Khan* v. *Musammat Bivi* (7), *Daulat Khan* v. *Musammat Mahtab Bibi* (4). The distinction between partition and separate possession was explained in *Nupa Singh* v. *Musammat Sobrai* (8), and the Financial Commissioner after quoting that explanation in *Dan Singh* v. *Musammat Sukhan* (2) also held that "a Revenue Officer acting under Chapter IX of the Land Revenue Act had no power to award separate possession of her share to a widow except by effecting partition of her share." The award of separate possession would be of the nature of a temporary partition to last only during the continuance of the widow's limited estate. It is true that the word partition is not expressly defined for the purposes of the Land Revenue Act, but there can, I think, be no question that the procedure laid down in Chapter IX of the Act was not intended to apply to temporary partition except under the circumstances specified in section 115. The presence of the latter section in fact seems to strengthen the above conclusion. I would hold, therefore, that the separate possession to which a widow has been held to be entitled cannot be given by a Revenue Officer under the provisions of Chapter IX of the Land Revenue Act.

6. Having regard, therefore, to the fact that, as found above, agricultural custom in the province, as judicially interpreted up to the present, generally does not concede to the widow, who is in the enjoyment of a life-estate in an undivided or unseparated share of a holding, the right to obtain partition, I am of opinion that this fact would constitute a good and sufficient reason for the exercise of the Revenue Officer's discretion under section 115, Land Revenue Act, to refuse partition, when such a widow applied for it and other parties to the proceedings denied her right to obtain it. The widow would however, in spite of such refusal still be in a position to sue to establish her right to partition in a Civil Court. It will, therefore, be generally desirable that in the class of cases under consideration the Revenue Officer should proceed under section 117 of the Land Revenue Act rather than under section 115, due attention being paid to the instructions contained in paragraph 8 of Financial Commissioner's Standing Order No. 27. The Revenue Officer should thus treat the question of the widow's right to obtain partition as one of title. Where he has *prima facie* ground for thinking that the widow is being obstructed by her co-sharers in the due and reasonable enjoyment of her life-interest in a share of the undivided holding and the co-sharers object to partition, the Revenue Officer should himself proceed, in the exercise of the discretion allowed him by section 117, to decide the question of title as a Civil Court, the burden of proving the widow's right to obtain partition being placed upon her. Where, on the other hand, there is no such *prima facie* ground and the co-sharers object, the Revenue Officer should decline to grant the application for partition until the question has been determined by a Civil Court, the proceedings being filed with leave to the widow to have them re-opened after decision of the Civil suit in her favour. If and when the Civil Court should find on the question of title that the widow has a right to obtain partition, then the mere fact of her widowhood would no longer constitute as against her "a good and sufficient cause" under section 115 for refusing partition.

7. In the particular case which has been referred by the learned Commissioner, there is I consider no satisfactory *prima facie* ground for holding that the widow, *Musammat* Rabia, is being obstructed in the due and reasonable enjoyment of her life-estate. On the contrary there is ground for thinking that she desires partition for ulterior objects not connected with such enjoyment. The case is, therefore, one in which the application for partition should be refused pending a decree of a Civil Court in favour of *Musammat* Rabia establishing her right to obtain partition. I accordingly agree with the learned Commissioner so far as to set aside the orders of the

(7) 30 P. R. 1905; 38 P. L. R. 1905.
(8) 116 P. R. 1879.

Assistant Collector and Collector and, refusing the application for partition, to direct that the proceedings be filed until the applicant applies for them to be re opened after establishing her right to partition in a Civil Court.

The respondent will pay the costs incurred by the applicants for revision throughout the proceedings.

Revision accepted.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 36 OF 1915.

May 24, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

BANGSHI BADAN BISWAS AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

KAMALA KANTA POROHIT—DEFENDANT—RESPONDENT.

Land Registration Act (VII B C. of 1876), s 78, bar prescribed by—Previous payment of rent by tenant, effect of.

A suit for rent brought by the plaintiff, on the allegation that he was owner of the land, was dismissed on the ground that his name was not registered under the Land Registration Act. Subsequently he brought another suit against the same tenant for rent, in which he claimed as a *talukdar* under the proprietor:

Held, that if the plaintiff was in fact a proprietor, the fact that the defendant had previously paid rent to him would not affect the defendant's right to set up the defence that section 78 of the Land Registration Act was a bar to the plaintiff's getting a decree and the mere allegation by the plaintiff in the plaint that he was a *talukdar* under the proprietor would not avail him. [p. 479, col. 1.]

Per *Mookerjee, J.*—The bar prescribed by section 78 of the Land Registration Act to the plaintiff's getting a decree in a suit for rent in consequence of his name having not been registered under the Act does not cease to be applicable, merely because the plaintiff establishes that the defendant has previously paid rent to him amicably or that he brought the defendant upon the land. [p. 479, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Mullick, dated the 2nd March 1915, in Appeal from Appellate Decree No. 1112 of 1913, against the decree of the Subordinate Judge, 2nd Court, Chittagong, dated the 21st December 1912, reversing that of the Munsif, 2nd Court, Patiya, dated the 4th December 1911.

FACTS appear from the following judgment of

MULLICK, J.—The plaintiffs sue for the rent of a holding in respect of the years 1269, 1271 and 1272 *M. E.* The schedules describing the lands of the holding have not been printed in the Paper Book, but I gather that the holding is situated within certain *noabad* tenures described in schedule 2 and certain *lakhiraj* tenures and revenue-paying estates described in schedule 1 of the plaint. The Munsif dismissed the suit, but the Subordinate Judge decreed it and hence this second appeal by the defendants.

It appears that in 1909 both the Munsif and the District Judge dismissed the plaintiffs' suit for the rent of the same holding for the years 1269 and 1270, on the ground that the plaintiffs had not registered their names as proprietors under Act VII B. C. of 1876 in respect of the revenue-paying estates and the *lakhiraj* tenures within which the holding is situated. In the present suit the plaintiffs claim under a different title. They are entirely silent in their plaint about the title previously alleged, namely, that they were proprietors by adverse possession. They now set up a *taluki* right held under one Ramesh Chandra Roy. With regard to the *noabad* tenures which are *taluks* held under Government, it is admitted that no registration under Act VII B. C. of 1876 is necessary. There is no bar, therefore, against the plaintiffs in regard to the lands in schedule 2 of the plaint, but, in my opinion, there is a serious obstacle in regard to schedule 1. It is admitted that the defendants are auction-purchasers of the holding at a rent sale brought about in execution of a decree by plaintiff No. 1 acting as representative of the original landlord Uma. In the rent suit of 1909 the plaintiffs Nos. 1 and 2 as heirs of Uma founded their claim in respect of three of the properties on a proprietary title by adverse possession. The issues in that suit were:—1. Are the plaintiffs registered proprietors? If not, are they entitled to get a decree for rent? 2. Are they entitled to get rent of the plaint land? Although in a rent suit the question of title is not generally directly and substantially in issue, yet it would appear that in the suit of 1909 the parties by their pleadings made the question of title a matter not incidentally but substantially

in issue. The defendants challenged the plaintiffs' right to receive rent on the ground that they were not registered proprietors and pleaded the statutory bar under section 78, Land Registration Act. The parties raised a further issue whether apart from their title as registered proprietors the plaintiffs were entitled to succeed. It was incumbent, therefore, upon the plaintiffs to prove their *taluki* right in that suit, and as they omitted to prove that right it is no longer open to them to prove it now. It is not alleged that it is a new right, for the *pottah* of 1911 executed after the decision of the suit of 1909 and alleged to have been granted by Ramesh Chandra Roy only confirms an ancient right; nor is it a case of mistake or ignorance of the *taluki* right on the part of the plaintiffs. In my opinion, therefore, the plaintiffs are barred by the rule of *res judicata*. It is true that the defendants cannot question their landlord's title, but the defendants are entitled to plead the statutory bar against their landlords as regards realisation of rent. Even, therefore, if my view as to *res judicata* is wrong the plaintiffs cannot succeed unless they can show in the present suit that they are not proprietors, but *talukdars*. The Munsif has gone into the evidence in regard to *taluki* right and finds that it has not been established. He has dismissed the suit on the merits.

The learned Subordinate Judge expresses no opinion as to whether the *taluki* right has been established or not, but appears to think that the defendants are bound to pay rent because they cannot question their landlord's title. This view, as I have already observed, is wrong. The learned Subordinate Judge also observes that the plaintiffs have realised rent on a previous occasion from the defendants. This is denied by the defendants and there does not seem to be any evidence for this finding.

The result is that the plaintiffs are not entitled in the present suit to set up their *taluki* right and if they are entitled, then they have failed to prove that right. Their suit must be dismissed with costs. The appeal is accordingly decreed with costs.

Babu *Khitis Chandra Sen*, for the Appellants.

Dr. *Dwarka Nath Mitter* and Babu *Baikuntha Nath Mitter*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—In my judgment this appeal must be dismissed. The question is whether the plaintiffs' suit is barred by the provisions of section 78 of the Land Registration Act. The learned Munsif seems to have thought that this was an attempt on the part of the plaintiffs to get over the provisions of section 78 of the Land Registration Act and he thought that the plaintiffs did not succeed in so doing. Now, section 78 provides that: "No person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act." It appears that a previous suit was brought by the plaintiffs in which they alleged that they were owners of the property, basing their claim upon adverse possession; and, as I understand, they were then met by the provisions of section 78, and their suit was dismissed. Then they have brought this suit, and in this suit they claim as *talukdars* under the proprietor; in other words, they allege that they are not proprietors but *talukdars* under the proprietor, and so they want to get over the difficulty which presented itself in the previous suit, namely, section 78 of the Land Registration Act. In order to get over that difficulty the plaintiffs had to prove that they were *talukdars*. That matter was investigated by the Judge of the Court of first instance, who came to the conclusion that they did not prove that they were *talukdars*, and the result was that he dismissed the suit. Then the matter came before the first Appellate Court, and the learned Judge did not arrive at any conclusion as to whether the plaintiffs were proprietors and, therefore, were affected by the provisions of section 78. He did not decide that question at all but based his judgment on the ground that inasmuch as the plaintiffs claimed as *talukdars* and the defendants had in fact, as he found, paid rent to the plaintiffs, the defendants were estopped from denying that the plaintiffs were the defendants landlords and that rent was due to them. With regard to that matter, all I can say is

that if the plaintiffs were in fact proprietors and if section 78 did apply to them, then the allegation of estoppel based upon the payment of rent could not affect the defendants' right to set up the defence that inspite of the payment of rent, section 78 would apply to the plaintiffs as proprietors. Therefore, I do not think that the judgment of the first Appellate Court can be sustained.

The learned Judge in this Court apparently based his decision upon the defence that appears to be inevitable in most of these cases, namely, *res judicata*. That is the primary ground of his decision. He also found as follows, and I think that this was the true ground, "even, therefore, if my view as to *res judicata* is wrong, the plaintiffs cannot succeed unless they can show in the present suit that they are not proprietors, but *talukdars*. The Munsif has gone into the evidence in regard to the *taluki* right and finds that it has not been established. He has dismissed the suit on the merits." The learned Judge relied upon that as the second ground for his judgment. In my opinion the second ground upon which he bases his judgment is the right one, and I think that this appeal should be dismissed with costs.

MOOKERJEE, J.—I agree. It is perfectly plain that the bar prescribed by section 78 of the Land Registration Act does not cease to be applicable, merely because the plaintiff establishes that the defendant has previously paid rent to him amicably, or because he brought the defendant upon the land. There is really no question of estoppel for the defendant does not dispute the title of the plaintiff; he relies only upon the statutory bar which places the plaintiff under a disability. Clearly, the plaintiff cannot evade the effect of section 78 of the Land Registration Act by recourse to the doctrine of estoppel.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1425 OF 1914.

July 2, 1917.

Present:—Mr. Shah Din, Chief Judge, and Mr. Justice Broadway.

BABU LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HARI BAKHSH, MINOR, THOUGH HIS MOTHER *Musammat* BASANTI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 11—Res judicata, *question of, how determined—Decision on point not necessary for decision of suit, whether* res judicata—*Registration Act* (*XVI of* 1908), *s.* 17 (1) (b)—*Acknowledgment of partition, whether compulsorily registrable.*

In order to determine the question of *res judicata* it is necessary to ascertain what matters were in dispute between the parties, and this should be done not merely by looking at the decree but also by examining the pleadings and the judgment. [p 485, col. 2; p. 486, col. 1.]

One *J. R.* with his sons owned several business concerns in Delhi, Calcutta and Cawnpore. On his death in 1903 a partition took place between his sons *J. N.* and *S. R.* and the business was divided half and half. Later on disputes arose between the descendants of *J. N.* and one *H. B.*, his great grandson, brought a suit for his share in the property. This suit was instituted at Cawnpore on 7th August 1909. Various pleas were raised by the defendants, the principal one being that the family was not joint, there having been a complete disruption since *Sambat* 1960=1903 A. D. when the partition between *J. N.* and *S. R.* took place. One *B. D.*, son of *J. N.*, was joined as a defendant to the suit and a written statement was filed on his behalf on the 30th November 1909. As, however, he had not signed the verification, an adjournment was made and time given up to 11th December 1909 and the written statement was re-filed on the 6th December: but *B. D.* had died on the 5th. The case proceeded on a question of jurisdiction and eventually the plaint was returned to the plaintiff for presentation to the proper Court, as it was held that the Cawnpore Court had no jurisdiction to try the suit. It was also found that the Delhi concerns had no connection with Cawnpore and that *B. D.* and his descendants alone were concerned with the Cawnpore business. The plaint was consequently presented at Delhi. It was contended that the judgment in the former suit operated as a bar to this suit:

Held, (1) that the question whether the Cawnpore shop was or was not a part of the joint property was directly and substantially in issue in the Cawnpore Court and was concluded by the decision of that Court; [p. 486, col. 2.]

(2) that the mere fact that the question of jurisdiction was also decided on other grounds as well did not prevent the decision in the former suit operating as *res judicata*. [p. 486, col. 2.]

Muhammad Rustam Ali Khan v. *Nawab Muhammad Azmat Ali Khan*, 64 P. R. 1882; *Wingrove* v. *Wingrove*, 56 P. R. 1904; 84 P. L. R. 1904; *Rajab-un-*

BABU LAL *v.* HARI BAKHSH.

Nissa v. *Habib Bakhsh*, 57 P. R. 1907; 66 P. W. R. 1907, distinguished.

During the pendency of this suit the defendant *B. L.*, a son of *J. N.* by his second wife, applied for and obtained Probate of the Will executed by *B. D.* on 26th November 1909 and in these proceedings it was held that *B. D.* had executed the Will as a free agent and not under undue influence and had a disposing mind. It was urged that the plaintiff being a minor, his guardian *ad litem* was guilty of gross negligence in not appealing against this decision and that, therefore, it should not be treated as *res judicata* so far as the minor was concerned:

Held, that the question as to the disposing mind and the due execution of the Will by *B D.* could not be re-agitated and must be regarded as having been finally settled. [p 487, col. 1.]

Kalyanchand Lalchand v. *Sitabai Dhanasa*, 23 Ind. Cas. 325; 38 B. 309 (F. B.); 16 Bom. L. R 5; *Ramnandan Prosad* v. *Sheo Parson Singh*, 6 Ind. Cas. 301; 11 C. L. J. 623; *Brendon* v. *Shrimant Sunderabai*, 23 Ind. Cas. 221; 38 B. 272; 16 Bom. L. R. 164, followed.

Ahmad Ali Shah v. *Amir Shah*, 35 P. R. 1898; *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*, 22 C. 8; 11 Ind. Dec. (N. S.) 7, distinguished.

A document which professes to be nothing more than an acknowledgment that a partition was effected at a certain time does not create any right in any property and is not compulsorily registrable. [p. 489, col. 2.]

First appeal from the decree of the District Judge, Delhi, dated the 15th May 1914, decreeing the claim.

The Hon'ble Pandit *Sheo Narain*, R. B., Messrs. *Shah Nawaz*, *Kanwar Narain* and Rai Sahib Lala *Moti Sagar*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., Messrs. *Sundar Das*, *Haq Nawaz*, *Muhammad Rafi* and Lala *Balwant Rai*, for the Respondent.

JUDGMENT.

SHAH DIN, C. J.—The following pedigree-table will assist in an understanding of this case:—

The ancestral house of this family is in Bassan in Jaipur State, where there still exists a concern known by the name of Devi Dutt-Jodh Raj. Emigrating from there Jodh Raj and his sons established themselves in Delhi and succeeded in amassing considerable wealth by trade, opening shops or branches of their business in Cawnpore and Calcutta, which in *Sambat* 1960=1903 A. D. were known by the following names:—

1. Jodh Raj-Jai Narain at Delhi.
2. Jai Narain-Khunka, at Delhi.
3. Sri Ram-Ram Lal, at Delhi (a partnership with a stranger Khandoo Mal).
4. Murli Dhar-Deoki Nandan, at Delhi (a partnership with strangers Deoki Nandan etc.)
5. Jodh Raj-Sanahi Ram, at Calcutta.
6. Jai Narain-Sanahi Ram, at Cawnpore.

In that year (1960 *Sambat*=1903 A.D.) Jodh Raj being dead, a partition of the business took place between Jai Narain and Sanahi Ram. This is admitted as also is the fact that to Sanahi Ram and his branch fell the concerns known as:—

1. Jodh Raj-Sanahi Ram at Calcutta.
2. Jai Narain-Khunka at Delhi, and
3. Sri Ram-Ram Lal at Delhi, while Jai Narain and his branch took over the remaining three concerns above named. Following on this partition certain changes took place in the names of some of these concerns while some were closed.

(*a*) Jodh Raj-Sanahi Ram retained this name.

(*b*) Jai Narain-Khunka became Jodh Raj-Sanahi Ram (Delhi).

(*c*) Sri Ram-Ram Lal was closed.

(*d*) Murli Dhar-Deoki Nandan became Babu Lal-Deoki Nandan.

(*e*) Jodh Raj-Jai Narain retained this name.

(*f*) Jai Narain-Sanhai Ram became Jai Narain Bishen Dial (Cawnpore).

(Further subsequent changes that took place will be referred to later).

The entire business was estimated, roughly, to be of the value of 6 lakhs and the division made was half and half.

As noted above in the pedigree-table, Banwari Lal son of Brij Mohan died in 1903, Brij Mohan died in 1905, Jai Narain in 1906 and Sri Ram and Murli Dhar in 1908.

On the 7th August 1909 a suit was instituted at Cawnpore on behalf of Hari Bakhsh, through his mother *Musammat* Basanti, against Babu Lal, his son Chet Ram (aged three years) and Bishen Dial. That Bishen Dial was a party is not disputed though the plaint, and amended plaint printed at pages 1 and 227 of the Printed Book, Part I, do not shew his name. Subsequently *Musammat* Basanti, *Musammat* Sarasati (Bini) and *Musammat* Indri were also impleaded, the first as a plaintiff and the two latter as defendants (amended plaint, Printed Book, part I, page 227).

The parties thus were descendants of Jai Narain and Hari Bakhsh prayed that after arranging for the maintenance of *Musammat* Basanti, *Musammat* Sarasati and *Musammat* Indri his half share in the joint property should be partitioned off and given over to him.

Various pleas were raised by the defendants, the principal one being that the family was not joint, there having been a complete disruption in *Sambat* 1960=1903 A. D., when the partition between Jai Narain and Sanahi Ram took place. In this plea Bishen Dial joined and a written statement was prepared on his behalf and on his instructions by his Pleaders and filed in Court on 30th November 1909.

As, however, it was found that he had not, through an oversight, signed the verification an application was made on that date (30th November 1909) for an adjournment in order that the requisite signature could be obtained. (Printed Book, Part I, page 244). Time was accordingly granted up to 11th December 1909 and the written statement was filed duly signed on 6th December 1909 (Printed Book, Part I, page 235), but Bishen Dial had died on 5th December 1909 (Printed Book, Part I, page 246). The case proceeded on a question of jurisdiction and on 29th August 1910 the Additional Subordinate Judge, Cawnpore, returned the plaint to the plaintiff for presentation to the proper Court, holding that the Cawnpore Courts had no jurisdiction to try the suit. The judgment, which is to be found at pages 280 to 290

of Part I of the Printed Book, shews that it was held that the entire immoveable property was outside the jurisdiction of the Cawnpore Courts. It was also specifically found that the Delhi concerns had no connection with Cawnpore, and that Bishen Dial and his descendants alone were concerned with the Cawnpore business.

At this stage it will be as well to ascertain what this Cawnpore firm is.

As has been said above, on the separation between Jai Narain and Sanahi Ram in 1903, the firm at Cawnpore known as Jai Narain-Sanahi Ram fell to the share of Jai Narain's branch of the family, and the name was changed to Jai Narain-Bishen Dial. In *Sambat* 1963 the name was again changed from Jai Narain-Bishen Dial to Murli Dhar-Hari Bakhsh, and in *Sambat* 1965 it was once more changed to Hari Bakhsh, Cawnpore, and in the same year it was given its present name of Hari Bakhsh-Khunka. From the foregoing it will, therefore, be seen that the Cawnpore Court held that the firm known as Hari Bakhsh-Khunka, at one time called Jai Narain-Sanahi Ram, was the sole property of Bishen Dial and his descendants and had nothing whatever to do with the Delhi concerns. The plaint having been returned it was presented in the Court of the District Judge at Delhi on the 22nd October 1910, and having been returned for amendment by that Court was finally filed in, in its present form, on the 21st November 1910. This plaint is printed at page 307 of Part II of the Printed Book and differs to some extent from the original and amended plaints filed in the Cawnpore Court. Hari Bakhsh is the sole plaintiff through his mother *Musammat* Basanti and the defendants are Babu Lal and his son Chet Ram. *Musammat* Basanti, *Musammat* Sarasati and *Musammat* Indri have not been made parties. The claim made was for partition of the property and rendition of accounts. The details of the shops or firms in which a share by partition was claimed were also varied, those known as Jai Narain-Murli Dhar at Kalpi, Jai Narain-Brij Mohan at Delhi, Sri Ram-Babu Lal at Calcutta, and Babu Lal-Deoki Nandan at Bombay being added, while the property in Bassan was omitted.

After a trial that lasted over three years, the learned District Judge granted the plaintiff a decree declaring that he was entitled to a half share in the property mentioned in the plaint, with the exception of a house situate in Katra Ashrafi in Delhi, and that the accounts of the 8 shops should be taken and the plaintiff paid his share. The partnership was also dissolved from the date of judgment, *viz.*, 15th May 1914.

Against this decree the defendants have preferred this appeal and we have heard Mr. Sheo Narain for the appellants while Mr. Shafi has addressed us on behalf of the plaintiff-respondent. The averments in the plaint (Printed Book, Part II, page 307) were as follows:—

(1) The descendants of Jodh Raj constituted a joint family up to 1960 *Sambat*=1903 A. D., when Sanahi Ram separated himself from the rest, Jai Narain and his descendants remaining joint.

(2) Brij Mohan, Jai Narain, Sri Ram, Murli Dhar and Bishen Dial died on dates specified while the family was still joint.

The business of this joint family was carried on by the defendants in Delhi, the Cawnpore shop alone being not under their management.

(3) Bishen Dial having married a second wife lost all affection for the sons by his first wife, and on the death of his second wife lost his "proper senses" and neglected the business of the family.

(4) On being requested to make a partition of the family property Bishen Dial took certain actions detrimental to the interests of the plaintiff which necessitated the institution of the suit in Cawnpore (referred to above), and finally this present suit.

It was claimed that the plaintiff was entitled to a half share in the family property and business.

The defendants-appellants' pleas were to the following effect:—

(1) Sri Ram had adopted Chet Ram.

(2) In *Sambat* 1960=1903 A. D. the family was not joint, the business alone being joint. Sanahi Ram and Jai Narain effected a partition that year and arbitrators were appointed to go into the accounts. Jai

Narain, however, was not joint with his descendants.

(3) Brij Mohan and the others named died in the years mentioned but were not joint at the time of their respective deaths.

(4) The property did not belong to a joint Hindu family.

(5) The shop known as Jai Narain-Sanahi Ram at Cawnpore fell to the share of Jai Narain in 1960 *Sambat*=1903 A. D. and Jai Narain partitioned his share with his descendants, this Cawnpore shop falling to Bishen Dial who changed its name to Jai Narain-Bishen Dial and closed it during his lifetime. The shop Hari Bakhsh-Khunka was opened after the partition and was the sole property of the plaintiff.

(6) Similarly the shop Babu Lal-Deoki Nandan formerly known as Murli Dhar-Deoki Nandan was made over on partition by Jai Narain to Babu Lal and Sri Ram, who altered the names as stated above.

(7) Raghu Mal-Gobind Pershad was a branch shop of Murli Dhar-Deoki Nandan and went with it to Babu Lal and Sri Ram, it was closed by them in *Sambat* 1962.

(8) Jai Narain in the same manner and at the same time gave the shop Jodh Raj-Jai Narain (Delhi) to Babu Lal and Sri Ram and they alone were its proprietors.

(9) The shops of Babu Lal-Sri Ram, Calcutta, and Babu Lal-Deoki Nandan, Bombay, were started by the defendants in 1964 *Sambat* and 1963 *Sambat* respectively, and belong to them solely.

(10) The defendants had no concern with the shop known as Jai Narain-Murli Dhar at Kalpi.

(11) The shop of Jai Narain-Brij Mohan in Delhi was opened by Brij Mohan alone after the partition and he was its sole owner, the defendants having no concern with it.

(12) It was denied that Bishen Dial had mismanaged his business.

(13) In 1960 *Sambat* = 1903 A. D. Jai Narain effected a partition and his three sons were given the following shops in addition to a third share each in the rest of the property:—

Bishen Dial got the shop Jai Narain-Sanahi Ram (Cawnpore).

Sri Ram and Babu Lal got Jodh Raj-Jai Narain and Murli Dhar-Deoki Nandan with its branch shop of Raghu Mal-Gobind Pershad.

(14) Following on the partition Bishen Dial further divided his own share between his sons and separated from them.

(15) On 26th November 1909 Bishen Dial executed a Will disposing of his own property appointing Babu Lal his executor.

(16) The shop of Hari Bakhsh-Khunka had been wrongly included having regard to the decision by the Cawnpore Court.

(17) Bishen Dial having admitted and accepted the partition made by Jai Narain the plaintiff had no *locus standi* to dispute it.

The plaintiff filed a replication traversing the above pleas generally and denied the execution of the Will, alleging that Bishen Dial had no disposing mind. It was also denied that the decision in the Cawnpore Court was in any way binding on the plaintiff, and it was stated that Bishen Dial had not admitted or accepted the alleged partition and that any such admission by him was made under undue influence.

A preliminary issue was framed on the question of *res judicata* in regard to the decision in the Cawnpore Court and was disposed of in favour of the plaintiffs-respondents on 10th April 1911 (page 321, Printed Book, Part II) and again in the judgment under appeal. At page 319, Printed Book, Part II, are to be found certain *suggested issues*, twenty in number, there is nothing to shew that they were adopted by the Court but in the judgment under appeal they are quoted in detail and presumably they were as a matter of fact accepted as the issues arising in the case.

During the pendency of this case Babu Lal applied for, and obtained Probate of the Will executed by Bishen Dial on 26th November 1909, and in those proceedings it was held that Bishen Dial had executed the Will as a free agent and not under undue influence, and that he had a disposing mind (Printed Book, Part I, pages 295, 296).

BABU LAL *v.* HARI BAKHSH.

The *first issue* was: "*Was Chet Ram adopted by Sri Ram and is the adoption valid?*

The Trial Judge has held the adoption not proved. Mr. Sheo Narain, though stating that he did not give up this point, contented himself by drawing our attention to the statements of Ghanaya Lal, page 392; Bhagat Ram, page 556; Bansi Dhar, page 409; Chhaju Ram, page 450 and Babu Lal, defendant-appellant. The question was not argued at the Bar and no reason has been given for doubting the correctness of the decision arrived at. The evidence is inconclusive and this issue has been rightly decided.

The first point taken by Mr. Sheo Narain related to issues Nos. 7 and 12 which are:—

Issue No. 7:—Is the the present suit barred by section 11, Civil Procedure Code?

Issue No. 12:—Was the Will, the voluntary act of Bishen Dial and was he competent to make it and was it made *pendente lite* and is plaintiff bound by it?

The findings on these issues are to be found at page 495, Printed Book, Part II, and briefly stated they are, *as to issue* No. 7, that the Cawnpore Court having found that it had no jurisdiction to try the suit was not competent to decide anything that was in dispute in the suit and, therefore, the judgment in that case did not operate as *res judicata* in the present suit.

As to issue No. 12 that the plaintiff was not bound by the Will which had been made *pendente lite* and while the testator was under the complete control of the defendant-appellant. With regard to *issue* No. 7 it was contended that in order to arrive at a decision as to whether the Court at Cawnpore had jurisdiction, it was imperatively necessary to come to a decision as to whether the Cawnpore shop was or was not a part of the joint property and that, therefore, the decision that it was not and that it had ceased to be connected with the Delhi concerns since the partition in 1903 = *Sambat* 1960 was final and binding on both parties.

In support of this contention *Gandu Singh* v. *Natha Singh* (1) was cited and reference was made to Hukam Chand's Civil Procedure Code, page 193. Mr. Shafi, in reply, contended that the question of jurisdiction had been decided by the Cawnpore Court on the ground that there was no joint immoveable property situate within the jurisdiction of that Court, and that, therefore, the decision on the point now under consideration was redundant and uncalled for, and consequently did not operate as *res judicata*, and he drew attention to the fact that in spite of this finding the plaintiff had included the Cawnpore shop in this suit. He cited *Muhammad Rustam Ali Khan* v. *Nawab Muhammad Azmat Ali Khan* (2), *Narain Das* v. *Faiz Shah* (3), *Malik Rahim Bakhsh* v. *Musammat Fakhar-un-nisa* (4), *Wingrove* v. *Wingrove* (5), *Barkat Ali* v. *Hussain Khan* (6), *Rajab-un nissa* v. *Habib Bakhsh* (7), *Run Bahadur Singh* v. *Lucho Koer* (8), *Bhuka das Vijbhukandas* v. *Lallubhai Kashidas* (9), *Abdul Kadir* v. *Dulan-bibi* (10) and *Chandi Prasad* v. *Maharaja Mahendra Mahendra Singh* (11).

Muhammad Rustam Ali Khan v. *Nawab Muhammad Azmat Ali Khan* (2) appears to have no bearing on the point at issue and requires no discussion.

In *Narain Das* v. *Faiz Shah* (3) it was held by a Full Bench that the true test is "whether the matter has been directly and substantially in issue in the former case and has been heard and finally decided", and that "no matter can be said to be directly and substantially in issue or to have been finally decided unless a decision thereon is necessary for the decision of the case upon the ground on which the final decision ultimately proceeds."

In *Malik Rahim Bakhsh* v. *Musammat Fakhar-un-nisa* (4) the above ruling was referred to, it was held that a decision on a

(1) 12 P. R. 1907; 6 P. L. R. 1908; 92 P. W. R. 1907.

(2) 64 P. R. 1882.
(3) 157 P. R. 1889.
(4) 31 P. R. 1898.
(5) 56 P. R. 1904; 84 P. L. R. 1904.
(6) 6 P. R. 1906; 61 P. L. R. 1906.
(7) 57 P. R. 1907; 66 P. W. R. 1907.
(8) 11 C. 301; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind Dec. (N. S.) 930 (P. C.).
(9) 17 B. 562; 9 Ind. Dec. (N. S.) 368.
(10) 20 Ind. Cas. 530; 37 B. 563; 15 Bom. L. R. 672.
(11) 23 A. 5; A. W. N. (1900) 173.

point which is decided, but which is not necessary for the decision of the suit, which is disposed of on another point, cannot operate as *res judicata*.

Wingrove v. *Wingrove* (5) has no bearing and need not be considered, and the same may be said of *Barkat Ali* v. *Hussain Khan* (6).

In *Rajab-un-nisa* v. *Habib Bakhsh* (7) the facts were quite different and no new principle was enunciated. It is authority for the proposition that a party setting up a plea of *res judicata* is bound to establish it, and that a Court is competent to examine whether the point was necessary for the decision of the case upon the ground upon which the final decision was arrived at.

Run Bahadur Singh v. *Lucho Koer* (8) was referred to in *Narain Das* v. *Faiz Shah* (3) and is to the same effect.

In *Bhukandas Vijbhukandas* v. *Lallubhai Kashidas* (9), *A* sued *B*, *C* and *D* on a mortgage executed at Surat of certain property situated there, the covenant for re-payment being joint and several. *C* and *D* residents of Surat pleaded that the Bombay Court had no jurisdiction as against them, and as against them the suit was dismissed, a decree being passed against *B* alone. *A* then sued *C* and *D* at Surat and the plea of *res judicata* was raised. The High Court held that there was no decision on the merits in the former case and as against them the proceedings were a nullity.

In *Abdul Kadir* v. *Dulanbibi* (10) the Court having held that it had no jurisdiction proceeded to give a decision on the merits. It was held that such decision was not binding inasmuch as the Court was incompetent.

In *Chandi Prasad* v. *Maharaja Mahendra Mahendra Singh* (11) the learned Judges differed and though Mr. Shafi drew attention to page 7 of the report, that is, part of the judgment of Banerji, J., Aikman, J., came to a different conclusion and the case was decided in accordance with his views.

The question in this case was whether interest was payable on arrears of land revenue. In a former suit it had been held that interest was payable. The land revenue having again fallen in arrears a second suit for the same was instituted and interest claimed. It was held that the decision in the former suit that interest was payable operated as *res judicata*, inasmuch as the liability to pay interest was in issue in both suits.

This case cannot assist Mr. Shafi and, if anything, is in favour of the appellants.

In *Gandu Singh* v. *Natha Singh* (1) Chatterji, J., held that in order to arrive at a decision whether the Court below had jurisdiction, the Chief Court had power to consider the correctness of an Appellate Court's findings on the facts relative to the question of the jurisdiction of that Court to entertain the appeal. The applicability of this case is not very apparent, but Mr. Sheo Narain seems to have regarded it as an authority for the proposition that in arriving at a decision as to whether a Court had jurisdiction to try a suit, such a Court is authorized to come to a decision on facts on which it can base its final decision on the point of jurisdiction and that a decision on those facts would operate as *res judicata* in any subsequent suit in which they come up. Whether or not this proposition is correct, the ruling relied on does not appear to support it.

At page 183 of Hukam Chand's Treatise on the Civil Procedure Code, the learned author says that a dismissal of a suit on a preliminary point is a decision on that point.

Now section 11, Civil Procedure Code, runs thus:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties....."

The question really, therefore, is whether in the Cawnpore suit the present *issue* was directly and substantially before the Court and whether it was necessary to decide it in order to arrive at the final decision on the point of jurisdiction. The authorities cited appear to lay down no more than this and each case must be decided on its own facts.

There can be no doubt that the question was directly and substantially in issue in the Cawnpore Court. Evidence was led on the point and the accounts exhaustively examined, and the judgment shews that the matter was carefully and thoroughly considered. In order to determine the question

of *res judicata* it is necessary to ascertain what matters were in dispute between the parties, and this should be done not merely by looking at the decree, but also by examining the pleadings and the judgment [*Krishna Kamini* v. *Abdul Jubbar* (12)]. At page 269, Printed Book, Part I, it will be found that a clear and separate issue was framed and an order passed that parties were to produce evidence as to it. This issue was :—

"Was the shop at Cawnpore, known as 'Hari Bakhsh', which at least existed before the institution of the suit, joint, and was the name only of the first shop known as 'Jai Narain-Sanahi Ram' changed, or was not the said shop a branch of the shop known as 'Jai Narain-Sanahi Ram' but was it a separate shop, and which persons were parties therein?"

This issue arose directly out of the pleadings in the case and there can be no doubt that its decision had a very important bearing on the question of jurisdiction. If the Cawnpore shop was separate from the Delhi concerns, it is obvious that the Cawnpore Courts had no jurisdiction to try the suit. The learned Additional Sub-Judge at Cawnpore proceeded to dispose of this issue, clearly stating that on its decision the question as to jurisdiction would *also be determined* (see page 286, line 12, Printed Book, Part I). Was it, however, necessary or essential to decide this issue having regard to the fact that the question of jurisdiction had been decided on other grounds?

Now it seems that this question must be answered in the affirmative. The plaintiff in that suit made certain allegations on which he based his claim that the case was triable at Cawnpore. These allegations were traversed by the defendants and the various points arising out of them were put in issue. They all had a bearing on the question and they all ought to have been decided, in any event the parties clearly, by adducing evidence, invited a decision on the present point. The mere fact that the question of jurisdiction was also decided on other grounds as well cannot prevent this decision operating as *res judicata*.

(12) 30 C. 155 at p. 193; 6 C. W. N. 737.

The decision on the merits of this issue formed an additional ground for arriving at the conclusion that the Court had no jurisdiction, and to that extent it must be considered that it was necessary to come to a finding on the point. This view is fortified by the decision in *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (13), in which case the facts were as follows:—

A instituted a suit against *C* for damages for not removing certain offensive matter from his land. A question was raised whether a certain notice had been given and also whether *C* was bound to remove the offensive matter from *A*'s land. The Court held that no notice had been issued and that, therefore, the suit failed, and also that on the merits *C* was not bound to remove the filth from *A*'s land and dismissed the suit.

In a subsequent suit *A* claimed the same relief as in the previous suit and *C* raised the defence that the suit was barred as *res judicata*.

The High Court held that as the matter was directly and substantially in issue in both suits, the subsequent suit was barred as *res judicata* notwithstanding that the previous suit failed by reason of the decision of the Court upon some other matter as well.

Upon this view of the law, which is not in any way opposed to the principles laid down in the decisions cited at the Bar, the decision of the Trial Judge on issue No. 7 is erroneous, and it must, therefore, be held that the question whether the Cawnpore shop known as Hari Bakhsh-Khunka is a part of the joint property must be held to be barred as *res judicata*, the decision being that it is not joint.

Coming now to issue No. 12 it was contended by Mr. Sheo Narain that having regard to explanation I to section 11, Civil Procedure Code, the judgment in the Probate case precluded the re-opening of the question as to Bishen Dial having executed this Will under undue influence. *Kalyanchand Lalchand* v. *Sitabai Dhanasa* (14), *Ramnandan Prosad* v. *Sheo Parson Singh* (15) and *Brendon*

(13) 24 C. 900; 12 Ind. Dec. (N s.) 1269.
(14) 23 Ind. Cas. 325; 38 B. 309; 16 Bom. L. R. 5.
(15) 6 Ind. Cas. 301; 11 C. L. J. 623.

v. *Shrimant Sunderabai* (16) were relied on. These decisions are in point and support the contention of the learned Advocate.

Mr. Shafi, however, urged that his client was a minor and that his guardian *ad litem* was guilty of gross negligence in not appealing against the decision in the Probate case, and that for that reason the decision should not be treated as *res judicata* so far as the minor is concerned. He cited *Ahmad Ali Shah* v. *Amir Shah* (17), *Lalla Sheo Churn Lal* v. *Ramnandan Dobey* (18) and *Cursandas Natha* v. *Ladkavahu* (19).

In *Ahmad Ali Shah* v. *Amir Shah* (17) the decision was based on the facts before the Court and in the present case it has not been shown that the decision in the Probate case was so obviously erroneous as to render a failure to appeal gross negligence on the part of the minor's guardian. The Probate suit was contested throughout and it cannot be said that the minor's mother was in any way careless or negligent in her conduct of it.

Cursandas Nath v. *Ladkavahu* (19) does not support Mr. Shafi's contention, it was there held that a decree passed against an infant properly represented is binding upon him like a decree passed against an adult, but it is open to an infant to impeach such decree by a suit in cases where the guardian has been guilty of gross negligence in allowing the decree to be passed against him.

In *Lalla Sheo Churn Lal* v. *Ramnandan Dobey* (18), the question of *res judicata* did not arise, and as has been said no negligence has been shown and none can be presumed merely because no appeal was filed against the decision of the Probate Court. It must be held that the questions as to the disposing mind of, and the due execution of the Will by Bishen Dial cannot be re-agitated and must be regarded as finally settled.

It was next contended by Mr. Shafi that in any event the validity of the Will had not been determined by the decision of the Probate Court and he cited *Dharm Chand* v. *Musammat Karm Devi* (20), *Nanak Chand* v. *Musammat Dayan* (21), *Piare Lal* v. *Ram Chand* (22), *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (23) and *Madho Pershad* v. *Mehrban Singh* (24) in support. Mr. Sheo Narain, however, never claimed that the decision in the Probate case determined anything more than that Bishen Dial had duly executed the Will and it is not, therefore, necessary to pursue this matter any further.

The next point argued at the Bar related to issue No. 2 and this is the main point in the case.

Issue 2 is as follows:—

"Did Jai Narain make a division of his property between himself and his sons along with his division with Sanahi Ram?"

Mr. Sheo Narain commenced by pointing out that the provisions of Order XIII, rule 4, Civil Procedure Code, had not been complied with, and that as a result the Trial Judge had made use of, and been influenced by, documents which should have been excluded from consideration as not having been duly proved, and in this connection referred to the remarks of their Lordships of the Privy Council in *Sadik Husain Khan* v. *Hashim Ali Khan* (25). Those remarks are peculiarly applicable here. A large mass of letters and documents have been placed on the record apparently without any attempt to place them in any sequence or order and a number have been printed which no attempt even was made to prove.

The provisions of Order XIII, rule 4, Civil Procedure Code, appear to have been wholly ignored and it has been very difficult to ascertain what documents have been proved. The result has been that a great deal of

(16) 23 Ind. Cas. 221; 38 B. 272; 16 Bom. L. R. 164.
(17) 35 P. R. 1898.
(18) 22 C. 8; 11 Ind. Dec. (N. S.) 7.
(19) 19 B. 571; 10 Ind. Dec. (N. S.) 381.
(20) 6 P. R. 1893.
(21) 103 P. R. 1894.
(22) 11 Ind. Cas 443; 21 P. R. 1912; 112 P. W. R. 1911.
(23) 5 B. 48; 7 I. A. 181; 4 Sar. P. C. J. 173; 3 Suth. P. C. J. 778; 3 Shome L. R. 217; 4 Ind. Jur. 472; 7 C L. R. 320; 3 Ind. Dec. (N. S.) 34.
(24) 18 C. 157; 17 I. A. 194; 5 Sar. P. C. J. 586; Rafique and Jackson's P. C. No. 121; 9 Ind. Dec. (N.S.) 105.
(25) 36 Ind. Cas. 104; 21 C. W. N. 130 at p. 154; 31 M. L. J. 607; 19 O. C. 192; 18 Bom. L. R. 1037; (1916) 2 M. W. N. 577; 14 A. L. J. 1248; 21 M. L. T. 40; 38 A. 627; 1 P. L. W. 157; 4 O. L. J. 22; 25 C.L.J. 363 (P. C.).

trouble has been caused and the case has occupied far more time that it otherwise would have.

It will be seen that the onus of issue No. 2 as it is framed was placed on the defendants-appellants. Mr. Sheo Narain contended that the onus really lay on the plaintiff and had been wrongly placed on his clients. He cited *Nihal Devi* v. *Kishore Chand* (26), *Surajpal Singh* v *Gajraj Singh* (27), *Anandibai* v. *Hari Suba Pai* (28) and *Vaidyanath Aiyar* v. *Aiyasamy Aiyar* (29), as authorities for the proposition that when once a partition of a joint family has been shewn the presumption is in favour of a total disruption.

Mr. Shafi referred to section 106, section 102 and section 114, Evidence Act, and contended that the presumption was in favour of jointness, and that when two brothers separated, no presumption arose that their respective sons also separated *inter se*.

As a matter of fact the question as to onus in this case is to a great extent purely of academic interest, as the parties have produced all the available evidence relating to this issue, and the decision must, therefore, be arrived at on the evidence so produced. This evidence consists of a mass of documents, such as letters and accounts, and an admission in writing made by Bishen Dial as to the factum of his having separated from his brothers. There is also a certain amount of oral evidence and the conduct of the various members of the family has also to be taken into consideration.

It is common ground that in 1960 *Sambat*= 1903 A. D. a separation took place between Jai Narain and Sanahi Ram, the shares allotted to each have been stated already, and regarding them also there is no dispute.

The case for the plaintiff-respondent is that after the said partition with Sanahi Ram, Jai Narain and his descendants remained joint *inter se* and continued so up to the present.

The defendants-appellants on the other hand allege that Jai Narain, in continuation of the said partition, separated from his sons and allotted to each of them the proper and appropriate share of what had fallen to him. It was argued by Mr. Sheo Narain that the separation between the brothers Jai Narain and Sanahi Ram could not have been carried into effect in a day, and must have taken some time. In this contention there is considerable force. The shops each of them were to take had been agreed upon, but it is obvious that it would take considerable time to go into and settle the accounts, arrange for the recovery or allotment of outstandings, and apportion the debts due from the concern.

The business was admittedly a large one and there were shops in Delhi, Calcutta and Cawnpore.

If then there was a separation between Jai Narain and his sons, it is only to be expected that the parties interested would be found taking active steps to bring about a complete settlement of the affairs of the various concerns.

Assuming that the Cawnpore shop had fallen to the share of Bishen Dial, it is only natural that he should be present sometimes at Calcutta and sometimes at Delhi and similarly those to whom the Delhi shops had allotted would be found in Calcutta. At the same time the activities indicated are quite compatible with their continuing joint with their father Jai Narain, for as urged by Mr. Shafi any of the three brothers might have been deputed to bring about and arrange for a final settlement of the accounts of the joint concern. There exists, however, a certain amount of correspondence and to this both sides have referred, each side placing a construction on it which is most favourable to their own contentions. Before dealing with this correspondence, however, it will be as well to take up Exhibit D14.

This is a very important document and on it a good deal of the controversy has centred.

The Trial Judge at page 482, Printed Book, Part II, has held it to be a forgery.

D 14 is printed at page 220, Paper Book, Parat I, and is addressed to "Sri Ram-Babu Lal" from Bishen Dial It is dated *Phagun*

(26) 8 Ind. Cas. 999; 97 P. R. 1910; 142 P. W. R. 1910; 11 P. L. R. 1911.

(27) 26 Ind. Cas. 600; 1 O. L. J. 698.

(28) 30 Ind. Cas. 913; 35 B. 293; 13 Bom. L. R. 287.

(29) 1 Ind Cas. 408; 32 M. 191; 5 M. L. T. 49; 19 M. L. J. 94.

Sudi 2 *Sambat* 1965=22nd February 1909 and runs thus:—

"Jai Narain in your presence separated us the three brothers on *Asarh Badi* 10, *Sambat* 1960=20th June 1903. The whole work of Delhi remained with you the two brothers and the work at Cawnpore fell to my lot. This partition was effected by Jai Narain. We, the three brothers, agreed to this settlement and do not object to it. But the accounts, *Sambat* 1960, have not been settled. Whatever is due under that account will be paid by you, the two brothers. I have nothing to do with it. The property situate at Bassan and the houses will remain joint. We of our own accord have written this. No one can object to it. What is written above is correct."

Then follow the signatures of Bishen Dial and certain witnesses.

It is obvious that if this document is genuine it is a very important piece of evidence in favour of the appellants' case. The Trial Judge has based his conclusions with regard to it on the following grounds: —

(1) Though of such importance and admittedly in the possession of Babu Lal it was not produced in the Court at Cawnpore.

(2) Babu Lal's explanation that he had given it to his Pleader, Anand Sarup, and left it to his discretion to file in Court or not as he thought fit is unsatisfactory, and Anand Sarup, though examined, was not asked about it.

(3) None of the witnesses produced regarding it swear to Bishen Dial's signature or to having seen him write or sign it, and the witnesses are men of straw, whereas there are many respectable and wealthy persons in Katra Ashrafi, where this document was attested, who could and should have been asked to attest so important a document.

Mr. Shafi, while adopting these grounds for discrediting the document and the witnesses who give evidence relating to it, also contended that it was false because it was not referred to in the written statement filed in the Cawnpore Court. He also contended that it was inadmissible in evidence for want of registration, and that even if it were not a forgery it had no evidential value inasmuch as it was written under undue influence, and at a time when Bishen Dial was on bad terms with *Musammat* Basanti. Finally he referred to a letter, dated *Phagan Badi* 15, *Sambat* 1965=20th February 1909 (page 144, Printed Book, Part I), and urged that as Bishen Dial was at Cawnpore on the 20th February 1909, it was practically impossible for him to have executed or written the document D14 at Delhi on the 22nd February 1909. In this last contention there is no force. It is not known where Bishen Dial was before the 20th February 1909 and it is obviously not impossible for him to have been at Cawnpore on the 20th and at Delhi on the 22nd February 1909.

A perusal of the document itself shows that it does not profess to be anything more than an acknowledgment that a partition had been effected as far back as 1903, it does not create any right in any property and its registration was not compulsory. It is simply a piece of evidence supporting the allegation that a partition had taken place some six years previously.

Mr. Sheo Narain contended on the other hand that Exhibit D.4 was written in the natural sequence of events There had been some dispute about the outstandings and other matters and that these having all been satisfactorily settled, D14 was written in order to evidence the fact that the brothers had been separated.

Its production in the Cawnpore Court was not necessary and evidently Anand Sarup regarded it as of no assistance in the question that was then before the Court, which was whether there had been a separation between Bishen Dial and his sons, on which point Bishen Dial's written statement and Exhibit D12 (of which later) were considered all that was necessary.

On the question of "undue influence" he pointed out that Bishen Dial and Babu Lal were step-brothers and that the letter referred to by Mr. Shafi at page 144, Printed Book, Part I, dated 20th February 1909, is alone sufficient to show that Bishen Dial regarded the plaintiff, his grandson, with affection, and, therefore, would be most unlikely to be influenced into executing a false document which would deprive the said grandson of so much property. Babu Lal's explanation, it was contended, was a natural and a true one, and the Court below had omitted to notice that Anand Sarup had not been

examined as a witness and that, therefore, no questions could have been put to him with regard to this document. Finally he urged that the witnesses who gave evidence with regard to this document were not "men of straw"—and that nothing had been deduced to show that they were in any way partial to Babu Lal or inimical to the plaintiff-respondent. Now its non-production in the Cawnpore Court cannot be regarded as creating any suspicion as to the genuineness of the document. It has been shown above that the Additional Subordinate Judge, Cawnpore, drew up a special issue relating to the jointness of the Cawnpore shop, and there is nothing extraordinary in the fact that Bubu Lal's legal advisers thought it unimportant for the purposes of that issue. There was no undue delay in its production in the trial of this case. Again the Trial Judge is wrong in thinking that Anand Sarup was a witness and could have been questioned about Exhibit D 14. Anand Sarup made certain statements it is true, but he did so merely as a Counsel and it is obvious that the parties could not have treated him as a witness on that account.

As to the position and reliability of the witnesses, it is far from clear on what the learned District Judge based his finding that they were men of straw.

The witnesses are D. W. No. 1 Chote Lal, page 335, Part II, Paper Book; Hari Ram page 427, Part II, Paper Book; Sheo Narain, page 429, Part II, Paper Book, and Babu Lal, page 435, Part II, Paper Book. Chote Lal is a partner with his father in-law and owns a 12-anna share in the business. Doubtless a firm of which he was formerly a member has closed its doors, but that is scarcely any reason for referring to him as a man of straw.

Hari Ram pays Rs. 42 income-tax. Sheo Narain is the owner of a shop and though he does not state that he pays income-tax, the trend of the cross-examination would lead to the conclusion that he did. Assuming, however, that he does not, there is nothing in his cross-examination to lead to the conclusion that he is a man who could be readily bribed or coerced into committing deliberate perjury for the sake of Babu Lal.

In fact it can be said of all these three witnesses that nothing has been shown suggesting that either of them is on particularly friendly terms with Babu Lal or is in any way inimical to the plaintiff.

No doubt none of these witnesses say that D14 was written or signed by Bishen Dial in their presence.

Chote Lal, however, states that he signed as a witness at the instance of Bishen Dial who was then in Delhi, and that the signature on D14 is that of Bishen Dial with whose signature he is conversant.

He has sworn to Bishen Dial's signature on other Exhibits as well, and his evidence has not been shaken in cross-examination. Hari Ram also states that he attested the document at the instance of Bishen Dial who told him he had executed it. He does not profess to be able to recognise the signature of Bishen Dial.

Sheo Narain too says that he attested this document at the request of Bishen Dial. Mr. Shafi contended that though these witnesses were perjurers, they had not the courage to say that the document had been written in their presence. The evidence they give, however, if false, is sufficient to bring them within the law, so that it is difficult to understand why they should object to support a false case by saying that the document had been actually executed in their presence.

Setting aside the evidence of Babu Lal, Mr. Sheo Narain pointed out that the allegations made regarding this document were that it had been *written* as well as signed by Bishen Dial. Chote Lal had sworn to the signature, and though another Chote Lal (agent of the plaintiff in the Cawnpore suit) was also cognizant of Bishen Dial's handwriting, he was not put into the witness box to say that D14 was not in the writing of Bishen Dial.

After giving careful consideration to this evidence there appears to be no reason for doubting its correctness and it must be held that Exhibit D14 is a genuine document executed by Bishen Dial.

As to the contention that it was procured from Bishen Dial through undue influence it should be noted that there is no evidence to support the suggestion, and the letter at page 144, Paper Book, Part I, seems to strongly indicate that Bishen Dial was

fond of his grandson the plaintiff, and, therefore, it is difficult to believe that he could have been influenced by Babu Lal into executing a false document that would result in depriving the boy of his rightful dues.

The fact that he, at a later date, and shortly before he died, executed a Will in which Babu Lal figures as executor cannot be regarded as casting any suspicion on Exhibit D14. The Will was executed at a time when he had made up his mind to contest the claim that was being advanced by the plaintiff or rather on his behalf by *Musammat* Basanti. He had been to Bombay and endeavoured to settle the dispute by offering a sum of Rs. 30,000 to *Musammat* Basanti's brother for the boy – his efforts had proved futile and doubtless at that time he had decided to join forces with Babu Lal and to resist a claim (according to him an unjust claim) that was being advanced by *Musammat* Basanti. The next document for consideration is Exhibit D13, dated 17th May 1909. This is a receipt executed by *Musammat* Indri, widow of Brij Mohan in favour of Jodh Raj-Jai Narain acknowledging having received Rs. 5,086-6-0 in final settlement of the winding up proceeds of the firm of Jai Narain-Brij Mohan.

That it was duly executed cannot be denied but it was contended that *Musammat* Indri had been induced to give the receipt.

In order to understand what this document is, it will be necessary, to give the history of the shop to which it relates, *viz*, Jai Narain-Brij Mohan.

After the separation between Jai Narain and Sanhai Ram in 1960 *Sambat*=1903 A. D. Brij Mohan ran away from his father's house in Cawnpore and with Rs. 1,700 came to Delhi, where he opened a shop to which he gave the name of Jai Narain-Brij Mohan. This was in May 1904. On 30th May 1904 Jai Narain issued a notice (Exhibit D20, Paper Book, Part 1, page 193), in which he informed the public that this shop had been opened and given his name without his permission or consent and that he had no concern with it. On 1st August 1904, Brij Mohan replied to this notice by publishing Exhibit P17 (page 104, Paper Book, Part I), in which he stated that he had opened the shop at the instance of Jai Narain. He then gave a list of shops and announced that he was a co-sharer in all of them and that he would continue to be so "unless they separate me altogether and deliver my full share into my possession."

Brij Mohan died on 22nd June 1905 and the allegation is that Bishen Dial and Ram Partab (brother of *Musammat* Indri) came to Delhi and obtained the assistance of the firm of Jodh Raj Jai Narain in the winding up of the business of Brij Mohan. The accounts relating to the winding up are at pages 521 to 545 (Paper Book, Part III) and show that the goods were sold by 1964 *Sambat*, whereas the receipt denoting the final payment (after charging brokerage or commission) was executed on 17th May 1909.

Mr. Sheo Narain explained the delay by saying that the family was not on good terms during the interval and that, therefore, the payment was not made till Bishen Dial had finally settled the dispute by the execution of Exhibit D14.

Mr. Shafi on the other hand contended that this document D13 was collusive and that *Musammat* Indri stood so obviously to gain that she naturally was ready enough to fall in with Babu Lal's wishes.

This document was attested by Bishen Dial. Now though there is some force in Mr. Sheo Narain's contention, nevertheless the late stage at which the payment was made leads irresistibly to the conclusion that the receipt was obtained in order to be used as a piece of evidence in this case, and consequently Exhibit D13 cannot be held to have any great evidential value.

Next for consideration are the letters which have been referred to by the Counsel. It may be premised that these letters are in consonance with the views advanced by either side.

Mr. Sheo Narain contended that they clearly indicate that a partition had been effected between Jai Narain and his sons, by which the whole of Jai Narain's share amounting to three lakhs had been divided between the three sons Bishen Dial, Sri Ram and Babu Lal, Jai Narain continuing to live with the two latter, the sons of his second wife. Bishen Dial was given the Cawnpore concern while the two concerns

in Delhi remained with the other two brothers. Each brother was to get one lakh.

Bishen Dial accordingly took over the Cawnpore shop. It must be admitted that the letters are compatible with this theory.

Mr. Shafi on the other hand urged that as Bishen Dayal had been managing the Cawnpore business before Sanahi Ram divided off, he continued to look after that concern while the others continued in Delhi. Again it must be admitted that the letters may bear that construction. At the same time it has to be borne in mind that the view taken of Exhibit D14 has a very important bearing on the meaning of this correspondence.

For instance in letter C K page 189, Paper Book, Part I, Sri Ram writes to Bishen Dial on 19th July 1902: "You have written that the item of Rs. 30,000 of Cawnpore would remain with you ..... the amount in our opinion stands thus. Rs. 35,000 are due from the shop at Calcutta, Rs. 40,000 are due from the shop at Delhi, Rs. 20,000 of Delhiwala are due from Sada Sukh Parakh. About Rs. 10,000 out of the account of Sada Sukh Parakh are due by Delhiwalas. The property is worth about Rs. 8,000 or Rs. 9,000. Thus the above three items come to Rs. 95,000.....How have you made the account you are the person who know it ....."

If D14 is genuine, Mr. Sheo Narain's contention is considerably strengthened and this letter indicates that Bishen Dial had been complaining that he had less than his share, whereupon Sri Ram explained to him that the lakh was really made up and that it was Bishen Dial who should know best the state of affairs in Cawnpore. It would serve no good purpose to detail all the letters that have been referred to. Each one of them has been carefully considered in all its bearings and as has been said above the construction to be placed on each to a considerable extent depends on the view taken of Exhibit D14. This has been held to be genuine and, therefore, it follows that the letters must be regarded as strengthening the view that a partition did as a matter of fact take place.

Some of these letters show that Bishen Dial went to Calcutta. He had been in charge of the Cawnpore shop, which it is said had fallen to his share. It was, therefore, perfectly natural and indeed to be expected that he would go to Calcutta and assist Sanahi Ram in separating and settling up the joint business. Similarly the suit filed in Calcutta by Harsukh Rai and others against Sanahi Ram and others, the plaint in which is printed at page 126, Paper Book, Part I, clearly shows that Bishen Dayal's presence at Calcutta was necessary. That suit related to dealings with the Cawnpore shop between 1954 *Sambat* and 1960 *Sambat*, and whether there had been a partition or not Bishen Dial was obviously the best man to attend to the claim advanced.

The letter dated 15th October 1906 clearly refers to this dispute and Mr. Sheo Narain's contention that this indicates a partition is not without force. Sanahi Ram wrote to Delhi for money on account of this case and was referred to Cawnpore. Doubtless this is compatible with Mr. Shafi's theory, but the balance of probability is in favour of the opposite view.

Nor can the pleas in the Calcutta suit really assist the plaintiff to any extent. They appear to be oral pleas filed by Counsel and are not verified. It is impossible to draw any inferences one way or the other from them in such circumstances.

Mr. Shafi then took us through (1) P. 10, page 94, Paper Book, Part I (which, however, appears to be of no assistance), (2) P. 11, page 85 (*idem*), dated 8th August 1903, which refers to old accounts which Cawnpore was asked to settle and, if any thing, assists the appellants, (3) Exhibit C, dated 4th January 190 , Paper Book, Part I, pages 105, 106, and contended that the reference to a "Commission agency" indicates jointness—the translation of this is erroneous and the original shows that Bishen Dial may have been asked to assist in appointing an agent. There would be nothing strange in the Delhi brothers asking Bishen Dial to do this for them. The separation did not necessarily mean that the family were on hostile terms at that date.

Their Nos. 1133 (page 100), 1147 (page

198), 1135 (page 101), 1139 (page 199), 1129 (page 102), 1108 (page 109), 1104 (page 111), 1097 (page 118) and others referred to in the judgment were discussed as well as Nos. 1095 (page 110), 1110 (page 115), 1014 (page 98), 1009 (page 107), 1095 (page 117) and 1111 (page 108).

As has been said above all the correspondence has been carefully considered and on the whole indicates that a partition had been effected.

Mr. Shafi sought to show that the Delhi concerns were financing Cawnpore and other shops connected therewith such as Jai Narain-Brij Mohan (Delhi) and Jai Narain-Murli Dhar at Kalpi.

Letter No. 1118, page 89, and the accounts at page 68 indicate something quite different as also do Exhibit P. W. 2, page 191, and the accounts, page 35. It seems clear that these payments were being made by Delhi to Kalpi on behalf of Cawnpore, as Kalpi was in need of money and Delhi owed Cawnpore money in accordance with the arrangement at the time of separation. It is significant that in both instances Babu Lal-Deoki Nandan are sending money to Kalpi *to be credited to the old firm of* Murli Dhar-Deoki Nandan. There is thus no real reason for supposing that the shop at Kalpi was in any way financed by Delhi as a branch of Delhi.

That some sort of dispute arose between the sons of Jai Narain soon after 1903 is beyond doubt and there is nothing on the record to show that this dispute was not in connection with a partition. It is evident that Bishen Dial and his sons considered that the Cawnpore shop had less money than was anticipated. This is indicated by Exhibit C (K) (page 189, Paper Book, Part I). Brij Mohan came to Delhi and opened a shop as has been shown above. This led to the notice issued to the public referred to bove.

Jai Narain then applied on 26th August 1904 to the Income-tax authorities and asked that the shops be all separately assessed.

It is not necessary, however, to discuss this question at length, inasmuch as it really does not afford any substantial assistance to either side.

In 1907 the situation became more acute and Bishen Dial was induced by his son to consult a Pleader and issue a notice. See letter No. 1161 (page 132), dated 19th July 1907, in which Bishen Dial refers to the fact that a suit was imminent and that a notice had been sent "as directed by you."

This notice is at page 302, Paper Book, Part I, dated 19th July 1907, and was sent by Babu Peare Lal to Deoki Nandan. It is significant that no notice was sent to Sri Ram or Babu Lal. Deoki Nandan replied through Mr. Kirkpatrick on 20th July 1907 (page 136, Paper Book, Part I), pointing out that he had no concern with Bishen Dial who should settle his own dispute with his brothers if he had any claims against them.

Then the correspondence shows that efforts were being made to get the matter settled through some friendly intervenor. In 1908, Sri Ram died and a few months later the death of Murli Dhar took place. No suit was brought and in February 1909 Exhibit D 14 was written. There seems a good deal of force in Mr. Sheo Narain's contention that Murli Dhar was really at the bottom of the trouble between Bishen Dial and his brothers, and that as soon as he died an amicable arrangement of their differences was speedily brought about.

That these differences related to a division of the property seems to be beyond question. This is the account of it given by Babu Lal and against his version there is no evidence, while it is supported by the notice issued by Brij Mohan in 1904 in which he claimed to be a co-sharer until he had been given his full share.

There was some discussion regarding the changes in the names of the shops that took place from time to time. Mr. Shafi admitted that these changes might have been due to a partition, but also argued that the introduction of strangers into the business would also have given occasion to such changes. It is not, however, necessary to discuss this matter, as it is not now of much importance. The fact that changes did take place assists the appellants to a small extent, but the point by itself is of no great value.

The written statement prepared for Bishen Dayal in the proceedings at Cawnpore was also discussed at some length. After an

examination of the evidence relating to it there is no reason to doubt that it was prepared on the instructions given by Bishen Dial himself to his Pleaders. In this too the partition is admitted, but this admission is of small value in comparison to the one made in Exhibit D 14.

In conclusion, the admissions made by Bisben Dial, the finding that the shop at Cawnpore was separate from the Delhi concerns, the correspondence on the record and the various entries in the accounts, relating to the dealings between these several shops, and the evidence on the record leave no doubt in my mind that there had been a partition between the three brothers Bishen Dal, Sri Ram, and Babu Lal effected in 1903 by Jai Narain and I would, therefore, accept this appeal and dismiss the plaintiff's suit with costs throughout.

BROADWAY, J.—I agree generally in the foregoing judgment and in dismissing the plaintiff's suit with costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 268 OF 1917.

July 9, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

SURENDRA NATH BHAUMIK AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

GAYESHUDDIN—DEFENDANT—OPPOSITE PARTY.

Small Cause Court, jurisdiction of—Landlord and tenant—Suit for damages for cutting down trees.

A suit by a landlord against a tenant for damages for cutting down trees on his holding does not lie in a Small Cause Court, where the relief claimed depends upon the determination of the status of the defendant as a tenant. [p. 495, col. 1.]

Rule against the order of the Munsif, first Court, Rangpur, in Suit No. 1029/1284 of 1916.

FACTS.—This was a Rule granted by Mookerjee and Beachcroft, JJ., on 30th March 1917 against the judgment of Babu Gopal Chandra Basu, Small Cause Court Judge of Rangpur, dated the 18th December 1916.

The plaintiffs were executors to the estate of a deceased lady. The defendant was an ordinary *raiyat* under this estate. The plaintiffs sued the defendant in the Small Cause Court of Rangpur for damages of Rs. 20 for cutting down and appropriating a mango tree standing on the *raiyati*-holding of the defendant. The Small Cause Court Judge held that as the defendant filed rent receipts showing payment of rent at a uniform rate for over 20 years, he had the right to cut down trees. The Small Cause Court Judge in his judgment said: "The defendant has filed rent receipts from 1294 of the time of the plaintiffs' predecessor Bipad Nashini, to show that he has held the land at the same rent for over 20 years. I think, therefore, that the defendant has the right to cut down timber trees."

The Rule came up for hearing before N. R. Chatterjea and Richardson, JJ.

Babu *Mohini Mohan Bhattacharjee*, for the Petitioners.—The status of a tenant cannot be determined in a Small Cause Court suit when the relief claimed by the plaintiff depends on the determination of a question of status or title. Section 23 of the Provincial Small Cause Court Act allows the return of the plaint for presentation to the proper Court. Even supposing that the Small Cause Court can incidentally determine a question of status, in the present case there were no materials before the Court sufficient for the purpose. The only material before the Court in this suit is the payment of a uniform rate of rent for about 30 years. This certainly is insufficient to raise a presumption as to the fixity or permanence of the holding. Such a presumption based simply on the payment of a uniform rate of rent for over 20 years would be valid only in a suit under the Bengal Tenancy Act under section 50, clause (2), of that Act. But this presumption does not arise in a Small Cause Court suit. See *Nilmani Maitra* v. *Mathura Nath Joardar* (1). It is true that the Court may presume any fact which it thinks likely to have happened, regard being had to the common course of natural events, and the presumption as to the fixity of a holding may be based on this principle. Mere payment of a uniform rate of rent for over 20 years, how-

(1) 5 C. L. J. 413.

ever, is not sufficient to raise a presumption of this sort. If the uniformity of the rate of rent continues for 50 or 60 years, if improvements have been effected or transfers recognised, a presumption about the fixity of the holding may be valid, *vide Buzlul Karim* v. *Satish Chandra* (2). The case reported as *Radhika Nath Roy* v. *Samir Fakir* (3) is distinguishable from the present case on this principle. "There the existence of the holding is dated from 1278," also "the defendant produced an *ijara patta* granted by him in favour of one Rashul Mahmud in 1302. In this document there was a recital that he mortgaged the property in question to the above lessee in 1299."

JUDGMENT.

No one appears to show cause. We think that the questions raised in the case cannot be finally d-termined by the Court of Small Causes.

We set aside the judgment and decree of the Court below and direct that the plaint be returned to the plaintiff to be presented to a Court having jurisdiction to determine the questions raised in the case under the provisions of section 23 of the Provincial Small Cause Court. The petitioner, however, must pay the costs of the opposite party in the Court below within a fortnight of the arrival of the record in the Court below, and if the costs are not so paid the Rule will stand discharged.

Plaint returned.

(2) 10 Ind. Cas 325; 15 C. W. N. 752; 13 C. L. J. 418.

(3) 38 Ind. Cas. 49; 21 C. W. N. 636.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1301 OF 1916.

May 24, 1917.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

SHEO SAHAI MISIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAJO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Zurpeshgi *lease, construction of*—*Lessee under* zurpeshgi *lease, rights of, nature of.*

Under a *zurpeshgi* lease *A* entered into possession of the land in order to secure repayment of the advance that he had made to *B*. He was required to cultivate the land and to pay merely a nomina annual rent of Rs. 2-4-0:

Held, that the object of the *zurpeshgi* lease was not to create the relationship of landlord and tenant but to provide a security as between debtor and creditor and that this being the governing intention between the parties to the contract, *A* had entered into possession in the capacity of a mortgagee and not as a *raiyat* and consequently was not entitled to claim occupancy rights in the land. [p. 496, col. 2.]

Appeal against a decision of the Additional Subordinate Judge, Gaya, dated the 25th September 1916, reversing that of the Munsif, Gaya, dated the 24th January 1916.

Messrs. *Kulwant Sahay* and Rai *Guru Saran Prasad*, for the Appellants.

Mr. *Haribhusan Mukerjee*, for the Respondents.

JUDGMENT.

ATKINSON, J.—This suit was instituted by the plaintiff for a declaration of title to $3\frac{1}{2}$ *bighas* of land situated in *Mouzah* Hardia and consequential thereon for recovery of *khas* possession of same from the defendants, who are alleged to have been in possession of the lands in suit as trespassers. The original proprietors of the land in suit granted a *zurpeshgi* lease which expired in the year 1883. Another *zurpeshgi* lease referable to the land now in suit was created on the 14th April 1883. A third *zurpeshghi* lease was made on the 6th July 1892 to the defendant No. 1, for a period of nine years from 1300 to 1308 to secure an advance of Rs. 250 at an annual rent of 12 annas. Of this 12 annas 7 annas was payable for road cess and 5 annas to the landlord as his share of the rent. This lease expired in the year 1900, and when the proprietors were unable to discharge their liability on foot of the *zurpeshgi* lease of the 6th of July 1892, they executed a fresh lease on the 19th May 1900 in consideration of an advance of Rs. 350, Rs. 250 whereof was to satisfy the money due under the previous *zurpeshgi* lease coupled with a cash advance of Rs. 100 and the rent reserved by this *zupeshgi* lease of the 19th May 1900 was Rs. 2-4-0. The plaintiff acquired by purchase the interest of the original proprietors in the lands in suit on the 19th June 1911; and on the 30th May 1912 the plaintiff tendered to the defendants the full amount that was due and owing to

to them secured by the *zurpeshgi* lease of the 19th May 1900. The defendants contend that they have acquired in the lands in suit occupancy rights by virtue of the provisions of the *zurpeshgi* lease of 1900, and that they are not liable to be ejected therefrom. The plaintiffs on the other hand contend that the defendants never occupied the character or position of tenants; and that they entered on the lands in suit under the *zurpeshgi* lease of the 19th May 1900 in the capacity of mortgagees to enable them to realise, out of the security provided by the *zurpeshgi* lease, the amount of the advance which they had made to the plaintiff's predecessors-in-title, and that the term of the lease having expired and the debt due having been discharged by payment to the defendants, the plaintiff, therefore, is entitled to recover possession of the lands in suit from the defendants. The learned Munsif held that the position of the defendants in respect of the lands in suit was merely that of mortgagees in possession under the usufructuary mortgage, and that they could not acquire occupancy rights therein. The learned Subordinate Judge, however, took a different view, and he held that on the construction of the *zurpeshgi* lease of the 19th May 1900 the defendants were occupancy *raiyats*, and accordingly he dismissed the plaintiff's suit.

Everything depends in cases of this kind upon the construc ion of the particular document in question: but having regard to the decision of the Privy Council reported as *Bengal Indigo Company* v. *Roghobur Das* (1), I think a general principle may be laid down. Their Lordships in that case were considering a case exactly similar in character to the one which we have before us; and their Lordships say: "We see no reason to differ from the view expressed by the learned Judges of the High Court, to the effect that the leases in question were not mere contracts for the cultivation of the land let; but that they were also intended to constitute, and did constitute, a real and valid security to the tenant for the principal sums which he had advanced, and interest thereon. The tenants' possession under them was, in part at least, not that of cultivators only, but that of creditors operating repayment of the debt due to them, by means of their security."

Now in the present case the defendants primarily entered into possession of the land in suit to secure repayment of the advance that they had made. No doubt there was a letting of the land in a sense and they were required by the terms of the *zurpeshgi* lease to cultivate the lands and to pay merely a nominal annual rent, which in the case of the last *zurpeshgi* lease of the 19th May 1900 was Rs. 2-4-0. The defendants were bound to cultivate the lands and they were to remain in possession until the date of repayment, namely, 1318, nine years from the date when the *zurpeshgi* lease was granted. The primary object of the *zurpeshgi* lease in this case was not to create the relationship of landlord and tenant but it was to provide a security as between debtor and creditor. Once you arrive at that conclusion as being the governing intention between the parties to the contract, it is reasonably clear that the defendants entered into possession in the capacity of mortgagees and not as *raiyats*, and consequently they are not entitled now to claim occupancy rights as against the plaintiffs in the lands in suit. No doubt the Record of Rights is in the defendants' favour, but upon a true construction of the *zurpeshgi* lease of the year 1900 it is transparently clear that the entry in the Record of Rights is erroneous and the entry in the Record of Rights cannot operate to override the legal construction which the contract can alone bear; and we are of opinion that the defendants are not entitled to be regarded as occupancy *raiyats* in respect of the lands in suit. We have had in the case immediately preceding this the same point for consideration which arises in this case for our decision, and the view which was expressed in that case applies to the present one; and, therefore, we think that the learned Judge was erroneous in the conclusion at which he arrived. This appeal is allowed with costs and we direct that the judgment and decree of the learned Munsif be restored.

CHAPMAN, J.—I agree.

Appeal allowed.

(1) 24 C. 272; 1 C. W. N. 83; 23 I. A. 158; 7 Sar. P. C. J. 94; 12 Ind. Dec. (N. S.) 848.

PYARI MOHAN KUNDU *v.* KALU KHAN.

CALCUTTA HIGH COURT.
RULE *Nisi* No. 732 OF 1916.
February 12, 1917.
Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.
PYARI MOHAN KUNDU—DEFENDANT No. 2—PETITIONER
versus
KALU KHAN AND OTHERS—PLAINTIFFS AND DEFENDANT No. 1—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review, application for, whether can be heard after appeal is preferred against decree—Appeal.

A Court has power, and in fact is bound, to proceed with an application for review of its judgment, notwithstanding the fact that an appeal has been subsequently filed in the case by the applicant for review. [p. 498, col. 2.]

But that power of the Court exists so long as the appeal from its decree is not heard, because once the appeal is heard, the decree in appeal is the final decree in the case and the application for review of judgment of the Court of first instance can no longer be proceeded with. On the other hand, if the application for review is successful, the appeal preferred by the applicant for review cannot proceed. [p 498, col. 2.]

Rule against the order of the Sub-Judge, 2nd Court, Backergunge, in Review Case No. 65 of 1916.

FACTS of the case appear from the judgment.

Babu *Dwarka Nath Chuckerbutty* (with him Babu *Romesh Chunder Sen*), for the Petitioner.—The Subordinate Judge had jurisdiction to dispose of the application for review on the merits and he failed to exercise that jurisdiction.

The application for review was filed on the 26th June 1916 and it was registered on the 30th June 1916, and on that date notice was directed to be issued to the opposite party. The second appeal in this Hon'ble Court was filed on the 4th July 1916. Thus on the 20th June 1916 the petitioner not having appealed from the decree was competent to apply for review of judgment and the Court had jurisdiction to entertain that application. How was that jurisdiction taken away? The subsequent filing of the second appeal could not take away the jurisdiction to entertain the application which had been already entertained. Section 114 and Order XLVII, rule 1, Civil Procedure Code, do not contain any such provision. The law was the same under section 376 of the Act of 1859.

The Court not only may but is bound to dispose of the application for review which was filed before the appeal was filed. See the Full Bench case of *Bhurrut Chunder Mojoomdar* v. *Ram Gunga Sein* (1) and *Thacoor Prosad* v. *Baluck Ram* (2), which has been followed by all the High Courts. See also *Chenna Reddi* v. *Pedda Obi Reddi* (3), *Narayan Purshottam Gargote* v. *Laxmibai Datto Bhagwan* (4), *Kanhaiya Lal* v. *Baldeo Prasad* (5), *Sarat Chandra Dhal* v. *Damodar Manna* (6).

The subsequent filing of the appeal does not make the application for review incompetent, but on the contrary, if that application succeeds and the judgment and decree are set aside or modified, the appeal becomes incompetent. The questions raised in the application for review may be questions of law as well as questions of fact, which are not open to criticism in second appeal. How are findings of fact of the lower Appellate Court which are apparently erroneous be set right except by an application for review? If, on the other hand, the filing of the second appeal be delayed until the disposal of the application for review, very probably the time for appealing will expire and the appeal will become time-barred. The only feasible safe course is that adopted in the present case, *viz.*, to apply for review of judgment first and then file the second appeal, and if the former succeeds then withdraw the appeal but if that fails, to proceed with the appeal. In the present case the petitioner is prepared to give an undertaking not to have the appeal heard until the application for review is disposed of and if it succeeds and the decree is set aside, then to withdraw the appeal.

Babu *Ramani Mohan Chatterjee*, for the Opposite Party.—The fact of the filing of the appeal shows that the petitioner did not want to proceed with the application for review. The learned Additional Subordinate Judge's order shows that the petitioner's *karmachari* informed the Court that a second appeal had been filed.

(1) 5 W. R. 59; B. L. R. Sup. Vol. 362.
(2) 12 C. L. R. 64.
(3) 2 Ind. Cas. 802; 32 M. 416; 6 M. L. T. 130; 19 M. L. J. 388.
(4) 23 Ind. Cas. 513; 38 B. 416; 16 Bom. L. R. 89.
(5) 28 A. 240; A. W. N. (1905) 265.
(6) 12 C. W. N. 885.

PYARI MOHAN KUNDU *v.* KALU KHAN.

[CHATTERJEA, J.—The application has been rejected on the ground that the Court had no jurisdiction to entertain it and not on the ground that it was not pressed. The *karmachari* only stated what was a fact.]

The petitioner is simultaneously trying two remedies. He can raise the same questions in the second appeal. The application for review is unnecessary. Moreover, a party who has appealed cannot go on with an application for review of judgment. Such a course is prohibited by section 114 and Order XLVII, rule 1.

JUDGMENT.—We are invited in this Rule to set aside an order passed by the Court below refusing to hear an application for review of a judgment presented to it by the petitioner, on the ground that an appeal had been preferred against the decree to this Court. The application for review, it appears, was filed on 25th June 1916 and the appeal to this Court was not preferred until the 4th of July. The application for review, therefore, was filed before any appeal was preferred to this Court. Section 114, Civil Procedure Code, lays down that "Any person considering himself aggrieved by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred, may apply for review of judgment." It is clear from that section that an application for review can be made before any appeal has been preferred. That being so, the question is whether there is anything in the Civil Procedure Code to prevent the Court from proceeding with the application for review notwithstanding the pendency of the appeal. The question has been considered in several cases. One of the earliest cases in this Court is *Bhurrut Chunder Mojoomdar* v. *Ram Gunga Sein* (1) where, in delivering the judgment of the Full Bench, the learned Judges observed: "It is clear that, if a review be applied for in proper time, and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of appeal, and he has full power, and is bound to proceed under the application for review." That case was decided under Act VIII of 1859; but, so far as this question is concerned, section 376 of that Act has substantially been re-enacted in section 114 of the present Code. See also *Thacoor Prosad* v. *Baluck Ram* (2), *Surat Chandra Dhal* v. *Damodar Manna*(6). The same view has been taken in the Bombay and Madras High Courts. See *Narayan Purshottam Gargate* v. *Laxmibai Datto Bhagwan* (4) and *Chenna Reddi* v. *Pedda Obi Reddi* (3), the last one being a decision of the Full Bench. We agree with the observations made in that case and which run as follows: "The Legislature has thus conferred upon the party a right to apply for review and upon the Court jurisdiction to entertain the application, and has directed how it shall be dealt with. When a right and a jurisdiction are conferred expressly by Statute in this way, it appears to me that they cannot be taken away or cut down except by express words or necessary implication. There are no express words and the question, therefore, is—is there any necessary implication? No such implication arises from the terms of section 623 itself which provides by way of exception, that, in certain cases, an application for review may be made even after an appeal has been filed and if the Court can proceed to hear such an application, why not also an application made before the filing of an appeal?" Having regard to the terms of the section and the cases referred to above, we are of opinion that the Court has power, and in fact is bound, to proceed with the application for review, notwithstanding the fact that an appeal has been subsequently filed in the case. But that power exists so long as the appeal is not heard, because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be proceeded with. Whether it can be so proceeded with (after the appeal is heard) in cases coming under Order XLVII, rule 1 (2), it is unnecessary for us to consider: On the other hand, if the application for review is successful, the appeal cannot proceed. See *Kanhiya Lal* v. *Baldeo Prasad* (5). The appeal in the present case has not yet been heard under Order XLI, rule 11, Civil Procedure Code. The appellant undertakes to have the hearing of the appeal stayed until the decision of the application for review. We,

therefore, make the Rule absolute, set aside the order of the lower Court and direct that the application for review be taken up and disposed of without delay. The petitioner is entitled to his costs in this Rule from the opposite party. We assess the hearing fee at one gold *mohur*.

Let the record be sent down without delay.

Rule made absolute.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 60 OF 1917.

May 30, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Mullick.

RAJA SINGH—APPELLANT

versus

KISHUN BEHARI LALL—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 50, 105, 109—Fair and equitable rent, settlement of—Appeal from decision of Revenue Officer—Appeal, second, whether lies to High Court.

An application under section 105 of the Bengal Tenancy Act was made by the appellant to the Assistant Settlement Officer to settle a fair and equitable rent in respect of the land held by the respondents, who contended that they were fixed rate tenants of the land. The Assistant Settlement Officer held that the respondents had failed to prove that they were fixed rate tenants and settled Rs. 5-10-0 as a fair and equitable rent. The respondents did not appeal to the Special Judge. The appellant appealed contending that a higher rent should have been fixed, and the Special Judge raised it from Rs. 5-10-0 to Rs. 8. In second appeal the respondents urged successfully that they were fixed rate tenants. The appellants appealed under clause 10 of the Letters Patent:

Held, that the respondents had no right to bring before the High Court in appeal the question whether they were fixed rate tenants or not, as they had not appealed to the Special Judge and, therefore, the only question which the High Court should have considered was the question whether a fair and equitable rent had been fixed. [p. 500, cols. 1 & 2.]

Per *Mullick, J.*—Under section 109 of the Bengal Tenancy Act there is no second appeal to the High Court against an assessment of fair and equitable rent. [p. 500, col. 2.]

That class of cases which directs that in construing section 50 of the Bengal Tenancy Act small variations of rent are not to be taken into account does not touch a case where the variation is as much as six annas on an alleged rental of Rs. 2-8-0 per *bigha*. [p. 500, col. 2; p. 501, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Atkinson, dated the 27th February 1917, in Second Appeal No. 3754 of 1913.

Mr. *Abani Bhusan Mukerjee*, for the Appellant.

Mr. *Sushil Madhab Mullick*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This is an appeal against a judgment of a learned Judge of this Court setting aside decisions of the Special Judge of Shahabad and Assistant Settlement Officer of Shahabad. The appellant and o hers applied to the Assistant Settlement Officer under section 105 of the Bengal Tenancy Act to settle a fair and equitable rent in respect of the land held by the respondents, which appears to measure about $2\frac{1}{4}$ *bighas*. The respondents contended that they were fixed rate tenants of the land and that the appellants were not entitled to ask the Court to settle a rent in respect of the land. The Assistant Settlement Officer held that the respondents had failed to prove that they were fixed rate tenants of the land and he set himself to enquire what would be a fair and equitable rent. He says, "taking all the circumstances of the case into consideration, I settle Rs. 5-10-0 as a fair and equitable rent of the land in suit. Each party to bear its own costs." The respondents did not appeal to the Special Judge at all. The appellant and others appealed, contending that a higher rent should have been fixed. The Special Judge on appeal raised the rent from Rs. 5 10 0 to Rs. 8, that is, from Rs. 2 8-0 a *bigha* to Rs. 3 8-0 a *bigha* or thereabouts. From the judgment of the learned Special Judge it appears that the respondents in this Court contended that they were fixed rate tenants. It appears to me that such a contention was not open to them at all. It is suggested by Mr. Mullick in this Court that as the respondents were entitled under Order XLI, rule 22, to support the decree of the Assistant Settlement Officer on any ground decided against them in the Court below, they were entitled to plead and shew, if they could, that they were fixed rate tenants. It appears to me that by shewing that they were fixed rate tenants they were not supporting the decree of the Assistant Settlement Officer at all. That officer had fixed what he considered a fair and equitable rent in respect of the land and had

in fact declared that the respondents were occupancy tenants of the land and not fixed rate tenants. The respondents had no desire to support the decree of the Court of first instance. What they wished to do was to shew that they were fixed rate tenants. But if they were fixed rate tenants the landlord's application to the Assistant Settlement Officer should have been dismissed, as the Assistant Settlement Officer had no power to fix a rent on land held by fixed rate tenants. The Special Judge having fixed the rent of the land at Rs. 8 the respondents appealed to this Court. The learned Judge before whom the case came remanded certain issues to the Court below with reference to the question whether the respondents were fixed rate tenants of the land. In my opinion that question was not open to discussion in this Court at all. The only question that could by any possibility be brought before this Court was the question whether a fair and equitable rent had been fixed and even that appears to me to have been a pure question of fact. However, issues were remitted to the Special Judge who returned certain findings. He was of opinion that the respondents had entirely failed to shew that they were fixed rate tenants. On the case coming before the learned Judge of this Court again, he declined to accept the findings of the Special Judge on remand and he declared that the respondents were entitled to hold the land in suit at a fixed rent of Rs. 2-8-0 per *bigha*. It appears to me to be quite clear that the learned Judge of this Court had no power to make such a declaration. The history of the case has already been given. The respondents for the reasons I have already stated had no right to bring before this Court in appeal the question whether they were fixed rate tenants or not, as they had not appealed to the Special Judge and, therefore, the only question which this Court should have considered was the question whether a fair and equitable rent had been fixed. The rent fixed by the Special Judge was fixed with reference to the evidence in the case and the nature of the land and so forth, and should, in my opinion, have been accepted by this Court. I would allow this appeal, set aside the judgment of the learned Judge of this Court and dismiss the appeal to this Court with the costs of both hearings.

MULLICK, J.—I agree. In my opinion there was no second appeal to the High Court against an assessment of fair and equitable rent. Under section 109 of the Bengal Tenancy Act such an appeal was incompetent. The learned Vakil for the tenants, however, urges that the Special Judge decided a question of status and that, therefore, there was a second appeal to the High Court against that part of his judgment. Now upon this question of status the appeal to the Special Judge does not show any cross-appeal or cross-objection on the part of the tenants. It is not a case where the tenants-respondents were trying to support the decree of the Trial Court, namely, the Court of the Assistant Settlement Officer by objecting to a finding on an issue. They were really pressing before the Special Judge an independent cross-appeal of their own which, if successful, would have had the effect not of supporting the decree, but of rendering the whole proceeding incompetent and nugatory; for on it being decided that the tenants were *raiyats* at fixed rates the whole proceeding for the settlement of fair and equitable rent would have been incompetent and the only order which the Special Judge could have passed would have been to dismiss the suit. Therefore, not having preferred any cross-appeal as to status before the Special Judge, the tenants ought not to have been allowed to take that ground before the learned Judge of this Court in second appeal.

There is also another ground on which I would have dismissed the second appeal to this Court, and that is that the Special Judge has found upon the evidence that the rent has in fact been changed from Rs. 2-8-0 to Rs. 2-12 0 and then to Rs. 2-14-3 per *bigha*. It is not alleged that there is no evidence upon which the learned Special Judge could have arrived at this conclusion; and if there was evidence upon which he could have come to this finding, clearly that finding could not be disturbed in second appeal. That class of cases which directs that in construing section 50 of the Bengal Tenancy Act small variations of rent are not to be taken into account does not, in my opinion,

touch a case such as the present where the variation was as much as six-annas on an alleged rental of Rs. 2 8-0 per *bigha*. Therefore on the question of fact also the tenants ought to have failed in Mr. Justice Atkinson's Court.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1506 OF 1916.

July 6, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

RAJANI SUNDARI DASSI AND ANOTHER—*Pro forma* DEFENDANTS—APPELLANTS

versus

HARA SUNDARI DASSI—PLAINTIFF AND KAZEM MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), *s.* 88—*Consent in writing, what is—Evidence—"Rent roll," meaning of*—Jama wasil baki, *whether rent-roll.*

An express consent in writing within the meaning of section 88 of the Bengal Tenancy Act does not mean a consent which is to be implied from certain documents. [p. 502, col. 1.]

Therefore the consent, if any, which arises by implication from the rent-receipts granted by a landlord in respect of a part of the tenure or holding, with a knowledge that the tenancy has been sub-divided by the tenants, or from *jama wasil bakis* or from road-cess returns filed by a co-sharer of the landlord, cannot be a consent in writing within the meaning of section 88 of the Bengal Tenancy Act. [p. 502, cols. 1 & 2.]

Such documents cannot be taken as principal evidence to prove a consent in writing which does not, in fact, exist; they can only be used as evidence of such consent, when it is proved that there was in fact an express consent in writing which for some reasons cannot be produced. [p. 502, col. 2.]

A *jama wasil baki* (an annual statement of the rents payable and received from a particular estate) is not a rent-roll within the meaning of the proviso to section 88 of the Bengal Tenancy Act. The rent-roll mentioned therein is a *jamabandi*—a permanent document kept in the estate office or *sherista* of a landlord which contains a list of the tenants and the rents payable by them and which is kept up and amended from time to time. [p. 502, col. 2]

Appeal against the decree of the Subordinate Judge, Nadia, dated the 25th March 1916, reversing that of the Munsif, Chuadanga, dated the 26th July 1915.

FACTS of the case appear from the judgment.

Babu *Mohendranath Roy* (with him Babu *Manmothanath Roy*), for the Appellants.—The collection papers *karchas*, *sehaz*, *jama wasil baki* papers all show that there has been a sub-division of the tenancy. The statements in these papers amount to a consent in writing within the meaning of section 88, Bengal Tenancy Act—*vide Pyari Mohun Mukhopadhya* v. *Gopal Paik* (1).

[Babu *Baranashi Bashi Mukerjee*, for the Respondents.—But section 88, as it applies in Bengal and Behar, was amended in 1907 and the Full Bench decision was made before the amendment.]

[FLETCHER, J.—Yes, what is required now is "express consent in writing." Is there any case after the amendment of 1907 where the view taken in *Pyari Mohun Mukhopadhya* v. *Gopal Paik* (1) has been maintained ?]

Babu *Mohendranath Roy*.—There is at least one case in the books—*vide Abinash Chandra* v. *Purnananda Khan* (2).

[NEWBOULD, J.—But that case came from Rajshahi whereas everywhere in East Bengal and Assam the old section 88 is still in force.]

[FLETCHER, J.—Yes, the old section only required "consent in writing" and such consent may be either express or implied, and that is the gist of the Full Bench ruling.]

Babu *Mohendranath Roy*.—At any rate I submit that this case comes within the proviso of the new section. Why should not the *jama wasil baki* papers be called rent-rolls ?

[FLETCHER, J.—Is there any definition of term rent-roll in the Act.]

Babu *Mohendranath Roy*.—No.

[Babu *Baranashi Bashi Mukerjee*.—But section 104A (2) shows what the rent-roll should contain. The vernacular equivalent of the rent roll is the *jamabandi*, and not the *jama wasil baki* papers.]

Babu *Mohendranath Roy*.—Lastly, I contend that the cess-return, which was submitted by a co-sharer landlord, on behalf of all the co-sharers, is evidence against all of them [Section 95 of the Cess Act IX (B. C. of 1880)] The cess-return also shows that the tenancy in question has been sub-divided.

(1) 25 C. 531; 2 C. W. N. 375; 13 Ind. Dec. (N. s.) 352.

(2) 21 Ind. Cas. 420; 18 C. L. J. 174.

RAJANI SUNDARI DASSI *v.* HARA SUNDARI DASSI.

Babu *Baranashi Bashi Mukerjee* was not called upon to reply.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants Nos. 27 and 28 against a decision of the learned Subordinate Judge of Nadia, dated the 25th March 1916, reversing the decision of the Munsif at Chuadanga. The plaintiff brought the suit as co-sharer landlord to recover rent in arrears. The defendants Nos. 27 and 28 are admittedly co-sharer landlords. The plaintiff's case was that the rent was Rs. 49 odd. The case set up by the defendants-appellants was that true the rent was Rs. 49 odd but that the tenancy had been sub-divided and instead of one holding held at the rent of Rs. 49 odd there were two holdings, one of which was held at a rent of Rs. 34 odd of which the principal defendants were the tenants and another held at a rent of Rs. 14 odd of which the defendant No. 27 was the tenant. The first Court adopted the view of the appellants. The second Court has reversed that decision. The main point in this case turns on the provisions of section 88 of the Bengal Tenancy Act as applicable in Bengal or Behar. We are not concerned with the Act as it now is in Eastern Bengal or formerly in Bengal proper. The case turns on this: First of all, whether certain rent-receipts that have been produced show an express consent in writing to the division of the tenure or holding or the distribution of the rent payable in respect thereof as mentioned in that section. An express consent means a consent opposed to one which is to be implied from the documents. There are no express words in these rent-receipts of a consent. The consent, if any, arises from the implication that the landlord received the rents and granted the receipts with a knowledge that the holding had been sub-divided. It is impossible to say from these rent-receipts that there was an express consent.

The next point that has been urged is that section 88 of the Bengal Tenancy Act is qualified by a proviso. It is not always easy for the tenant to produce an express consent. It may be verbal or acted on by both parties or may be lost. So the Legislature provided that an entry in the landlord's rent-roll to the effect mentioned above should be *prima facie* evidence of the consent mentioned in the former part of the section. The question is whether the document produced in the present case is a rent-roll. The learned Judge of the lower Appellate Court states that the document produced is not a rent-roll. The document is what is called a *jama wasil baki*; that is, I understand, an annual statement of the rents payable and received from a particular estate. The *jamabandi* is what is called in England a rent roll, namely, a permanent document kept in the estate office or the *sheristha* of a landlord, which contains a list of the tenants and the rents payable by them and which, I suppose, is kept up and amended from time to time. That, I suppose, is the rent-roll mentioned in the proviso of the section. However, there seems to be no reason to think that the learned Judge in the lower Appellate Court was not right when he said that this document, the *jama wasil baki*, was not the rent-roll. Therefore, the presumption which arises by virtue of the proviso did not arise in the present case.

The last point that was urged was that in a road cess return made in the year 1901 by one of the co sharers not the plaintiff the sub-division of the tenancy was referred to. That, of course, cannot be taken to be an express consent in writing. I think it may be evidence of consent. But the question is "does it evidence a consent in writing"? Before looking into a document like this to establish a consent in writing, it must be proved, *first* of all, that there had been a consent in writing, and *secondly*, that the consent in writing, although sought for, could not be produced and, therefore, it must be presumed, at any rate, against the person who made it that there had been a consent and that that consent was in writing as stated by some witnesses who were believed to have proved it. A document like this cannot be taken in evidence as principal evidence to prove a consent in writing, which apparently did not exist. In my opinion, the learned Judge of the lower Appellate Court arrived at a correct conclusion. The present appeal, therefore, fails and must be dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

SUDHIR CHANDRA DAS *v.* KAMAL CHANDRA DUTTA.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 364, 413 AND 414 OF 1914 AND 153 TO 167 OF 1915.

July 5, 1917.

Present:—Mr. Justice Chitty and Mr. Justice Beachcroft.

SUDHIR CHANDRA DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KAMAL CHANDRA DUTTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Executors, power of, to borrow money for carrying on business—Personal liability in respect of borrowings—Creditor's suit against estate and executors—Evidence of mismanagement on executors' part, admissibility of—Parties to suit—Hindu Wills Act (XXI of 1870), power of executor under.

The executors under a Will borrowed large sums of money for the purpose of carrying on a business left by the testator, which ultimately failed. Some of the creditors brought an administration suit in the High Court, while others individually instituted suits against the executors for the recovery of the debts due to them from the estate, and these suits were decreed by the Court against the estate as represented by the executors:

Held, that the Court should have in the exercise of a wide discretion postponed the hearing of these suits and allowed the plaintiffs to prove their claims, along with the rest of the creditors of the estate, in the administration suit which was pending in the High Court, even though no specific order was made by the High Court asking the lower Court to postpone those suits. [p. 504, col. 2.]

Under the Hindu Wills Act, an executor under Will has a statutory position and the estate of his testator vests in him. His position is not like that of a guardian of a minor or a *shebait* or a widow succeeding to her husband's estate, but he is the legal representative of the testator for all purposes and all the property of the testator vests in him as such [p. 505, col. 2.]

An executor who borrows money in the course of the administration for the purposes of the estate is personally responsible for the payment of such debts, though he is entitled to be indemnified out of the estate for such borrowing if he shows that it was reasonably and properly made. [p. 505, col. 2; p. 506, col. 1.]

In India a business left by a deceased owner is undoubtedly a heritable asset which passes to his heirs, and in the case of a Will, vests in his executor. In respect of the duties of the executor in carrying on that business, whether he does so for the purpose of winding it up or of making it over as a going concern to the person or persons entitled to inherit it and his duties in dealing with any other part of the testator's estate, there does not appear to be any difference between executors in India and in England. An executor may pledge any portion of his testator's estate in order to raise money for the purpose of administration, even when it is necessary to carry on a business left by the testator. [p. 506, cols. 1 & 2]

In a suit by the creditors against the executors of an estate for the recovery from the estate of money borrowed by them for the purpose of administration, evidence of mismanagement on the part of the executors should not be shut out, as the estate cannot be rendered liable without deciding the question of the propriety or impropriety of the executor's conduct in borrowing the monies. [p. 506, col. 2; p. 507, col. 1.]

Such a suit cannot be decreed against the estate but should be decreed against the executors in their personal capacity subject to the right of indemnity, if any, out of the estate, unless it is established that the borrowing was in all respects proper and for the benefit of the estate. [p 508, col. 1.]

In such a suit the executors cannot fully represent the estate, as their personal interests as executors are diametrically opposed to those of the estate. [p. 508, col. 2.]

Appeals against the decrees of the First Subordinate Judge, Dacca, dated the 1st May 1914.

Mr. *B. Chakrabarty*, Babus *Basanta Kumar Bose* and *Bipin Behari Biswas*, for the Appellants.

Messrs. *B. C. Mitra*, *C. R. Das*, *S. C. Roy*, Dr. *Sarat Chandra Basak*, Babus *Upendra Lall Roy*, *Rajendra Chandra Guha*, *Gopal Chandra Das*, *Akhil Bandhu Guha*, *Khitish Chandra Neogy*, *Prakash Chandra Pakrashi*, *Suresh Chandra Dass* and *Shib Chandra Palit*, for the Respondents.

JUDGMENT.

CHITTY, J.—These are 18 appeals filed by Sudhir Chandra Das, the infant adopted son of Srish Chandra Das, through his guardian *ad litem* Mr. A. C. Banerjee, and by Mr. K B. Dutt, Receiver of the estate of Srish Chandra Das, against as many decrees of the First Subordinate Judge of Dacca. The 18 suits were heard by the Subordinate Judge and disposed of by him in one judgment. The main questions are common to all these suits but there are points peculiar to some of them which must be separately dealt with. The Subordinate Judge has held the estate of Srish Chandra Das responsible for the debts claimed in these 18 suits, absolving the executors from personal liability. It will be convenient to deal first with the questions which are common to all the suits and then to deal with any points peculiar to any one or more of them.

The facts are not seriously disputed. Srish Chandra Das was a *zemindar* and Banker carrying on business at Dacca and elsewhere. He had inherited the business from his grandfather Raj Chandra and

his father Protap Chandra. The business was carried on in the name of Issur Raj Chandra-Protap Chandra Das. It is with this banking business that we are concerned in these appeals. The method of business appears to have been to take deposits from the public and pay them interest at the bank rate, while, presumably out of those deposits, loans were made to other persons at a higher rate of interest. The business undoubtedly had a good name in the district and many people were found willing to entrust their money to Srish Chandra Das. The method of taking deposits was on receiving money from a person to pass to him a *hundi* payable at 90 days' sight or a promissory note or even a plain *hatchitta*. These documents appear to have been given rather as evidence of the deposits than as negotiable instruments; that is to say, the depositor was often willing to leave his money with Srish Chandra Das long after the due date of the *hundi* or promissory note had expired. But we understand that the *hundis* and promissory notes were, as a matter of form, renewed from time to time. Srish Chandra Dass died on 12th December 1904, having the day previous made his Will, by which he appointed his wife Raseswari Chowdhrani, defendant No. 1, executrix and his cousin and servant Rajani Mohan Das, defendant No. 2, executor. The Will is very short and simple, and no question turns upon its construction. He empowered his wife to adopt Nirmal Chandra Das, the son of his daughter, Sarojini, or failing him, any other person. To the son so to be adopted the testator left the whole of his estate, subject to an allowance of Rs. 100 a month to be paid to his two eldest daughters and two houses to be given to them. The testator left him surviving, besides his wife Raseswari, four daughters—Sarojini, who married Bankim Chandra Chowdhury and whose son Nirmal Chandra was to be adopted; Indumati, who married Bipin Behary Biswas; Promila, who married Ghanoda Nath Roy Chowdhury (known as Raja of Dubalhati); and Sukumari. On 22nd February 1905, an application was made to the District Judge of Dacca for Probate of the Will by the executors. The testator's daughter Indumati filed a caveat and on 4th April 1905, Babu Chandra Kumar Dutt was appointed administrator *pendente lite*. The Probate case was soon afterwards settled. Indumati was paid Rs. 30,000 out of the estate, and withdrew her caveat. Probate was accordingly issued to the executrix and executor on 22nd May 1905. On 26th April 1906 Raseswari adopted the boy Nirmal Chandra Das, who was then given the name of Sudhir Chandra and who is one of the appellants before us. The executors continued to carry on the business of the testator and for that purpose appear to have borrowed very large sums of money. Their management was not successful and the estate became more and more heavily involved.

On 26th April 1912, a suit was filed on the Original Side of this Court (Suit No. 415 of 1912) by Sudhir Chandra Das, through his adoptive sister and next friend Promila, against the executrix and executor. In that case after contest a preliminary decree was passed by Chowdhury, J., on 6th May 1913. Notices were issued in that suit to all the 107 creditors of the estate and we are told that among the creditors all the plaintiffs now before us preferred their claims. The business had gone from bad to worse and in 1912 it was finally closed. In that year and in 1913, 75 suits were filed against the executors of the estate by various creditors, 6 in the High Court and 69 in the *mofussil*. Of these the High Court suits and 51 *mofassil* suits were stayed. The 18 suits now before us were not stayed and have gone to decree. We think that the Subordinate Judge did not exercise a wise discretion in declining to postpone the hearing of these 18 suits also, and allow these plaintiffs to prove in the administration suit along with the rest of the creditors of the estate. The matter was brought to his notice, but he appears to have declined to act without a specific order of this Court upon himself. If his decrees against the estate were in other respects proper and could be supported, even then it would give the present plaintiffs a somewhat unfair advantage over the other creditors of the estate, because they would come in with their claims already decided and increased by the costs of hearing in their several suits. It should be stated that in the adminis-

tration suit Ghanoda Nath Roy Chowdhury was appointed Receiver. His place is now held by Mr. K. B. Dutt. In the administration suit Promila was removed from the position of next friend and Mr. S. P. Bose was appointed on 27th July 1912. Later his place was taken by Mr. A. C. Banerjee. On 12th August 1912, Ghanoda Nath Roy Chowdhury as Receiver took possession of the estate, and it was at or about that time that the business was closed.

For the most part, the debts now in question in these 18 suits were incurred by the executors between the years 1909 and 1912. In two cases (Suits Nos. 21 and 213) it is alleged that the *hundis* were in renewal of former *hundis* and that these debts were actually incurred in the lifetime of Srish Chandra Das. In another suit (No. 51) it is said that the *hundis* were in renewal of debts incurred by Raseswari when she was heiress of the estate, before the adoption of Sudhir Chandra Das. The main question in these appeals is whether the decrees should have been passed, as they have been passed, against the minor and the Receiver, that is to say, against the estate of Srish Chandra Das, and not against the executrix and the executor personally. It is admitted that the claims in all these 18 suits are based on *hundis* written by an employee of the firm and accepted by Rajani Mohan Das as executor. Rajani Mohan Das died pending the appeals and his sons have been brought on the record as his legal representatives.

It was argued by the learned Counsel for the plaintiff in Appeal No. 364, which is the main appeal before us, that the executors had power to carry on the business, to borrow money for that purpose, and to bind the estate by those borrowings. A long and elaborate argument was addressed to us as to the position of an executor under the Hindu Law. It was said—and rightly said - that before the passing of the Hindu Wills Act (XXI of 1870) he was a manager. It was not until the Hindu Wills Act incorporated section 179 of the Succession Act that the executor acqaired a statutory position, and that the estate of his testator vested in him. It was conceded that the powers of an executor under the Statute were, if anything, larger than those which he possessed before and it was said that no powers which he possessed before had been taken away. It was argued that, as a widow or a guardian of a minor or a *shebait* was a manager, therefore an executor, who was also a manager, stood in the same position. The argument is obviously fallacious. The analogy is in no sense complete, and the cases which deal with the peculiar powers of widows, guardians or *shebaits* have really no bearing upon the present question. A very large number of cases dealing with such persons and their powers were cited before us, and I have been at some pains to examine those decisions. I am, however, entirely unable to see that they afford any assistance for the decision of these appeals. We have to deal with executors and their powers and duties as such. An executor under Statute is the legal representative of a deceased person for all purposes and all the property of the deceased person vests in him as such. Section 4 of the Probate and Administration Act (V of 1881) is a reproduction *verbatim* of section 179 of the Succession Act (X of 1865), which was made applicable to Hindus by section 2 of the Hindu Wills Act. The executor is, therefore, in many respects in a different position from a Hindu widow succeeding to her husband's estate, a guardian of a minor, or a *shebait* of an idol. The estate of the testator is absolutely vested in the executor for the purposes of administration and he can deal with it as he pleases, subject, of course, to his responsibility as executor for the due administration of the estate. His powers are defined in Chapter VI of the Probate and Administration Act, while his duties are dealt with in Chapter VII. One of the duties of an executor is to collect with reasonable diligence the property of the deceased and the debts that were due to him at the time of his death (section 100). By section 105 debts of every description must be paid before any legacy. It has been held in several cases in this Court that the executor who borrows money in the course of the administration for the

purposes of the estate is personally responsible for the repayment of such debts, though he is entitled to be indemnified out of the estate for such borrowing if he shows that it was reasonably and properly made. This principle was laid down in England in the case of *Labouchere* v. *Tupper* (1) and *Farhall* v. *Farhall* (2). It has been applied to the case of Hindus in at least three cases decided by this Court – *Romanath Paul* v. *Kanai Lal Dey* (3), *Debendra Nath Biswas* v. *Hem handra Roy* (4) and *Satya Prashad Pal Chowdhry* v. *Motilal Pal Chowdhry* (5). It is true that in the last mentioned case the Court held the estate liable on *hatchittas* executed by the executrix but that decision was based on the peculiar facts of that case. *Farhall* v. *Farhall* (2) was referred to and the remarks of Mellish, L. J, were applied. The English Law as stated in various passages in Williams on Executors was also accepted. I do not think that it can now be successfully contended that the principle of an executor's personal liability as laid down in England and accepted by this Court as applicable to Hindu executors can be disputed. But it was said that those cases are distinguishable from the present, inasmuch as the debts there dealt with were ordinary debts on contract and not obligations undertaken in the conduct and for the purposes of a business. It was argued that a business in India is on a different footing from a business in England, that it is here an heritable asset which passes on the owner's death to his heirs. There is no doubt some distinction between the two but it is not a very real one. In England executors do, and must, carry on their testator's business for the purpose, at any rate, of winding it up. As to how long they can do so is a matter to be considered in every case. Sometimes the conduct of a business by executors in England has been prolonged over a large number of years, as for instance, where a testator has directed in general terms that the sale and conversion of his property might be postponed for such period as to the executor should seem expedient, see *Crowther, In re, Midgley* v. *Crowther* (6). In India business such as this is undoubtedly a heritable asset [see *Sakrabhai* v. *Muganlal* (7)]. It will pass to the owner's heirs, and, in the case of a Will, will vest in his executor. In respect of the duties of the executor in carrying on that business, whether he does so for the purpose of winding it up, or of making it over as a going concern to the person or persons entitled to inherit it, there does not appear to be any difference between his duties in so doing, and his duties in dealing with any other part of the testator's estate. An executor may pledge any portion of his testator's estate in order to raise money for the purpose of administration, *e. g.*, mortgaging a *zemindari* for the payment of Government revenue. I am unable to see any distinction between his borrowing money for other purposes of the estate and his borrowing money in order to carry on a business. In either case he can only do so for the benefit of the estate; and in so borrowing the responsibility rests entirely upon him, subject only to his ultimate right to be indemnified out of the estate.

It appears to me, therefore, that in these cases the decrees ought undoubtedly to have been passed against the executrix and the executor personally subject to their right of indemnity against the estate, if in the administration suit they showed that the borrowing was in all respects proper and for the benefit of the estate; I must, of course, assume that they might be able to show that the borrowing was for the benefit of the estate. Here the facts, so far as they have been investigated, point rather in the other direction.

The learned Subordinate Judge has, I think, fallen into a serious error in shutting out evidence of anything like mismanagement on the part of the executrix and executor. He has also held that the question of indemnity cannot be gone into in this case. The latter would be a correct decision, if he were making the executors liable,

(1) (1857) 11 Moore P. C. 198; 5 W. R. 797; 14 E. R. 670; 117 R. R. 16.

(2) (1872) 7 Ch. 123; 41 L. J. Ch. 146; 25 L. T. 865; 20 W. R. 157.

(3) 7 C. W. N. 104.

(4) 31 C. 253; 8 C. W. N. 135.

(5) 27 C, 683; 14 Ind. Dec. (N. S.) 448.

(6) (1895) 2 Ch. 56; 64 L. J. Ch. 537; 13 R. 496; 72 L. T. 762; 43 W. R. 571.

(7) 26 B, 206 at p. 215; 3 Bom. L. R, 738.

but is clearly wrong if he is making the estate liable, because in that case he has shut out any question of the propriety or impropriety of the executor's conduct in borrowing these moneys. Even on the present imperfect elucidation of the facts it would appear that the executors acted recklessly in carrying on this business. The debts of the business at the time of the testator's death, we are told, amounted to about six lacs of rupees. The executors continued to add to that liability and only succeeded in paying off a portion of it. The result was that the business after 6 or 7 years of such management was found to be insolvent and had to be closed. Rajani Mohan Das himself stated that, had it been closed at Srish's death, the whole estate would have been ruined. This was probably an exaggeration, but it shows that the liabilities of the business as distinct from the rest of the estate were far in excess of its assets, for I do not think that the whole estate including the *zemindaris* can properly be regarded as assets of the business. No doubt looking at the testator's estate as an entire whole, they might in a sense be so regarded. Rajani Mohan Das also admitted that the executors incurred a liability of some Rs. 50,000 in order to invest in immoveable property worth Rs. 70,000, the balance presumably being met from other portions of the estate. If the business was in that condition at the date of Srish's death, it is difficult to see how the executors were justified in borrowing for such a purpose. Nor could they be justified in incurring further debts in the vain hope of saving the business as a going concern.

As to the liability of Rajani Mohan Das, or rather (as he is dead) of his estate, there can be no question. It was argued on behalf of Raseswari, defendant No. 1, that she had nothing to do with the business and that she was not accountable for the acts or defaults of her co-executor. The evidence, however, shows that this contention is not correct. It was she who decided to carry on the business after her husband's death and did in fact carry it on. She appointed the Manager Babu Chandra Kumar Dutt, and the evidence shows that to some extent she looked into the details of the business. She was at that time in the position of heiress to her husband's estate because until the adoption took place, there was a partial intestacy. She was, therefore, in the dual capacity of executrix and heiress. She cannot, however, escape her responsibility as executrix by pleading that she gave orders in the other capacity. The arguments addressed to us for the plaintiffs-respondents appear to me to be somewhat inconsistent, because it was conceded that the executors could not charge the estate except for moneys properly borrowed and that the creditors were bound to make enquiries to see whether they were justified in lending to the estate, and the plaintiffs seek to make the estate liable without any investigation of those matters. That the plaintiffs made no such enquiries is clear. There is no evidence of anything of the kind and it does not appear to have been contended before the Subordinate Judge that they made any such enquiries at all.

It was argued for the plaintiffs that, as the estate had vested in the widow as heiress on the testator's death and in the adopted son from the date of adoption, he being under the guardianship of his mother Raseswari, the estate would be bound as she could assent to the borrowing of these moneys, first in her capacity as beneficiary and then in her capacity as guardian of the minor beneficiary. This is also fallacious, because the estate was wholly vested in the executors as such and they were responsible till such time as the administration was complete. Admittedly it is not yet complete and the propriety of their borrowing may yet be investigated in the administration suit. It should perhaps be stated that there is no provision in the Will authorising the executors to carry on the business. So far as they did so, they did it subject to the general law in such matters. In Suits Nos. 21 and 213 (Appeals Nos. 758 and 163) it was stated that the *hundis* were in renewal of former *hundis* and that the original deposits had been made in the lifetime of Srish Chandra Das. It was urged that in these suits at any rate the decrees should be against the estate. No doubt if the facts are as stated, these cases stand on a somewhat different footing to the rest. It may well be that in those

cases the executors would have but little difficulty in establishing their right to indemnity and these creditors would get the benefit of that in the administration suit. There are, however, substantial objections to passing decrees at once against the estate in these cases. In the *first* place, the evidence that the deposits were made in Srish Chandra's lifetime is by no means complete. It is at present rather a matter of inference than of proof. *Secondly*, all evidence of mismanagement has been shut out, so that it is impossible to decide one way or other as to the propriety of the executor's conduct in renewing these loans. *Thirdly*, the question of indemnity has not been and cannot be gone into here and that must be determined before the estate can be charged. I think, therefore, that these claims should stand over with the others for investigation in the administration suit. On the whole I am of opinion that these 18 decrees against the estate cannot stand but that they must be entered up against the executors in their personal capacity, subject to their right of indemnity, if any, in the administration proceedings.

This disposes of the main question which is common to all the appeals.

With regard to Appeals Nos. 157, 159, 161, 165, 413 and 414, it appears that the *hundis* in these suits were insufficiently stamped. In Appeals Nos. 161 and 414 the question cannot be gone into, as the Subordinate Judge points out that the objection was not taken until after the admission of those *hundis* in evidence. As to the other four appeals I think that the Subordinate Judge is right in holding that the plaintiffs were at liberty to give the go by to the *hundis* which were inadmissible in evidence and sue for the consideration. That appears to be settled law, so far as this Court is concerned. [See *Golap Chand Marwaree* v. *Thakurani Mohokoom Koaree* (8) and *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (9)]. In the administration suit these creditors could certainly come in and claim the executor's indemnity, if they had any, against the estate.

In Appeal No. 156, the plaintiff challenged the validity of the adoption of Sudhir Chandra Das. The learned Subordinate Judge held that the point was beyond the scope of that suit and declined to go into it In this he was, I think, in error. If Sudhir Chandra Das was on the record as the beneficiary representing the estate, it is clear that the estate could only be represented by him if he was in fact such beneficiary. That would depend on the validity of his adoption. If the point was raised, as in this case it undoubtedly was, the lower Court ought, I think, to have gone into it. In the view that I take of the liability of the executrix and the executor, the matter becomes of little importance as the suits must fail against Sudhir Chandra Das. In all the other cases the validity of adoption, though at one time in question, was not seriously disputed either in the lower Court, or before us on appeal.

This is sufficient to dispose of the 18 appeals.

There is, however, another and equally substantial ground on which the decrees of the Subordinate Judge against Sudhir Chandra Das must necessarily be set aside. It is clear from the record in these various suits that the minor Sudhir Chandra Das was not properly represented in the Court below. In Suit No. 91 of 1913 (Appeal No. 162) the minor Sudhir Chandra Das was never made a party at all. The Receiver Kumar Ghanoda Nath Roy was a party, defendant No. 5, and his place was taken by Mr K. B. Dutt on 22nd January 1914. The learned Subordinate Judge says that the absence of the minor was immaterial, as the estate was fully represented by the executors Ordinarily speaking, no doubt, the executors could fully represent the estate, but not in a case like this where their personal interests as executors were diametrically opposed to those of the minor beneficiary and the estate. The minor is spoken of throughout in all the suits [except Suit No. 91 (Appeal No. 162) just mentioned] as represented by his guardian *ad litem* Janaki Nath Roy. We have been at some pains to investigate the facts which led up to the appointment of Janaki Nath Roy in each and every one of these cases. It is not necessary to go through them in detail at this stage. It is sufficient to say that in most cases the plaintiffs proposed, as was not unnatural, the appointment of Raseswari as guardian *ad litem* of her minor son. In most cases the notices required by Order

(8) 3 C. 314; 2 C. L. R. 112*n*; 2 Ind. Jur. 601; 1 Ind. Dec. (N. S.) 787.

(9) 23 C. 851; 12 Ind. Dec. (N. S.) 565.

XXXII, rule 3, Code of Civil Procedure, were issued on the minor and Raseswari. In some cases no notice at all was issued. In many cases the service of the notice is left in doubt. In several cases there was no formal appointment of a guardian at all. In all the cases, however, it appears that Janaki Nath Roy, who is a cousin of Raseswari, came forward of his own motion and asked to be appointed guardian *ad litem*. It is certain that he did so as the nominee of Raseswari. Now it cannot be disputed for a moment that the interests of Raseswari were wholly antagonistic to the interests of her minor son. It was, therefore, impossible that she could act as his guardian *ad litem*, nor was it right that her nominee should be appointed to that post. Another extraordinary circumstance is that one at least of the Pleaders for the parties. namely, Babu Birendra Chandra Sircar, was appearing both for the minor and his mother. In other cases we find that the Pleaders in the Court below were occasionally to be found first on one side and then on the other. Thus Babu Peary Lall Das, who appears throughout as the Pleader of the minor or of the Receiver, appears in one case to have made an application for the mother. He appears in one case at least to have held a *vakalatnamah* for Rajani Mohan Das (see the decree in Suit No. 91 of 1913). On 29th May 1914, directly the hearing was over, Janaki Nath Roy put in a petition in all the suits (except No. 91 of 1913) praying to be relieved of his guardianship. This was granted on 20th June 1914, when Mr. A. C. Banerjee was appointed in his place. I should not be disposed to lay much stress on the absence in some cases of a formal order of appointment, in view of the fact that the cases were all tried together, and Janaki Nath Roy was formally appointed in most of them. The substance, however, of the objection is that the minor was not properly represented or his case, which was diametrically opposed to that of the executors, properly put before the Court by Janaki Nath Roy. This is shown by the fact that no evidence was called on his behalf. The only witness nominally called by him being a Pleader who was called to prove the affidavit in the petition for Probate, in other words, to give evidence in favour of the executors. The cases were, except for some desultory cross-examination, conducted practically without opposition on behalf of the minor. As I have before observed, the learned Subordinate Judge (in my opinion erroneously) shut out the evidence of mismanagement on the part of the executors, which the Pleader for the minor wished to elicit by cross-examination. It may be said that in most of the cases the Receiver was also a party and that he could and did properly represent the estate. He was made a party simply in his capacity as Receiver. He does not appear to have taken any active part in the proceeding. It may be that he had no funds in his hands to enable him to conduct the defence in a more strenuous manner. The fact remains that the real defendant brought on the record to represent the estate was the minor Sudhir Chandra Das, and his interests, which were at stake, have not been properly safeguarded in the trial in the Court below. The learned Subordinate Judge appears to have taken a somewhat one-sided view of the case throughout, and instead of endeavouring to protect the minor and his interests has been too ready to protect the executors at the expense of the minor and his estate. There appears to be no foundation in fact for the suggestion that in the Court below the executors and the guardian *ad litem* of the minor were combining to defeat the claims of the creditors. The impression left on my mind after a full consideration of the whole case is rather that the executors were playing into the hands of the creditors in order to relieve themselves of liability by throwing it on the estate.

I would accordingly set aside all these 18 decrees of the Subordinate Judge and enter up decrees for the several amounts against the executrix and the executor personally (the executor now being represented by his sons), with liberty to the plaintiffs to claim the executor's indemnity, if any, against the estate in the administration proceedings.

The appeals must be allowed with costs, that is to say, the suits will be dismissed against the present appellants with costs (one set only) in both the Courts. The plaintiffs will have their decrees against the executrix and the executor personally with costs in both the Courts. The executrix and the estate of the executor will also be responsible jointly with the several plaintiffs to the appellants for their costs of these appeals.

SHANMUGA CHETTY *v.* NARAYANA AIYAR.

In the appeals which are valued below Rs. 5,000 we fix the hearing fee in this Court as follows:—

In Appeal	No. 153 at 2	gold *mohurs*.
,,	No. 154 at 3	,,
,,	No. 155 at 5	,,
,,	No. 156 at 5	,,
,,	No. 157 at 10	,,
,,	No. 158 at 7	,,
,,	No. 159 at 3	,,
,,	No. 160 at 3	,,
,,	No. 161 at 3	,,
,,	No. 162 at 3	,,
,,	No. 163 at 10	,,
,,	No. 164 at 5	,,
,,	No. 165 at 5	,,
,,	No. 166 at 3	,,
,,	No. 167 at 3	,,

BEACHCROFT, J.—I agree.

Appeals allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 39 OF 1913.

October 4, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, and Mr. Justice Burn.

SHANMUGA CHETTY, MINOR, BY HIS NEXT FRIEND MEENAKSHI AMMAL—PLAINTIFF—APPELLANT

versus

C. K. NARAYANA AIYAR, DEAD, AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 10—Major wrongly described as minor—Suit by next friend—Amendment of plaint—Procedure.

Order I, rule 10, of the Civil Procedure Code is wide enough to cover a case where a major is wrongly assumed to be a minor and a suit is brought on his behalf by his next friend. The proper procedure to adopt in a case of this nature is to return the plaint so that it may be presented after making the necessary amendments.

Sheorania v. *Bharat Singh*, 20 A. 90, A. W. N. (1897) 203; 9 Ind. Dec. (N. S.) 417, dissented from.

Taqui Jan v. *Obaidulla*, 21 C. 866; 10 Ind. Dec. (N. S.) 1209, followed.

Appeal against the decree of the District Judge, South Arcot, in Original Suit No. 18 of 1912.

Messrs. *V. R. Ponnuswami Aiyangar* and *N. Sreenivasa Chariar*, for the Appellants.

Messrs. *A. Krishnaswami Aiyar* and *A. N. Sitharama Sastriar*, for Respondent No. 2.

Dewan Bahadur *M. O. Parthasarathy Aiyangar* and Mr. *N. C. Viziaraghavachariar*, for Respondent No. 3.

Mr. *V. Viswanadasastriar*, for Respondent No. 4.

Mr. *T. V. Muthukrishna Iyer*, for Respondent No. 9.

JUDGMENT.—We think that it is clear that Shanmuga Chetty who is described in the plaint as a minor had, in fact, attained majority four days or so before the plaint was filed. His grandmother apparently made a *bona fide* mistake that Shanmuga was still a minor when she filed the suit on his behalf as his next friend. The learned District Judge was asked for leave to amend the plaint by striking off the description of Shanmuga the plaintiff as minor suing through his next friend and for other consequential amendments. The learned Judge following the ruling in *Sheorania* v. *Bharat Singh* (1) has dismissed the suit. We think, however, that the decision in *Taqui Jan* v. *Obaidulla* (2) lays down the law correctly. That was also a similar case and the learned Judges of the Calcutta High Court held that the proper procedure to adopt in a case of this nature was to return the plaint so that it may be presented after making the necessary amendments. Rule 10 of Order I of the Code of Civil Procedure, 1908, which is practically the same as Order XVI, rule 2 of the Rules of the Supreme Court, seems to be wide enough to cover a case of this nature. It says that if a suit is instituted in the name of a wrong person, the right person may be substituted. Here the suit was instituted by the right person, but through another person purporting to act as his next friend.

The ruling in *Taqui Jan* v. *Obaidulla* (2) seems to us to be right, and the plaint ought to have been allowed to be amended. We, therefore, allow the appeal. The plaintiff will be allowed to amend the plaint. Costs will be costs in the cause.

Appeal allowed.

V.R.P.

(1) 20 A. 90; A. W. N. (1897) 203; 9 Ind. Dec. (N. S.) 417.

(2) 21 C. 866; 10 Ind. Dec. (N. S.) 1209.

COURT OF THE BOARD OF REVENUE, MADRAS.

SECOND CIVIL APPEALS NOS. 15 TO 20 OF 1917.

July 4, 1917.

Present:—Mr. M. Azizuddin, Acting Fourth Member.

KARUPPAYYA THEVAN AND OTHERS—APPELLANTS

versus

ADAIKKALAM CHETTY AND OTHERS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 40—Commutation of rent payable in kind, suit for—Burden of proof.

The Madras Estates Land Act is intended to protect the interests alike of the tenant and the landlord and unless it is proved that either of them suffers because of the payment of rent in kind, interference by way of commutation will be unjustifiable.

The party who asks for commutation of rent under section 40 of the Madras Estates Land Act must prove that he is entitled to it.

Second appeals against the decrees in Appeal Suits Nos. 15, 11, 8, 12, 10 and 17 of 1916 on the file of the District Collector's Court, Tanjore.

Mr. *G. S. Venkatrama Ayyar*, for the Appellants.

Messrs. *T. Narasimha Ayyangar* and *M. S. Ramanuja Ayyangar*, for the Respondents.

JUDGMENT.—These second appeals are preferred against the decision of the Collector of Tanjore confirming the decrees of the Deputy Collector, Pattukottai Division, dismising the suits filed by the appellants for commutation of rent.

2. Appellants' primary contention is that the Court below erred in holding that the burden of proving that commutation should be allowed, lay on the appellants.

It appears to the Board that as the appellants ask for the commutation, the onus of proving that they are entitled to it obviously lies on them.

As held by the Courts below, there is no evidence worth the name to show that the "*amani* tenure" which has been in vogue for the last 30 years has been productive of any hardship to the appellants. On the other hand it is evident from the records that if commutation were to be allowed, the respondents who require paddy and other grains for their private requirements and those of their 'Pannaiyals' will be subjected to considerable inconvenience.

The Estates Land Act is intended to protect the interests alike of the tenant and of the landlord and unless it is proved that either of them suffers because of the payment of rent in kind, interference by way of commutation will be unjustifiable.

The lower Courts' decisions are upheld and the appeals dismissed.

The appellants should bear the costs of the respondents.

Appeal dismissed.

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 498 OF 1913.

May 1, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

KUMUD KRISHNA MANDAL AND OTHERS DEFENDANTS—APPELLANTS

versus

JOGENDRA NATH SIRCAR—PLAINTIFF—RESPONDENT.

Execution Sale—Purchaser, rights of—Hindu Law—Gift to woman—Presumption—Will, construction of—Probate, whether necessary before dealing with interest expectant on death of legatee—'Santan,' meaning of.

Where property is sold in execution of a decree, ordinarily all right, title and interest therein which the judgment-debtor had in possession, reversion, remainder, or in expectancy would pass to the purchaser, unless the Court limits the operation of the conveyance. [p. 513, col. 1]

A Will provided:—"and on my said daughter attaining her majority.....the executor...will give her my estate and make over the accounts ...God forbid if my daughter should die childless then my full brother... will get the properties....." The daughter survived her father, attained majority, but died without issue:

Held, that under the Will the daughter took an absolute interest liable to be defeated either by death during the testator's life-time or during her own minority; so that the gift over in favour of the full brother could not take effect on the daughter's death without issue after attainment of majority. [p. 513, col. 2.]

The word 'santan' as used in Bengalee documents at the end of the 19th and beginning of the 20th century means issue generally and is not limited to male descendants. [p. 514, col. 1.]

There is no presumption under the Hindu Law that every gift of immoveable property made by Will to a Hindu woman is of a limited interest, except

in the case of a gift by a husband to his wife. In all other cases a gift to a Hindu woman is taken to be of an absolute interest, unless there is something to show that the interest granted is not to be an absolute interest. [p. 514, col. 2.]

A reversionary interest, expectant on the death of a legatee, granted by a Will can be sold, dealt with and taken in execution without the Will being proved. [p. 515, col. 2.]

Appeal against the decree of the Sub-Judge, 1st Court, 24-Pergannas, dated the 27th August 1913.

FACTS of the case will appear from the judgment.

Sir *Rash Behari Ghose* (with him Babus *Ram Charan Mitra* and *Jotindra Nath Lahiri*), for the Appellants.—There are two points in the case:—

(1) Whether or not Sarmistha took an absolute or limited interest under the Will.

(2) If it is held that Sarmistha took a limited interest, whether or not that interest was sold by auction sale held in execution of a decree obtained against Jogendra and his brothers in which the defendant purchased the property in dispute.

The decree and the proceedings of the suit in which the sale took place have been destroyed, but it appears from the proceedings of the subsequent suit that was brought by Sarmistha to set aside the decree and the sale above referred to, that the decree was against the three brothers and the entire property was sold.

Reads the Will which amongst others contains the following: "My brother Jogendra would keep the accounts of the income and expenditure of the moveable and immoveable properties left by me and on my said daughter attaining majority he will give her my estate and make over the accounts.....God forbid, if my daughter should die childless, then my full brother Jogendra Nath Sarkar will get the properties in my share," and contends that the gift over to the testator's brother Jogendra cannot take place unless the testator's child die during the lifetime of the testator, since the period of distribution as contemplated by section 111 of the Succession Act is, under the authority of their Lordships' decision reported as *Norendra Nath Sarcar* v. *Kamalbasini Dasi* (1), the time of the death of the testator.

Secondly, even if Sarmistha took a life-interest then also the interest of Jogendra, namely, the remainder of the estate passed by the sale that took place.

[FLETCHER, J.—Is not this case covered by the judgment reported as *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* (2)?]

Dr. *Ghose*.—No, the facts here are quite distinguishable from that case.

Babu *Bepin Behari Ghose*, II (with him Babus *Jyotish Chandra Hazra* and *Mahesh Chandra Banerjee*), for the Respondent.—Succession opened after Sarmistha's death. The wording of the Will suggested that only a life-interest was given to Sarmistha. The case cannot be distinguished from the case reported as *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* (2). The testator's intention must have been to give Sarmistha a limited estate in accordance with the well-known desire of every Hindu not to divest the line of succession. Besides the wording used in the Will is 'santan', which means according to the judgment of their Lordships in the Privy Council [*Buddha Singh* v. *Laltu Singh* (3)] 'male issue.'

Besides in the application for execution of the decree the name of Jogendra alone was mentioned as the judgment-debtor, and surely the interest of any person other than Jogendra could not pass in the sale held in pursuance thereof.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants from a judgment of the learned Subordinate Judge of the first Court of the Twenty-four Pergannahs. The case comes back to this Court after remand. The learned Judge in the lower Court decreed the plaintiff's suit. The plaintiff brought the suit to establish his title to one-third of a particular piece of land, the whole of which was purchased in the year 1886 by the ancestor of the defendants in execution of a money-decree in which, at any rate according to the plaintiff's own case, he himself was one, if

(1) 23 C. 563; 23 I. A. 18; 6 Sar. P. C. J. 667; 6 M. L. J. 71; 12 Ind. Dec. (N. S.) 374.

(2) 34 Ind. Cas. 892; 43 C. 432; 20 C. W. N. 169; 19 M. L. T. 97; 30 M. L. J. 110; 23 C. L. J. 169; 14 A. L. J. 167; 3 L. W. 252; (1916) 1 M. W. N. 73; 18 Bom. L. R. 347 (P. C.).

(3) 30 Ind. Cas. 529; 20 C. W. N. 1 at p. 9; 29 M. L. J. 434; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 22 C. L. J. 481; (1915) M. W. N. 772; 37 A. 604; 42 I. A. 208 (P. C.).

not, the sole judgment-debtor. The plaintiff had one brother and a step-brother. The brother's name was Upendra Nath Sircar. Upendra made a Will and died on the 19th June 1882. He left him surviving his widow Kumudini with whom, it is quite clear from the terms of his Will, he was not on good terms and an only child, a daughter Sarmistha Dasi. The case set up by the plaintiff is this: That the property in suit formed a portion of his ancestral estate of which he, his brother Upendra and his half brother Lalit Mohan were each entitled to one-third. The defendants purchased, as I have already said, in execution of a money-decree. That money decree is not forthcoming. But according to the plaintiff's own case, he was liable for the whole amount recoverable under that decree. In execution of that decree, the property was put up to sale on the 6th April 1886 and purchased by the defendants' ancestor. The case put forward by the plaintiff and which has been assented to by the learned Judge of the Court below seems to me to be an extraordinary case. The plaintiff says that he took under the Will of his brother Upendra, in the events that had happened, which I shall refer to presently, a reversionary interest which became absolute on the death of the only child of Upendra, namely Sarmistha, without any issue. The property that was sold in execution was the whole of the piece of land and the case set up by the plaintiff Jogendra is that although he admits that the original share that he inherited from his father passed under the sale in execution, the one-third share that he acquired under the Will of his brother in the event of the death of the only child of Upendra without issue did not pass. Of course, that is a very strong case to set up, because the Court sold the property to the predecessor of the defendants and ordinarily any right, title and interest which the judgment-debtor had in possession, in reversion, in remainder or in expectancy would pass to the purchaser. That the Court meant to limit in any sense the operation of the conveyance cannot, I think, for one moment be suggested. But apart from that, I think in this case it is extremely doubtful whether the contention put forward by the plaintiff is right. The words on which the plaintiff says that he acquired the interest under the Will of his brother Upendra are these. Under clause (7) of the Will of Upendra the executor was, in the first instance, directed to keep accounts of the income and expenditure of the moveable and immoveable properties left by the testator and then the Will proceeded as follows: "and on my said daughter attaining her majority he," that is the executor Jogendra, "will give her my estate and make over the accounts. If he should fail in that, he will be responsible in accordance with law. God forbid it, if my daughter should die childless, then my full brother Jogendra Nath Sarkar will get the properties in my share." The daughter Sarmistha survived her father, attained majority but died without issue. It is argued, therefore, that the property passed to the brother, the plaintiff Jogendra. Under the Hindu Wills Act in which are incorporated some of the provisions of the Indian Succession Act, I do not think that that is so. The first section that is referred to is section 82 of the Indian Succession Act, which provides that where property is bequeathed to any person he is entitled to the whole interest of the testator therein, unless it appears from the Will that only a restricted interest was intended to be given. Then, under section 111, which is a statutory enactment of one of the rules in the well-known case of *Edwards* v. *Edwards*(4), it is provided that where a legacy is given if a specified uncertained event shall happen and no time is mentioned in the Will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable. The rule in *Edwards* v. *Edwards* (4) has received judicial comment not favourably on many occasions; but, in this country, that rule as enacted in section 111 of the Indian Succession Act is a part of the statutory law of the land and it is not open to the Courts here like the Courts in England to re-consider the judgment in the case of *Edwards* v. *Edwards* (4). We have got to take section 111 as the law in India and in which full effect has got to be given to the ordinary meaning of the words. First of all, there is a dispute between the parties as to the word that has been translated as "childless" in the translation of the Will of Upendra in the 7th clause. It is said

(4) (1852) 15 Beav. 357; 21 L. J. Ch. 324; 16 Jur. 259; 51 E. R. 576; 92 R. R. 454.

that in the case of *Buddha Singh* v. *Laltu Singh* (3), Mr. Ameer Ali in delivering the judgment of the Judicial Committee of the Privy Council has laid down that the word *santan*....., which is a Bengalee word, means not issue or descendants as is given in the books and in Wilson's Glossary but male issue. On the other hand, we have got two decisions of this Court in the cases of *Kisto Kishore Bhuttacharjee* v. *Seetamonee Bhuttacharjee*(5) and *Hurish Chunder Chowdhry* v. *Chunder Monee Debia* (6) [the latter of which was affirmed by the Judicial Committee, the judgment of the Judicial Committee being reported as *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (7)] in which it is held that the word *santana* means issue generally and is not limited to a male descendant. I do not think that Mr. Ameer Ali meant in any way to cast any doubt upon the two decisions I have referred to. What we find in the judgment is that Mr. Ameer Ali in expressing the opinion of the Judicial Committee as to the meaning of the word *santan* as used by the author Vijnaneswara in the Sanscrit book Mitakshara stated that the word *santan* as used by that particular author in a portion of his work meant a male descendant. He did not purport to lay down what the ordinary meaning of the word *santan* was as used in the Bengalee documents at the end of the 19th or the beginning of the 20th century. There seems to be no doubt that issue generally is the meaning of the word *santan*. Then, the daughter of Upendra, having survived her father and having attained majority, ought to have the property transferred to her as is provided by the 7th clause of the Will together with the accounts as kept by the executor. It is said that under section 111 of the Indian Succession Act this gift over in favour of the plaintiff could take effect, because under section 111 the period of distribution was not until the death of the daughter Sarmistha. I think it is quite impossible to say that the period of distribution in this case would be the death of Sarmistha, unless it can be held that Sarmistha took less than an absolute interest because if Sarmistha on the terms of clause (7) of the Will took, as she would have taken if she had been a person governed by the provisions of the Indian Succession Act, an absolute interest, it is impossible to say that the period of distribution under the terms of the Will could be postponed later than either the date of the death of the testator or the date when Sarmistha attained full age, whichever event happened later. The case that has been made by the learned Vakil for the plaintiff-respondent is that there is a presumption that every gift made by a Will to a Hindu woman is of a limited interest. There is nothing to support that proposition. In fact, the proposition is the other way. The statement of the rule of Hindu Law is contained in the judgment of a learned Hindu Judge of this Court, which is reported as *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (8), and the rule laid down by the learned Judge is this: That the presumption applies only in the case of a gift by a husband to his wife. It will also apply in the case where the gift is a maintenance grant, because the very nature of the grant shows that it is not to be a grant of an absolute interest, although the words used in the deed would otherwise be sufficient to convey an absolute interest. There will also be a restriction when any words used in the Will are sufficient to show that the testator did not intend to give an absolute interest. But apart from the case of a husband to his wife, in all other cases there must be something to show that the interest taken by a Hindu woman is not to be an absolute interest. In the present case, there is absolutely nothing except that the legatee is a woman. First of all, it is said that if it be held to be an absolute interest, the testator's wife with whom obviously he was on bad terms might have been in certain events entitled to the property. On the other hand, that argument that the interest was not an absolute one given to the daughter would exclude the daughter's daughter in favour of the plaintiff. I do not think that that is what was intended by the testator. At any rate, there is nothing to show one way or the other whether the testator had any such intention. We must

(5) 7 W. R. 320.

(6) 24 W. R. 268.

(7) 5 I. A. 138; 4 C. 23; 3 C. L. R. 339; 3 Sar. P. C. J. 815; 3 Suth. P. C. J. 537; 2 Ind. Jur. 430; 1 Shome L. R. 241; 2 Ind. Dec. (N. S.) 16.

(8) 24 C. 646; 1 C. W. N. 578; 12 Ind. Dec. (N. S.) 1100.

take the words of the Will as they are and see what the testator meant and whether there are any words used in the deed to show that the testator meant to give his daughter Sarmistha less than an absolute interest. I do not think that there is anything which cuts down the clear term of the gift "to my daughter on attaining majority." If that is so, then, under section 111 of the Indian Succession Act, the gift in favour of the brother must take place before the estate is distributable, that is, before the daughter receives the estate by transfer from the executor under clause (7). I think this is a perfectly clear case that the daughter did take an absolute interest liable to be defeated either by death during her father's lifetime or by her own death during minority. But subject to that the interest is an absolute interest.

Then, there is the other head of the case, namely, that the interest of the plaintiff did not pass by the sale in execution. The plaintiff seems to have persuaded the learned Judge of the Court below that he was the only person liable under the decree in execution of which the property was sold in 1886. I think there is grave doubt as to the learned Judge being correct in that. It is said that the decree has disappeared and there is no evidence as to what the decree stated. But we have got the terms of the decree stated in the judgment of the case in which the testator's daughter Sarmistha was the plaintiff and there it is stated that all the three brothers were jointly liable under the decree. We have also got the statement of the present plaintiff in the application by which he applied to the Court for leave to sell a portion of the estate of Upendra for the purpose of paying off the debts. The present plaintiff states that that application was made to the learned District Judge to authorize him (Jogendra) to sell a portion of his own property for the payment of his own debts. That is an idle explanation. There cannot be any doubt as to what the application was, namely, that it was an application under section 90 of the Probate and Administration Act for the purpose of enabling Jogendra as the executor of his brother Upendra's Will to sell a portion of Upendra's estate for the purpose of satisfying the decree that had been passed against Jogendra and his brothers. I must confess that I am at a loss to understand how the learned Judge, on the evidence before him, could have come to the conclusion that it had not been established that Upendra's portion of the property was liable under the decree. But, in my opinion, it makes little difference, because obviously Jogendra was liable on his own statement for the whole of the decretal amount. His statement was that the suit was brought on a promissory note and that he alone was sued and judgment was passed for the whole amount against him. It is said that the sale could not affect Upendra's share in the property, because although Upendra's Will had been proved prior to the sale in execution of that decree, the Probate had not issued out of the Court of the learned District Judge. I am not prepared to pay much attention to that contention. Even if it has any force, there is nothing in it at all. Jogendra, according to his own statement, was the person solely liable under the decree. He had an interest inherited from his father. According to his own case, he had a reversionary interest expectant on the death of his niece Sarmistha to one-third of the property under the Will of his brother Upendra. That interest could be sold, dealt with, taken in execution, without the Will of Upendra being proved. As a matter of fact, the Will had been proved, although Probate had not issued to the plaintiff, because apparently there was some dispute probably as regards the stamp duty payable on the grant, which had not been settled in the Court of the learned District Judge. But the Court having sold all the right, title and interest of Jogendra in the whole of this property to the defendant's ancestor, Jogendra cannot now say that that sale did not pass any interest, which he says was on the date of the sale in reversion but which on the death of Sarmistha without issue would fall into possession. It is a case which I am clearly of opinion he cannot put forward. The case seems to me to be a perfectly simple one. In my opinion, first of all, Jogendra took no interest in the events that had happened in the one-third of the property under the Will of his brother Upendra. If he did, it was a reversionary interest—an interest then in reversion but now in possession—which was sold under the sale in execution in 1886 and that interest passed by the sale in execution to the ancestor of the present defendants. In either view, the pre-

sent suit cannot succeed. I, therefore, think that we ought to set aside the judgment and decree passed by the learned Subordinate Judge of the Court below in favour of the plaintiff and instead thereof we ought to allow the present appeal and dismiss the plaintiff's suit with costs both in this Court as well as in the Court below. The defendants-appellants will be entitled to two sets of hearing fees for the two hearings in this Court.

NEWBOULD, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL SIDE NO. 99 OF 1916.

January 3, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

THAKURDAS MOTI LAL—APPELLANT

versus

JOSEPH ISKENDER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, r. 52—Rateable distribution—Time for making application—Anticipatory attachment, validity of—Priority of attachment, effect of—Attaching creditors, relative rights of.

Rule 52 of Order XXI, Civil Procedure Code, applies only where the property to be attached is in the custody of a public officer. It does not allow of an anticipatory attachment of money expected to reach the hands of a public officer. Therefore, the attachment by a notice under this rule of a fund before it has reached the hands of a public officer is not valid even where during the continuance of the attachment the fund comes into the custody of that officer. [p 518, col. 2; p 519, col. 1; p. 522, col. 1.]

Per *Sanderson, C J.*– An attachment under Order XXI, rule 52, Civil Procedure Code, of a fund merely prevents alienation of the fund subject to the further order of the Court and does not give title to the creditor who effects the attachment. [p. 520, cols. 1 & 2.]

Per *Mookerjee, J.*—To make sub-section (1) of section 73, Civil Procedure Code, applicable it must be shown that the applications for execution were made before the receipt of assets. Where assets are realised by the sale of immoveable property, the point of time for consideration, before which applications for execution should be made, is the date of the sale of the property. [p 521, col. 2.]

An attachment does not create any title in the attaching creditor; it creates no charge or lien upon the attached property. It is effected by a Court for the benefit of the execution creditor by prevention of private alienations by the judgment-debtor of the attached property. Consequently where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment, but the Court is bound to apply the rules of justice, equity and good conscience in the determination of the relative rights of the creditors who wish to proceed against the fund in *custodia legis* for the satisfaction of their dues. If the fund is insufficient to meet in full the claims of the creditors, it should be rateably distributed amongst them. [p. 522, col. 2.]

Appeal against the following order of Mr. Justice Chaudhuri, dated the 31st August 1916, sitting on the Original Side:—

"I think I must allow this application. The plaintiff obtained his decree on the 16th December 1915 against the defendant. Prior to that the property belonging to the defendant was sold by the Registrar of this Court on the 11th December 1915 in a mortgage suit. On the 13th January 1916 the plaintiff obtained an order for attachment to the extent of Rs. 17,500. On the date of the sale Rs. 41,000, representing one-fourth of the value of the purchase money, was paid into Court. Under the rules of this Court this amount was held by the Registrar, and the money was not transferred by him to the Accountant-General, who is the same Officer. The balance of the purchase-money was paid on the 24th January 1916. There was no other attachment prior to the 24th January 1916. On the 20th July 1916 the balance, after satisfying the creditor in whose suit the property had been sold, was transferred to the credit of this suit. In the application for transfer, a statement was made that it was for purposes of rateable distribution under section 73. Certain creditors have now appeared who effected their attachments after the 24th January. Mr. Mitter appearing for the plaintiff argues that since his attachment was prior to the receipt of the assets and the other attachments are subsequent thereto, he alone is entitled to be paid and there ought be no rateable distribution until he has been satisfied. The other creditors contend firstly that the plaintiff's attachment was of money in the hands of the Accountant-General but as no money had come into his hands, that attachment is of no effect. It is said it was merely an attachment by way of anticipation of funds

likely to come into the hands of the Accountant-General. I do not think that argument has much substance. What they intended to attach was the money which was then in Court, and in the hands of an officer of this Court. There was an undoubted right in the plaintiff to effect such an attachment but he made a mistake in mentioning the officer, due to the same officer being both the Registrar and the Accountant-General. There was no confusion as to the money which was to be attached. That ground, therefore, fails. The next contention is that when the plaintiff applied for the transfer of the balance to his suit, he stated that it was for purposes of rateable distribution, and it is said that there should, therefore, be a rateable distribution. I do not think there is any substance in that also. There is no estoppel by statements of that character. The plaintiff is entitled to his legal right under section 73. I, therefore, make the order asked for. The balance after payment of the plaintiff would be rateably distributed as between the creditors who have attached, and the costs of their appearance to-day and of realisation would be added to the amounts claimed by them respectively certified for Counsel.

Messrs. *N. Sarkar* and *H. C. Mozoomdar*, for the Appellant.

Messrs. *S. R. Das* and *B. L. Mitter*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from a judgment of Mr. Justice Chaudhuri, whereby he granted the application of Joseph Iskender. That application was made asking for an order that the Comptroller-General of Accounts for the time being of the Government of India and the Secretary and the Treasurer for the time being of the Bank of Bengal with the privity of the Accountant-General of this Court do out of the funds standing to the credit of this suit (No. 617 of 1915) *viz.*, Rs. 29,894-5-11 pay to the plaintiff the sum of Rs. 16,519-7-0, being the decretal amount due to him under the decree made in this suit, dated 16th December 1915, with interest.

One of the points which has been raised in the course of the argument is in my judgment of considerable importance, and in order that it may be correctly appreciated, it is necessary to look at the facts carefully and in some detail.

The facts, as stated by the learned Counsel for the appellant, Mr. Sarkar, in opening the appeal and which, it is agreed, are not disputed are as follows:—It appears that on the 14th of August 1915 the appellants, Thakurdas Motilal, the names under which they carry on business, obtained a decree for Rs. 14,842 12-6 against one Kally Churn Sett. At sometime or other—the date of which is not material—a decree was made in a mortgage suit against the said Kally Churn Sett, and certain property which was comprised in the mortgage was on the 11th of December 1915 sold for the sum of Rs. 1,63,500. The sum of Rs. 41,000 was paid on the day of the purchase by the purchaser, as a deposit made to the Registrar of the Original Side of the High Court. On the 16th of December 1915 the respondent in this appeal, Joseph Iskender, obtained a money-decree for Rs. 16,519-7-0, against the said Kally Churn Sett. On the 13th of January 1916, the respondent Joseph Iskender obtained an order for attachment of moneys to the extent of Rs. 17,300 out of the above-mentioned purchase money of Rs. 1,63,500. The application upon which that order was made was as follows: "I pray that the total amount of Rs. 16,519-7-0 together with interest on the principal sum up to date of payment and the costs of the suit and the costs of taking out execution be realised by attachment to the extent of Rs. 17,300 in the hands of the Accountant-General of this Honourable Court payable to the defendant out of a sum of Rs. 1,63,500, representing the sale proceeds of the defendant's immoveable properties sold by the Registrar of this Honourable Court on the 11th December last in execution of decrees, dated respectively 17th February 1911 and 1st March 1912, made in Suit No. 1144 of 1910 of this Court (*Raja Sreenath Roy* v. *The Defendant in this suit*) and the amount be paid to me." The order which was made upon that application by the Registrar on behalf of the Court was in these terms, and it was addressed to the Accountant-General of the High Court, Original Side. "Sir,—The plaintiff having applied under

THAKURDAS MOTI LAL *v.* JOSEPH ISKENDER.

Order XXI, rule 52, of the Code of Civil Procedure for an attachment of the money now in your hands to the extent of Rs. 17,300 payable for the defendant out of a sum of Rs. 1,63,500, representing the sale proceeds of the defendant's immoveable property sold by the Registrar of this Court on the 11th December 1915 in execution of decrees, dated respectively the 17th February 1911 and 1st March 1912, made in suit 1144 of 1910 of this Court (*Raja Sreenath Roy* v. *The Defendant in this suit*), I am directed to request that you will withhold the said money subject to the further order of this Court.—(Sd.) J. H. Hechle, Registrar."

Now, it is to be noticed that at that time there was no money in the hands of the Accountant-General in respect of this matter. The sum of Rs. 41,000 which was paid as a deposit was in the hands of Mr. Hechle in the capacity of the Registrar of the High Court, and it was not until the 24th of January 1916 that the purchaser upon an order of the Court paid in the balance into Court. On the 26th of January two days after the money was paid in, the appellant applied for attachment of the sale proceeds. On the 11th of February, Chuni Lal Johurry, another creditor, made a similar application for attachment of the sale proceeds. On the 15th of February 1916 the appellant obtained an order for attachment, and that attachment was effected, as I assume, in a manner similar to that in which the attachment of the respondent was effected on the 13th of January 1916. Then comes an important date: It appears that on the 16th of February 1916, the money was transferred by the Registrar to the Comptroller-General of Accounts with the privity of the Accountant-General. On the 29th of February the other creditor, Chuni Lal Johurry, obtained an order for the attachment of the sale proceeds in execution of his decree. On the 15th of March there was an order that the mortgagee should be entitled to take out of Court a sufficient sum in satisfaction of his claim in respect of the mortgage decree, leaving a balance of Rs. 29,894 in Court to the credit of the mortgage suit. On the 20th of July 1916 an order was obtained, as we are informed, *ex parte* by the respondent Joseph Iskender that this balance of Rs. 29,894, should be transferred from the mortgage suit to the suit in which the respondent was the plaintiff and Kally Churn Sett was the defendant. That application was based upon the allegation that the respondent had obtained an order for attachment of the balance of the purchase money, and it was also upon the basis that the application was made for the purpose of having the sum transferred in order that it might be rateably distributed amongst the creditors of the defendant Kally Churn Sett. These are all the dates and facts which I think it necessary for me to mention for the purpose of my judgment. Then the application in this case was made on the 26th August 1916. I have already referred to the application and I need not mention the terms again. Upon that application the learned Judge made an order that the respondent should be paid out of the balance the sum which he asks.

It is against that order that this appeal is brought: and, the first point that was argued by the learned Counsel for the appellant was that this application was one which was under Order XXI, rule 52 of the Code of Civil Procedure. I do not think myself that there is any doubt that that was so, having regard to the documents which have been put before us. That rule is as follows:—"Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued." Then there is a form in the Appendix (No. 21 of Appendix E) which was followed in this case in the order which I have read, dated the 13th of January 1916.

The learned Counsel for the appellant argued that inasmuch as this was an order directed to the Accountant-General of the High Court and inasmuch as at that time there was no money in the hands of the Accountant-General, the attachment was invalid. In my judgment that argument must prevail.

It was urged on the other hand that Mr. Hechle occupied the position of the Registrar and also that of the Accountant-General and that there was no doubt as to the identity of the fund which was

in question and that the intention was that the respondent was asking for an order to attach the balance which might remain over, after the mortgagee was paid out That might be so. It is quite true that there was no doubt about the identity of the fund, as there was no doubt as to what was the object of the respondent. But we have got to follow the words of the Statute, which are in my opinion quite clear and which have been also interpreted by the decision of the High Court. I think that when the rule says that "where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer," it is clear that that rule was only intended to relate to an officer who has, at the time the application is made, in his hands the fund which may be the subject of attachment. My interpretation of the rule is borne out by the judgment of this Court, to which my learned brother Mr. Justice Mookerjee was a party, in the case of *Padmanand Singh* v. *Rama Prosad* (1). The passage in his judgment to which I desire to refer is at page 19* and is as follows:—"In so far as rule 52 of Order XXI is concerned, the case is equally clear. As already stated, that rule applies only where the property to be attached is in the custody of a public officer. It does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, and is restricted only to money actually in his hands." Those are words which in my judgment are strictly applicable to this case, and are words with which I entirely agree: and, I think, that is sufficient for the judgment at which I have arrived, namely, that the attachment which was attempted to be made by the respondent on the 13th of January 1916 was an invalid attachment

The result of that conclusion is that not only was the attachment of the respondent an invalid one, but also the attachment effected by the appellant on the 15th of February 1916 was invalid, because it was exactly in the same form as the attachment of the respondent. At that time there were no funds in the hands of the Accountant General: and, therefore, the result is that the attachment of the respondent and the attachment of the appellant were both equally invalid.

Then it was argued by Mr. Das on behalf of the respondent that even if that were so, and even if the attachment which was effected by his client was invalid, still there was this sum standing to the credit of the suit in which his client was the plaintiff and he had made an application to have so much as would satisfy his claim paid out of that sum, and that inasmuch as the creditor whose attachment was valid, namely, Chuni Lal Johurry had not made any objection, and inasmuch as the attachment effected by Mr. Sarkar's client was invalid, he was entitled to have the money paid out of that sum. With that argument I cannot agree for this simple reason. To my mind it is obvious that that application was based upon the original application for execution; it was clearly, having regard to the wording of the petition, made in continuation of his application for execution: and, inasmuch as I have already come to the conclusion that the attachment was an invalid attachment, I do not think that that application for the payment out of the money in question was one which could have been acceded to by the Court, quite apart from the fact that the order for the transfer of the money had been obtained *ex parte*, upon a representation that it was for the purpose of distributing the money rateably amongst the creditors. The position, therefore, is this: Both the attachment effected by the respondent and the attachment effected by the appellant were invalid; and it appears that the attachment effected by Chuni Lal Johurry, which was made after the money had reached the hands of the Accountant-General, was a valid attachment. I now have to consider what are the rights of Chuni Lal Johurry on the one hand and the appellant and the respondent on the other hand, because on this part of the case the appellant and the respondent are in the same position. It appears from the enquiries which have been made during the course of the argument that there are no other creditors who attached or attempted to attach this fund,

(1) 11 Ind. Cas. 422; 16 C. W. N. 14; 14 C. L. J. 127.

*Page of 16 C. W. N.—*Ed.*

Now the learned Counsel for the respondent Mr. Das and the learned Counsel for the appellant Mr. Sarkar have both applied to us to-day that we should allow them to make an application for attachment of the fund. To this application, in my judgment we ought to accede, not only because we think that otherwise a great deal of unnecessary expense would be incurred but also because we think that right and justice necessitate that we should accede to that application. Therefore, I will consider this further question from the point of view of there being an attachment effected not only on behalf of Chuni Lal Johurry on the 29th of February 1916, but also there being an attachment on behalf of the respondent and an attachment on behalf of the appellant both of which became effective on the 3rd of January 1917, to-day, simultaneously and contemporaneously. This is a point which in my judgment is of considerable importance.

The learned Counsel for Chuni Lal Johurry has argued that inasmuch as his client's attachment was antecedent in point of date to the attachment effected by the respondent and the attachment effected by the appellant, his client ought to be allowed to take out of the money which is in Court the whole amount of his client's debt: and that after his debt has been satisfied to the full extent, he does not mind how the fund is to be treated, whether rateably or not. I have come to the conclusion that that argument ought not to be acceded to. The conclusion depends upon what is the effect and meaning of such an attachment as has occurred in this case: Does it on the one hand give to the creditor, who has attached the money, any interest in the fund or is it merely an order restraining alienation of the fund until further order of the Court? In my judgment it means the latter: and, I think that has been decided not only by authority of this Court but also by authority of the Privy Council. I desire only to refer to three cases, the first of which is the case of *In re Soobul Chunder Law, Soobul Chunder Law* v. *Russick Lall Mitter* (2). Another case which was decided by a Full Bench of this Court is the case of *Fredrick Peacock* v. *Madan Gopal* (3) and the third is a Privy Council decision, *Raghunath Das* v. *Sundar Das Khetri* (4). The result of all these decisions is that such attachment as has occurred in this case is merely to prevent alienation of the fund subject to the further order of the Court, and does not give title to the creditor who effected the attachment. That being so, when it is found that subsequently two other creditors have obtained attachment of the same fund, what is the further order of the Court that is to be made? Having regard to the scheme of the Code, I think that the order ought to be that those creditors ought to share rateably with regard to the amounts which are due to them respectively.

For these reasons I think that this appeal must be allowed and the order will be drawn up as I have stated. I think it would be desirable that the order, before it is finally settled, should be submitted to the learned Counsel appearing on both sides and if necessary they will have liberty to apply. The applications on behalf of the respondent and of the appellant in respect of the attachment and payment out must be put in writing before half past four to-day, as stated by the learned Counsel, and those applications when put in will be granted and our order will be that this fund must be distributed amongst the three creditors rateably with regard to their respective debts. For this purpose it is agreed by the parties that the money in Court will be paid out to Messrs. Morgan & Co., who will distribute the whole amount, the money which is already in their hands and the money so paid out of Court, amongst the three creditors in accordance with our judgment, less poundage.

With regard to costs, we think that the appellant has succeeded materially upon this appeal, and has in fact got the judgment of Mr. Justice Chaudhuri set aside. We direct that Mr. Das's client do pay the

(2) 15 C. 102; 12 Ind Jur. 207; 7 Ind. Dec. (N. S.) 719.

(3) 29 C. 428; 6 C. W. N. 577.

(4) 24 Ind. Cas. 304; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 42 C. 172; 41 I. A. 251 (P. C.).

costs of Mr. Sarkar's client in this appeal, and that Chuni Lal Johurry do pay his own costs in this appeal, and that as regards the costs in the Court of first instance each party do pay his own costs.

MOOKERJEE, J.—The facts material for the determination of the question in controversy may be briefly stated. In execution of a mortgage-decree obtained by Sreenath Roy against Kally Churn Sett, the hypothecated properties were sold on the 11th December 1915 for Rs. 1,63,500. The purchaser, on that date, brought into Court Rs. 41,000; the balance was deposited on the 24th January 1916. The decree-holder was paid his due and the surplus Rs. 29,894 was, on the 16th February, transferred by the Registrar to the Account-ant-General. Kally Churn Sett, it appears, had a number of unsecured creditors of whom three are now before this Court—one as appellant, the other two as respond-ents. Of these three, Thakurdas Motilal held a decree for money, dated the 14th August 1915. On the 26th January 1916 he applied to execute his decree and ob-tained an order for attachment on the 15th February following. Chuni Lal Johurry had obtained a decree for money on the 24th August 1915. He applied for execution on the 11th February 1916, and the attach-ment at his instance was effected on the 29th February 1916. Joseph Iskendar obtained his decree on the 16th December, 1915. His application for execution was presented and the attachment at his instance effected on the 13th January 1916. The Court is now invited to decide the relative rights of these three creditors in respect of the surplus fund in Court.

It is plain that no question of rateable distribution under section 73 of the Code of Civil Procedure of 1908 arises as amongst these creditors. Section 73 (1) provides that "Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons." If this sub-section were held applicable, it would have to be shown that the applications for execution had been made before the receipt of assets. In the case before us, this condition is not fulfill-ed, as the assets must be deemed to have been received on the 24th January 1916: *Maharaja of Burdwan* v. *Apurba Krishna Roy* (5). On the other hand, under clause (*c*) of the proviso to section 73, which is applicable to this case, it is plain that the point of time for consideration is the date of the sale of the property. Here the sale took place on the 11th December 1915; and as none of the creditors had applied for execution prior to that date section 73 has no application, as was erroneously assumed by one or other of the parties at an earlier stage of the proceedings. The real question then reduces to this, was there a valid attachment effected of this fund by any of the three creditors? There is no room for controversy that the attachment effected at the instance of Chuni Lal Johurry on the 29th February 1916 was valid and opera-tive in law. But as regards the attachment alleged to have been effected by Thakurdas Motilal and Joseph Iskendar, the question arises, whether steps were taken by them in conformity with rule 52 of Order XXI of the Code. Now, that rule provides that "Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued." In the case before us, the attachments were effect-ed by both these creditors on the assump-tion that there was a fund in the hands of the Accountant-General of this Court. But on the dates when the attachments were effected, there was no such fund in the hands of the Accountant-General. Consequently neither of the attachments would be valid and operative, unless it was held that the rule allows of an anticipatory attachment of money expected to reach the hands of a public officer. A reference to the terms of Form 21 of Appendix E to the Code, however, makes it manifest that

(5) 10 Ind. Cas. 527; 14 C. L. J. 50; 15 C. W. N. 872.

the rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is limited in its application only to money actually in his hands. This was the view adopted by this Court in the case of *Padmanand Singh* v. *Rama Prosad* (1), where the Court followed the earlier decision of the Bombay High Court in *Tulaji* v. *Balabhai* (6). The principle of the rule, as concisely stated by Mr. Justice Beaman in *Umabai Shankar Godbole* v. *Amritrao Anant* (7), is that what is attached must be something in existence and not merely in the future. The same view has been recently adopted by the Madras High Court in *Tiruvangadial* v. *Thiruvangadih* (8). There is consequently no escape from the conclusion that the attachments on the basis whereof Thakurdas Motilal and Joseph Iskendar seek relief are not operative in law.

The question finally arises, what is the relative situation of the three creditors. Thakurdas Motilal and Joseph Iskendar have now prayed for the immediate attachment of the fund in Court and that application we have decided to grant. Consequently the position at the present moment is that there is an attachment effected by Chuni Lal Johurry on the 29th February 1916, as also two other attachments effected at the instance of Thakurdas Motilal and Joseph Iskendar on the 3rd January 1917. As between these two attaching creditors no question of priority can arise; but the question remains, whether Chuni Lal Johurry is entitled to precedence by reason of the priority of his attachment. He claims such priority and relies upon the decision in *Tiruvangadial* v. *Thiruvangadih* (8), which does support his contention. The contrary view, however, has been taken by the Madras High Court itself in *Suikeena Katum* v. *Mahomed Abdul Aziz* (9). We are in this Court free to decide the question on first principles, and when the matter is so regarded, it seems fairly clear that no question of priority can arise on the basis of the successive attachments. As was pointed out by the Judicial Committee in *Moti Lal* v. *Karrabuldin* (10) and *Raghunath Das* v. *Sundar Das Khetri* (4), attachment does not create any title in the attaching creditor; it creates no charge or lien upon the attached property; the attaching creditor does not acquire the status of a secured creditor. Attachment is effected by a Court for the benefit of the execution creditor by prevention of private alienation by the judgment-debtor of property out of which the creditor seeks relief. This view was adopted by this Court in the cases of *In re Soobul Chunder Law, Soobul Chunder Law* v. *Rusick Lall Mitter* (2) and *Frederick Peacock* v. *Madan Gopal* (3). Consequently we must apply the principle that where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment; as the attachments create no charge or lien upon the fund, it is obvious that so long as the fund is in the custody of the Court, the Court is bound to apply the rules of justice, equity and good conscience in the determination of the relative rights of creditors who wish to proceed against the fund in *custodia legis* for the satisfaction of their dues. In such circumstances, the fund, if insufficient to meet in full the claims of the creditors, should be rateably distributed amongst them. On these grounds, I hold that the order now under appeal cannot be supported and must be set aside.

Appeal allowed.

(10) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639; 7 Sar. P. C. J. 222; 13 Ind. Dec. (N. S.) 121.

(6) 22 B. 39; 11 Ind. Dec. (N. S.) 607.

(7) 28 Ind. Cas. 18; 39 B. 80 at p. 85; 17 Bom. L. R. 133.

(8) 24 Ind. Cas. 617; 26 M. L. J. 364.

(9) 29 Ind. Cas. 239; 38 M. 221.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 834 OF 1916.

May 21, 1917.

Present:—Mr. Justice Mullick.

DARBHANGI THAKUR—PLAINTIFF—APPELLANT

versus

Munshi MAHABIR PRASAD—DEFENDANT No. 7—RESPONDENT.

Malicious suit, whether actionable—Damages, suit for, maintainability of—False collusive defence—Costs.

The malicious institution of civil proceedings without reasonable and probable cause is not generally an actionable wrong which entitles the party aggrieved to sue for damages. The principle is that the latter

is sufficiently indemnified by the judgment which gives him costs and that he cannot prove special damage. [p. 523, col. 2.]

An agreement to maintain a false defence in a civil suit is not an actionable wrong. [p. 524, col. 1.]

Case-law discussed.

Appeal from a decision of the Additional Subordinate Judge, Darbhanga.

Mr. *Muhammad Hassan Jan*, for the Appellant.

Messrs. *Rajendra Prasad Prasad Ram*, and *Jagarnath Prasad*, for the Respondent.

JUDGMENT.—The plaintiff and the defendants are co-sharers in *Mouzah* Rahmatpur and it appears that the plaintiff having applied to the Collector under the Estate Partition Act for the separation of his interest, some of the defendants filed a statement before the Collector supporting the plaintiff. Upon notice being issued to the other proprietors, a co-sharer named *Musammat* Bhagwati objected to the partition. The Collector declined to accept the objection and ordered the partition to proceed, whereupon she was compelled to institute a suit in the Civil Court, namely, Title Suit No. 1/289 of 1913, for a declaration that the estate was not liable to partition by reason of a previous private partition between the co-sharers

The suit was tried by the District Judge of Darbhanga and was decreed against the present plaintiff and present defendants Nos. 1. 2, 3, 4, 7, 11, 14, 15 and 17 with costs and against the remaining defendants of that suit without costs. *Musammat* Bhagwati then took out execution for her costs and realised the whole sum from the plaintiff. The plaintiff now sues the former set of defendants for contribution in proportion to the shares held by each in the estate. His claim against these defendants, namely, Nos. 1, 2, 3, 4, 7, 11, 14, 15 and 17 of this suit is Rs. 626-14-0. He makes no claim against the other defendants.

Defendant No. 7 only contested the suit before the Munsif, with the result that though there was an *ex parte* decree against defendants Nos. 1, 2, 3, 4, 11, 14, 15 and 17 the suit was dismissed as against defendant No. 7. There was then an appeal before the Additional Subordinate Judge, who found that there was collusion between the plaintiff and defendants in setting up a false defence in the suit before the District Judge of Darbhanga and agreed with the decree of the Munsif.

The present second appeal is preferred by the plaintiff.

Upon the dismissal of her objection petition before the Collector it was open to *Musammat* Bhagwati Kuer to appeal to the Commissioners under sections 112 and 113 of the Partition Act and in the event of success to recover costs from the opposite party. She had, however, another remedy, namely, by civil suit and this she chose. She was successful and obtained not only the declaration that she sought as to the estate not being liable for partition, but also a decree for costs. I take it that it was open to the Civil Court to award her the costs not only of the suit but also of the proceedings in the Collector's Court, but the decree seems in fact to have been only for the costs of the suit.

The first question then that arises is whether the plaintiff and the defendants in making the application for partition before the Collector committed an actionable wrong. I will assume that the lower Appellate Court has found (though as a matter of fact it has not) that in doing so the plaintiff and the defendants acted maliciously and without reasonable or probable cause.

The answer to the question put above must be in the negative.

It is now settled law that the malicious institution of civil proceedings without reasonable and probable cause is not generally an actionable wrong which would entitle the party aggrieved to sue for damages. The principle is that the latter will be sufficiently indemnified by a judgment which gives him costs and that he cannot generally prove special damage, see *Cotterell* v. *Jones* (1), *Quartz Hill Gold Mining Company* v. *Eyre* (2). The first of these cases is instructive, because there two persons *A* and *B* brought maliciously a false suit for debt in the name of an insolvent, named *D*, against *C*. The alleged *benamidar* plaintiff *D* was non-suited but no costs were allowed. It was held that the declaration showing no award of costs either ordinary or extra formed no ground of legal damage. To like effect is *Raj Chunder Roy* v. *Shama Soondari Debi* (3). There the Court held that the injury must be something other than

(1) (1851) 11 C. B. 713; 21 L. J. C. P. 2; 16 Jur. 88; 138 E. R. 655; 87 R. R. 754.

(2) (1883) 11 Q. B. D. 674 at p. 681; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668.

(3) 4 C. 583; 2 Ind. Dec. (N. S.) 370.

that which might have been compensated for by an award of the costs of the suit, or, in other words to use the language of Lord Holt in *Savile* v. *Roberts* (4), the injury must be a collateral wrong.

There are, however, other proceedings which though civil come within the mischief which is sought to be cured by an action for malicious prosecution on a criminal charge. These are proceedings which involve loss of reputation or loss of liberty to the person and upon the face of them involve damages.

But the case before us is clearly not one coming within this class of proceedings

I am of opinion that the plaintiff and the defendants, even if they in furtherance of a conspiracy maliciously without reasonable or probable cause made applications to the Collector praying for a partition, did not commit a wrong for which the law allows a remedy by an action for damages.

And if this is the case with the applications for partition, much more so is it the case with a conspiracy to put forward and maintain a false defence in the subsequent suit. In my opinion, therefore, the learned Vakil for the respondents must also fail on his alternative contention, which is that even if the making of an application did not constitute an actionable wrong, the collusive and false defence in the civil suit did constitute such a wrong. It is quite clear that *Musammat* Bhagwati Kuer was amply indemnified against these collusive acts by the award of costs.

In this connection it is necessary to notice that the contesting defendant in his written statement does not expressly plead that he and the plaintiff were joint tort-feasors. He rests his case on a contract by which the plaintiff undertook to indemnify him for the costs of the suit. The case of a joint tort appears to have been raised for the first time at the framing of the issues. At the trial he failed to prove this contract, but he succeeded in satisfying the Court that there was a joint tort to which the rules as to contribution would apply.

The learned Vakil for the respondent relies on *Surput Singh* v. *Imrit Tewari* (5). This was a case of tort caused by the cutting of trees. It does not support the proposition that an agreement to maintain a false defence in a civil suit is an actionable wrong. He next relies on *Manja* v. *Kadugachen* (6). The report of this case does not show whether the Court found that a collusive defence or a trespass against property was the tort. From the fact that the learned Judges in this case relied on *Surput Singh* v. *Imrit Tewari* (5), it would seem that the tort lay in some act antecedent to the filing of a false defence. The case of *Gobind Chunder Nundy* v. *Srigobind Chowdhry* (7) does, however, go the full length of the learned Vakil's contention. In that case the plaintiff and the defendants were jointly held to commit an illegal act by taking a *patni* settlement from a proprietor who had contracted to give the *patni* to another person. It would seem that the learned Judges were of opinion that it was an actionable wrong for the plaintiff and the defendants to set up a false defence in a suit for specific performance by the promisee against them and the proprietor. The case, however, was remanded and the learned Judges came to no clear and definite decision. It is possible that the tort which the learned Judges had in mind was the act of inducing the proprietor to break his contract, but if the learned Judges did intend to hold that the tort lay not in procuring a breach of the contract but in making a false defence in a suit upon the contract, then I would respectfully decline to agree. To apply this principle logically in this country or for the matter of that in any other country would lead to an intolerable multiplication of suits. I consider, therefore, that accepting all the findings of the learned District Judge as they stand, it has not been established that the plaintiff and defendant No. 7 were joint wrongdoers in an actionable wrong, and that the rule in *Merryweather* v *Nixan* (8) is not a bar to the present suit for contribution.

The learned Vakil for the appellant, however, goes further and contends that the rule in this last mentioned case does not

(4) 1 Ld. Raymond 374; 91 E. R. 1147.

(5) 5 C. 720; 6 C. L. R. 62; 2 Ind. Dec. (N. S.) 1066

(6) 7 M. 89; 2 Ind. Dec. (N. S.) 647.

(7) 24 C. 330; 1 C. W. N. 179; 12 Ind Dec. (N. S.) 887.

(8) (1799) 8 T. R. 186; 16 R R. 810; 101 E. R. 1337; 2 Sm. L. C. 569, (Eleventh Ed., Vol. 1, 398).

apply at all in this country, and he relies upon *Shakul Kameed Alim Sahib* v. *Syed Ebrahim Sahib* (9) and some other authorities of a like nature in support of his contention. But although it is true that Lord Herschell in *Palmer* v. *Wick Steam Shipping Co.* (10) declined to extend the rule to Scotland, so far as I am aware there is no authority in India which has refused to apply the doctrine wherever the facts have been clearly made out. The utmost that the Courts have done in the direction of dissent is to express doubts whether the rule in *Merryweather's* case (8) has not been too widely stated. It is also not irrelevant to note in this connection that in the draft Bill prepared by Sir Frederick Pollock for a Code of Civil Wrongs for India the doctrine is expressly recognized as applying to this country, and embodied in the form of a section. It is true that the Bill did not pass into law, but it is strong evidence of the opinion of a very high authority as to the law which prevails in this country.

My finding, therefore, is that the doctrine does apply to India, but that in the case before us there was no actionable wrong to which the plaintiff and the defendants were parties. In arriving at this conclusion I have assumed that the learned Subordinate Judge's findings of fact as to malice and reasonable and probable cause are legally sufficient; but if my view of the law had been otherwise, it might have been necessary to order a remand. In that case I would have directed the lower Court to give the parties the chance of producing the copies of the applications to the Collector in the partition proceedings as well as all the written statements in the civil suit before the District Judge. It is somewhat unsatisfactory that we have had to rely for the precise terms of those applications and written statements upon the account given of them in the judgment of the District Judge in the civil suit. I agree with the learned Subordinate Judge that the judgment in question was evidence for the purpose of showing what the statements were, but it would have been more satisfactory to have called for the originals or certified copies thereof for the purpose of securing the best evidence of their contents. In any event upon the view I take of the case the appeal must be allowed and the plaintiff's suit decreed in full against the defendant No. 7 to the extent of his share. The plaintiff will obtain costs against him in all Courts.

Appeal allowed.

(9) 26 M. 373.

(10) (1894) A. C. 318 at p. 324; 6 R. 245; 71 L. T. 163.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 106 OF 1916.

March 30, 1917.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Cuming.

MANINDRA NATH GHOSE AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

ASHUTOSH GHOSE—DECREE-HOLDER—RESPONDENT.

Landlord and tenant—Decree in rent suit obtained when plaintiff not landlord—Execution as rent decree—Precedents, value of.

A plaintiff, who institutes a suit for arrears of rent and obtains a decree at a time when the landlord's interest is not vested in him by reason of an execution sale thereof, can, after the restoration of his status as a landlord on the cancellation of the execution sale, execute the decree as a rent decree. [p. 527, col. 1.]

Every judgment must be read as applicable to the particular facts proved, and the general expressions used must be considered to be governed and qualified by the particular facts of the case in which such expressions are found. [p. 527, col. 2.]

A case is an authority for what it decides, and not for what may seem to follow logically from it. [p. 527, col. 2.]

Appeal against the order of the Subordinate Judge, third Court, Hooghly, dated the 29th February 1916, affirming that of the Munsif, first Court, Howrah, dated the 31st July, 1915.

FACTS of the case appear from the judgment.

Babu *Bepin Behari Ghosh* (Senior), for the Appellant.—This appeal is on behalf of the judgment-debtor, and it arises out of an application for execution under section 47, Civil Procedure Code. The question for determination is whether the decree sought to be executed was a rent decree and can be executed as such, having regard to the admitted facts that at the time when the suit for arrears of rent was instituted and the decree was obtained the decree-holder was not the landlord. According to the Privy Council ruling in *Arthur*

MANINDRA NATH GHOSE v. ASHUTOSH GHOSE.

Henry Forbes v. *Maharaj Bahadur Singh* (1), the decree cannot be treated as a rent-decree under the Bengal Tenancy Act and executed as such, because the relationship of landlord and tenant did not exist at the time of the institution of the suit or at the time of the passing of the decree or at the present moment when the execution proceeding is pending. The Full Bench case of *Khetra Pal Singh* v. *Tirthamoyi Dassi* (2) does not assist the decree-holder. So the plaintiff is not entitled to execute the decree and bring the holding to sale under the Bengal Tenancy Act.

Babu *Jogendra Kumar Dey*, for the Respondents.—The decree that was passed was passed under the Bengal Tenancy Act.

[WOODROFFE, J.—Plaintiff was not the landlord when the execution was put in force].

Undoubtedly when he made the application for execution he was not the landlord. Under the Full Bench case of *Khetra Pal Singh* v. *Tirthamoyi Dassi* (2) he is entitled to execute the decree as a rent decree, though it must be admitted that the Privy Council decision has created some difficulty in the matter. See *Profulla Krishna Deb* v. *Nasir-un-nissa Bibi* (3). The present case falls within the Full Bench case, and as the Full Bench case was only distinguished and not overruled by their Lordships of the Judicial Committee, the present appeal should be dismissed.

[WOODROFFE, J.—You rely on *Profulla Krishna Deb* v. *Nasir-un-nissa Bibi* (3)?]

I refer to it because it goes to show that the Full Bench case of *Khetra Pal Singh* v. *Tirthamoyi Dassi* (2) was not overruled by the Privy Council case. The facts of this case are similar to those of the Full Bench case.

Then sections 158B, 183, 165 and 169 of Chapter XIV of the Bengal Tenancy Act speak of "*decree-holder*" and not "*landlord.*" So for the purpose of sale of an holding in execution of a decree under the Bengal Tenancy Act it is not necessary that the decree-holder should continue to be a landlord at the time when the application for execution of the decree as rent decree under the Bengal Tenancy Act is made.

Babu *Bepin Behari Ghosh*, for the Appellant, replied.

JUDGMENT.—This appeal arises out of certain execution proceedings. The facts are briefly these: The respondent is or rather was the owner of a certain *putni taluk* called *Mouza* Khasmara. The appellants hold a *jama* of some 5 *bighas* and odd *cottahs* at an annual rental of Rs. 27-2-8 within the *taluk* under the respondent. Their contention is that they have a non-transferable occupancy right in these five *bighas*. The *taluk* belonging to the respondent was sold in November 1909 at the instance of the *zemindar* under Regulation VIII of 1819.

On the 14th April 1910 the respondent who was the *putnidar* brought a suit for rent of the 5 *bighas* odd against the present appellant and obtained a decree in January 1911. In February 1911 the sale of the respondent's *putni taluk* was set aside.

On the 20th January 1914 the respondent applied for the execution of the rent decree which he had obtained for the 5 *bighas* odd of land in January 1911 against the present appellant. The proceedings appear to have dragged on for some time.

On the 27th April 1915 it was ordered that sale proclamation and attachment should be issued under section 163, Bengal Tenancy Act, and the same order was passed on the 2nd August 1915.

On the 15th May 1915 the *putni taluk* of the respondent under which appellant held these 5 *bighas* odd was once more sold under Regulation VIII. Then on the 10th July the present appellant appeared and objected to the sale of the holding on two grounds:—

(1) That the decree could not be executed as a rent decree as the decree-holder was no longer the landlord.

(2) That it could not be executed as a money decree as the appellant had no transferable interest in it.

The learned Munsif found the first objection in favour of the respondent decree-holder. He did not, therefore, find it necessary to decide the second objection. The judgment-

(1) 23 Ind. Cas. 632; 41 C. 926; 25 C. L. J. 434; 18 C. W. N. 747; (1914) M. W. N. 397; 15 M. L. T. 380; 12 A. L. J. 653; 27 M. L. J. 4; 1 L. W. 1059 (P. C.).

(2) 33 C. 566; 3 C. L. J. 470; 10 C. W. N. 547.

(3) 37 Ind. Cas. 425; 24 C. L. J. 331.

debtor then appealed. The learned Subordinate Judge dismissed the appeal. He held that the case was covered by the Full Bench ruling, *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2) and distinguished the case from the Privy Council decision in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1). He held that the Privy Council case did not overrule the Full Bench decision in *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2). He held that the decree-holder had the landlord's interest vested in him at the time when he instituted the rent suit and obtained his decree and so was entitled to execute it as a rent decree, even though he had lost his title as landlord before the property was put up to sale. The judgment-debtor has appealed to this Court. His contentions are two-fold:—

(1) That as the tenure was sold in 1909 and the sale was not set aside till February 1911, the decree for rent, which was obtained in January 1911, is not a rent decree as the respondent was not then the landlord.

(2) Even if it were then a rent decree, the decree-holder is no longer the landlord as the *putni* was again sold in May 1915, and so cannot execute it as a rent decree. He contends that the Privy Council case, *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1) overrules the Full Bench case of *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2).

The respondent argues that with regard to the first contention as the status of the decree-holder as landlord was restored in February 1911, he must be considered to have been a landlord at the time of the rent suit. This is the view of the lower Appellate Court with which we agree. The case is thus within the Full Bench decision, as the relation of landlord and tenant existed when the suit was brought and decree was given therein.

With regard to the second contention the respondent submits that the Privy Council case does not overrule the Full Bench decision.

It cannot, we think, be said that the Privy Council overruled the Full Bench decision to which they referred and distinguished from the case before them. They laid down, however, certain principles which if applicable fully and in all cases are, as pointed out in the case of *Prafulla Krishna Deb* v. *Nosibannessa Bibi* (3), inconsistent with those upon which the Privy Council judgment proceeds. But every judgment must be read as applicable to the particular facts proved and the general expressions used must be considered to be governed and qualified by the particular facts of the case in which such expressions are found. A case is an authority for what it decides and not for what may seem to follow logically from it. If the Privy Council had considered the Full Bench decision to be erroneous, they would have doubtless said so. The facts of the case before them were wholly different, as the relationship of landlord had in the Privy Council case ceased before the suit was brought. In the result, the decision under appeal must be affirmed and the appeal dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1266 OF 1915.

March 29, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

KASIYANA KOUNDAN—PLAINTIFF—APPELLANT

versus

THIMA NAICKEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 13—Non-joinder of parties—Objection, when to be taken—Enforcement of joint right to mortgage debt by father—Adult sons jointly interested not made parties to suit—Objection as to non-joinder taken after settlement of issues.

Under Order I, rule 13, of the Civil Procedure Code, an objection as to non-joinder of parties should be taken before the settlement of issues. That rule applies even in cases where the plaintiff claims a joint right along with others but does not make the latter parties to such suit. [p. 529, col. 1.]

Kollichina Venkataramayya v. *Gudavalli Subbarayudu*, 25 Ind. Cas. 122, followed.

Dursan Singh v. *Durbejoy Singh*, 1 Ind. Cas. 530 9 C. L. J. 623; *Heiniger* v. *Droz*, 25 B. 433; 3 Bom. L. R. 1, distinguished.

A debt was due on a mortgage to a joint family consisting of a father and son. There was a parti-

tion among the members of the family and the mortgage debt was not included in the partition, as it was then considered as barred by limitation. Subsequently after the new Limitation Act came into force the father alone brought a suit on the mortgage. After the settlement of issues objection was taken by the defendants that the sons were necessary parties to the suit, and that the suit was, therefore, bad for non-joinder:

Held, that the objection was taken too late. [p. 530, col. 1.]

Second appeal against the decree of the District Court, Madura, in Appeal Suit No. 208 of 1913, preferred against that of the District Munsif, Dindigul, in Original Suit No. 427 of 1910.

Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.

NAPIER, J.—The suit out of which this appeal arises was brought by the plaintiff on a mortgage, dated 15th July 1878, executed by the 1st defendant in favour of one Ramasami Gounden. Defendants Nos. 2 and 3 are the sons of the 1st defendant, and the 5th, 6th, 7th and 8th defendants are members of the plaintiff's family. They were made parties on the allegation in the 6th paragraph of the plaint that there was a partition between the plaintiff and those defendants of their family properties, in which partition the plaint mortgage fell to the share of the plaintiff. The 15th defendant is a purchaser from the 1st defendant. Defendants Nos. 9 to 14 made no claim to any share in the property, admitting that it had fallen to the share of the plaintiff. Defendants Nos. 1 to 4 and 15 set up a case of discharge. The sole issues raised were whether the bond was true and whether there had been a full discharge. The issues were settled on the 17th of March 1911. The case went to trial and on the 2nd July 1912 the plaintiff in his examination as plaintiff's 1st witness admitted that he had sons and alleged that there had been a division between himself and them and a partition of their properties. It appeared, however, that this mortgage was not named in the partition list and it is perfectly obvious that it was omitted, being thought to be, as it was under the then existing state of the law, time-barred. In consequence of the passing of the new Limitation Act the right to sue revived and the plaintiff, therefore, brought the suit. On this admission by the plaintiff the defendants raised the objection for the first time that the suit was bad for non-joinder of the plaintiff's divided sons as parties. The effect of a finding in favour of the defendant on this issue would be, subject to an objection to be considered later, that the plaintiff being only a tenant-in-common with his sons was not entitled, without making the sons parties, to recover either the whole or a proportionate share of the mortgage debt by sale of the property or the proportionate share. This was conceded by the appellant. On the trial of this issue the plaintiff adduced the evidence of his sons to the effect that prior to the suit they had relinquished their rights in the suit amount in his favour. Both the lower Courts have, however, declined to accept this story as true and it is urged that in second appeal we must accept this finding. In argument before the first Court it was contended that even if the relinquishment is not true, the objection on the score of non-joinder of parties was taken too late and no issue should have been framed. It is pointed out that the plea is purely technical and that the sons have raised no objection to their father alone bringing the suit and that the sole object of the objection is to protect the defendants from liability, it being too late to add the sons either as plaintiffs or as defendants, for in both cases it is clear on the authorities that limitation would operate to prevent their getting a decree jointly with their father for the whole amount with the necessary consequence that the father's suit must also fail. That this is the only defence to the suit is made clear on the finding that the plea of discharge is false. It being, therefore, impossible to give the plaintiff any relief by joinder of his sons, he is compelled here to fall back on the only remaining defence, that the objection for want of parties is too late. Order I, rule 13, of the Civil Procedure Code is as follows:—"All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and in all cases where

issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

Mr. T. R. Venkatarama Sastri relies on the latter part of the rule and contends that the ground of objection has not arisen subsequent to the settlement of issues. This is undoubtedly true. The ground of objection was there from the very inception of the suit. The defendant could have ascertained that the plaintiff had sons alive and could have asked for issues, whether the plaintiff was entitled to sue on behalf of his sons or whether in any partition this particular debt had fallen to his share. If those issues had then been raised, they might have been fatal to the suit. In my opinion the case comes within the language of the rule and it has been decided by this Court in Second Appeal No. 1629 of 1912 in *Kollichina Venkatarmayya* v. *Gudavalli Subbarayudu* (1) that the objection as to non-joinder of parties applies even where the ground was not known to the defendant at or before the settlement of issues. Unless, therefore, the rule has no application to suits of this nature, the objection under rule 13 must prevail. It is, however, urged that this rule has no application to cases where the right to sue is vested in certain persons jointly and no one of them can recover without the presence of all. The authority relied on for this proposition is *Dursan Singh* v. *Durbejoy Singh* (2). This was a decision under section 34 of the old Code corresponding to this rule. The actual decision in the case was that any member of a Mitakshara family is entitled, as against a trespasser or a person who seeks wrongfully to seize the property in execution of a decree obtained against a stranger, to recover possession or ask for a declaration that the properties are not liable to be sold in execution, and in this view the Court decided that the objection for want of parties was bad. But at page 626* the Court expresses the opinion that the section will not prevent a Court dismissing a suit *in toto* where the application of the section would operate to give a plaintiff a measure of relief larger than the right he really possesses. I do not gather from the *dictum* in this case whether the learned Judges intended to go as far as to lay down that the sections in the old Code to which this section 34 was an exception have also no application to such cases. It seems to me that this result must logically follow from the decision of the Court, for section 34 is part of Chapter III dealing with 'parties and their appearance, applications and acts.' If this be so, it seems to me a strong proposition that the Court cannot, in a suit of this nature, order that a person may be joined as plaintiff or that a person who has been made a defendant be made a plaintiff. It would come to this, that if the objection had been taken at an earlier stage the Court could not have given permission to the plaintiff to join his sons as co-plaintiffs. The principle cannot, in my opinion, be founded on the objection that all the parties entitled must *sue*, because it is clear that where a person is jointly entitled to sue with other persons and cannot get relief except by making them parties, he is entitled, when they refuse to be plaintiffs, to join them as defendants. The object of this recognized principle is obvious, namely, that otherwise it will be in the power of one of several persons jointly entitled to prevent the others recovering their claims against a third party by refusal to join as co-plaintiffs. It must, therefore, be conceded that it is not necessary for all persons jointly entitled to sue and, therefore, it cannot be said that one of such persons has no right to sue alone. All that is required is that he should make persons jointly entitled with him defendants, who will not join as plaintiffs.

That being so, I am unable to accept the broad proposition laid down by the learned Judges in the above case. I do not wish to lay down any general rule, but in a case such as this where the right exists in the plaintiff but he cannot enforce it to any extent even without other persons jointly interested being parties to the suit, the objection does seem to me to be one as to parties and

(1) 25 Ind. Cas. 122.
(2) 1 Ind. Cas. 530; 9 C. L. J. 623.
*Page of 9 C. L. J.—*Ed.*

covered by the law of procedure, though probably it does not apply to a case where there is an absolute defect in the plaintiff's title and the person really entitled to the exclusion of the plaintiff was not a party to the suit. *Vide Heiniger* v. *Droz* (3). I may add that I can find no decision of this Court or any other Court in which the view enunciated in *Dursan Singh* v. *Durbejoy Singh* (2) has been accepted.

I am, therefore, of opinion that the rule does apply, that the objection is taken too late and the appeals must be allowed. The appeals will be remanded to the lower Appellate Court for trial on the other issues. Costs will abide.

ABDUR RAHIM, J.—I agree.

Appeal allowed; Case sent back.

V.B.P.

(3) 25 B. 433; 3 Bom. L. R. 1.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 104 OF 1916.

March 16, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

SARADA KRIPALALA—DEFENDANT—APPELLANT—PETITIONER

versus

AKHIL CHANDRA BISWAS—PLAINTIFF—RESPONDENT—OPPOSITE PARTY.

Lease, construction of—Permanent lease—Covenant for re-entry, whether personal—Covenant running with land—Construction of covenant—Landlord and tenant—Tenant, right of, to land annexed to tenancy by way of encroachment.

The interest created by a *taluka patta* and called a *taluka* constitutes *prima facie* a permanent tenure, where there is nothing, either in the surrounding circumstances or in the instrument which creates it, to show that it was intended to be otherwise. [p. 532, col. 2.]

Where the instrument creating a tenancy called *taluka* was silent upon the questions of heritability and transferability, but during the period of sixty years which had elapsed since its creation, the tenancy had passed in inheritance from father to son and had formed the subject of successive transfers and the succession and transfers were recognised by the landlord and the rent fixed at its inception was never varied and the grant was for residential purposes and structures were erected on the land:

Held, (1) that the lease was intended to be permanent, notwithstanding the fact that there was a covenant in the lease that if the grantor had personal necessity, the grantee would be bound to relinquish the land; [p. 532, col. 2.]

(2) that the said covenant was a personal one and did not run with the land, so that it ceased to be operative after the death of the grantor. In such a case the covenant must be construed most strongly against the grantor and most beneficially in favour of the grantee; [p. 532, col. 1.]

(3) that the same conclusion was applicable not merely to the plot which was covered by the grant but also to another plot which had been annexed to it by the tenant by way of encroachment, as the landlord had not, within the statutory period from the date of encroachment, instituted a suit to eject the tenant from the second plot on the ground that he could not, without his consent, acquire the status of a tenant in that plot. [p. 532, col. 2.]

Quære.—Whether the landlord was entitled to claim additional rent in respect of the plot encroached upon.

The question whether a covenant in a lease is a personal one or runs with the land, depends upon the true intention of the grantor and grantee to be ascertained from the construction of the terms of the instrument. It is impossible to tell by general reasoning what rights will be held to belong to the class of personal covenants or where the line would be drawn between personal covenants and covenants running with the land. [p. 532, col. 1.]

A covenant in a lease reserving a right of re-entry to the grantor on a certain contingency must be construed most strongly against the grantor and most beneficially in favour of the grantee, unless the meaning of the covenant is perfectly clear and it is expressed in absolutely unambiguous language. [p. 532, cols. 1 & 2.]

Appeal against the decree of Mr. Justice Newbould, dated the 6th April 1916, in Appeal from Appellate Decree No. 3872 of 1914.

FACTS material to the report will appear from the following judgment of Mr. Justice Newbould:—

"The plaintiff in this appeal has obtained a decree for ejectment and the defendant No. 3 has appealed to this Court. The main case of this defendant was that the interest of one of the two former proprietors of the land in dispute had descended to him by purchase through one Kali Kinkar. It has been found that there was no valid sale to Kali Kinkar and this defendant now relies on the title obtained by one of his predecessors Abdul Tinwalla, who got a settlement of this land in 1211 M. E. Both the lower Courts have found that so far as this settlement is concerned, Abdul Tinwalla was a tenant-at-will with no transferable right. The lower Appellate Court has merely incidentally mentioned that this Abdul Tinwalla had only the right of a tenant-at-will and has not

discussed the grounds for this finding. The probable reason is that the point was not disputed before that Court as Abdul Tinwalla's *patta* of the 12th *Byssakh* 1211 M. E. expressly reserved a right of re-entry for the lessor. The fact that the lease provides that the lessor can only enter the land on personal necessity, does not make the covenant any the less a covenant running with the land.

It is next contended that the lower Appellate Court has not given its reasons for holding that the legality of the notice to quit and the validity of its service have been duly proved. It has not been shown that the point was one of so complex a nature that in a judgment of affirmance it was necessary to do more than express a general agreement with the findings of the Munsif.

Lastly, it is urged that, as regards plot No 2, the plaintiff's claim is barred by limitation. The lower Appellate Court has held that this plot was held by the defendant and his predecessors as included in the tenancy by which plot No. 1 was held and this finding is sufficient to dispose of this plea.

The appeal fails and is dismissed with costs.

Babu *Biraj Mohun Majumdar* (wit him Babu *Probodh Kumar Das*), for the Appellant.

Babu *Khitish Chandra Sen*, for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Newbould in an action in ejectment. The suit was decreed in part in the Court of first instance. On appeal the Subordinate Judge decreed the claim in full and that decree has been affirmed in second appeal to this Court. The rights of the parties are regulated by a contract of tenancy executed on the 23rd April 1849 by Madan Mohan Ghose in favour of Abdul in respect of the first plot of land now in dispute. The lease, which is called *taluka patta*, recites that the tenant had executed a *kabuliyat* in favour of the grantor and that the *taluka patta* was granted on a rent of Re. 1 from year to year. Then follows an important covenant in these terms: "You shall erect houses upon the land and live there. If I have a personal necessity, you shall relinquish the land, and you will not be entitled to make any objection." The plaintiff is the successor-in-interest of the original grantor; the first defendant is the son of the original grantee; the third defendant who really contested the suit is a transferee of the tenure through the second defendant. The second plot in suit is not covered by the lease but was annexed to the first plot by the tenant by way of encroachment. The plaintiff has treated the third defendant as a tenant in respect of both the plots, and, after service of notice to quit on him, has instituted this suit for recovery of possession. The defendant contends that he cannot be ejected as the tenancy is of a permanent character. In these circumstances, the plaintiff, in order to succeed, must establish *first*, that the tenancy was of a terminable nature, and, *secondly*, that it has been terminated in accordance with law.

The fundamental question in the case relates to the nature of the tenancy created by the *taluka patta* of the 23rd April 1849. The appellant contends that the expression '*taluka*' *prima facie* implies permanence and relies upon the decision in *Krishano Chunder Goopto* v. *Meer Sufdur Ali* (1), which was recently followed in *Budyar Rahman* v. *Matiar Rahman* (2). It must now be treated as well settled that if there be nothing, either in the surrounding circumstances or in the instrument which creates the interest, to show that it was intended to be otherwise, the inference is that a tenancy called "*taluka*" constitutes a permanent tenure. We thus start with the presumption that the tenancy created by this lease was a permanent tenure. Are there, then, any indications in the instrument itself or in the surrounding circumstances which point to a contrary conclusion? On behalf of the respondent reliance is placed upon the fact that appropriate words of heritability or transferability do not occur in the instrument. This may be conceded and the deed is silent upon the questions of heritability and transferability. But the significant fact remains that during the period of sixty years, which have elapsed since the lease was granted, the tenancy has

(1) 22 W. R, 326.
(2) 21 Ind. Cas. 47; 18 C. L. J. 271.

passed by inheritance from father to son and has formed the subject of successive transfers; moreover, the succession and transfers have been recognised by the landlord. Consequently, the inference legitimately follows that the parties intended the leasehold interest to be heritable and transferable. We have the additional fact that the grant was for residential purposes; and as might have been expected, structures have been erected on the land, indeed, the decree entitles the plaintiff in accordance with the prayer in the plaint to remove the houses erected by the defendant on the disputed land. Finally it is noteworthy that the rent fixed in 1849 has never varied. Consequently, the indications furnished by the instrument all tend to confirm the conclusion that the lease described as *taluka patta* was intended to be permanent. Reliance, however, has been placed on the clause which entitles the grantor to re-enter and prevents the grantee from raising objection to such a course. On behalf of the appellant it is contended that this is a purely personal covenant in favour of the grantor himself. The respondent argues, on the other hand, that this is a covenant running with the land. Now as observed by Holmes in his Common Law (page 406), it is impossible to tell by general reasoning what rights will be held to belong to the class of personal covenants or where the line would be drawn between the two classes, that is, personal covenants and covenants running with the land. The proper course is to construe the terms of the instrument and thus ascertain the true intention of the grantor and grantee. Now, upon a plain reading of this lease, it is clear that the covenant was in favour of the grantor personally, for the words used are: "If I have personal necessity (* * * * * * * * * *) you shall relinquish the land." In a case of this description the well known rule applies that the covenant is to be construed most strongly against the grantor and most beneficially in favour of the grantee (see the observations of Wilde, C. J., in *In re Stroud* (3), of Romilly, M. R., in *Warde* v. *Warde*(4), and of Selborne, L. C., in *Neill* v. *Devonshire* (*Duke*) (5). We do not affirm the proposition that if the meaning of the covenant is perfectly clear, if it is expressed in absolutely unambiguous language, the language should be strained to obtain a conclusion in favour of the grantee and against the grantor. Such a course was condemned by Jassel, M. R., in *Taylor* v. *St. Helens Corporation* (6). It is equally clear that where the terms of the grant show plainly that the covenant was intended to be personally in favour of the grantor, the Court should not stretch the language and interpret the covenant to the detriment of the grantee. The covenant in this case is of a very stringent character and we should not accept the construction proposed by the grantor, which is not only more extensive than is justified by the actual words used but really destroys the permanency of the lease and places the grantee entirely at the mercy of the grantor. The position then is that the instrument, which is described as a *taluka patta* and consequently *prima facie* is a permanent grant, furnishes no indication that the intention of the parties was to create a terminable tenancy except that during the lifetime of the grantor, if he had personal necessity, the tenant would be bound to relinquish the land in his favour. That contingency has not happened. The tenancy has continued for 60 years and the successor-in-interest of the grantor now seeks to eject from the land a derivative holder from the grantee. In our opinion his claim cannot succeed.

We have finally to consider whether this conclusion is applicable, not merely to the first plot which is covered by the grant, but also to the second plot which has been annexed by the tenant to the land of his tenancy. No distinction can, in such circumstances, be made, we think, between the two parcels. The plaintiff has not treated the defendant as a trespasser in respect of the second plot. If within the statutory period from the date of encroachment, he had instituted a suit to eject the defendant on the ground that he could not, without his consent, acquire the status of a tenant in the second plot, he might have succeeded in his claim, *Ishan Chandra Mitter* v. *Raja Ram-*

(3) (1849) 8 C. B. 502 at p. 529; 19 L. J. C. P. 117; 137 E. R. 604; 79 R. R. 608.

(4) (1852) 16 Beav. 103 at p. 105; 51 E. R. 716; 96 R. R. 49.

(5) (1883) 8 A. C. 135 at p. 149; 31 W. R. 622.

(6) (1877) 6 Ch. D. 264; 46 L. J. Ch. 857; 37 L. T 253; 25 W. R. 885.

ranjan Chakarbutty (7), *Whitmore* v. *Humphries* (8), *Hastings* (*Lord*) v. *Saddler* (9), *Attorney-General* v. *Tomline* (10). Instead of this, he has treated the third defendant as tenant in respect of the encroached land, while the latter has professed to hold it as part and parcel of his tenancy. We need not decide whether the plaintiff may not claim additional rent from the defendant; it is sufficient to hold, for the purposes of the present claim in ejectment, that the two plots constitute one tenancy and stand on the same footing.

The result is that this appeal is allowed, the decrees of the Courts below discharged and the suit dismissed with costs in all the Courts

Appeal allowed.

(7) 2 C. L. J. 125.

(8) (1872) 7 C. P. 1; 41 L. J. C. P. 43; 25 L. T. 496; 20 W. R. 79.

(9) (1898) 79 L. T. 355.

(10) (1877) 5 Ch. D. 750; 46 L. J. Ch. 654; 36 L. T. 684; 25 W. R. 802.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 617 OF 1916.

May 8, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

Pandit SHEO NARAIN OJHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM JATAN OJHA AND OTHERS—PLAINTIFFS AND *Munshi* DEWAKAR PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882*), s.* 99*—Sale of mortgaged property in contravention of section, whether void or voidable—Limitation Act (IX of* 1908*), Sch. I, Art.* 12*—Civil Procedure Code (Act V of* 1908*), O XXI, r.* 90*, O. XXXIV, r.* 14*—Equity of redemption, extinction of.*

A sale in contravention of section 99 of the Transfer of Property Act is only voidable and not void. It must be set aside under rule 90 of Order XXI of the Civil Procedure Code by a suit within one year of the confirmation of the sale under Article 12, Schedule I, of the Limitation Act before redemption can be allowed [p. 533, col 2. p 534, col. 2; p. 535, col. 1; p. 536, col. 1.]

A suit for redemption cannot be regarded as a suit to set aside the sale, though the irregularity may be sufficient by itself to entitle the plaintiff to vacate the sale by a proper proceeding under the Civil Procedure Code or by a suit. [p. 536, col. 1.]

Khiarajmal v. *Daim*, 32 C. 296; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A L J. 71; 7 Bom. L. R. 1 (P. C.), followed.

Pancham Lal v. *Kishun Pershad*, 6 Ind. Cas. 47; 14 C. W. N. 579; 12 C. L. J. 574, dissented from.

Appeal from a decision of the Additional District Judge, Shahabad, dated the 22nd February 1916, modifying that of the Additional Subordinate Judge, Shahabad, dated 24th September 1915.

Sir *Ali Imam* and Mr. *Har Narayan Prasad*, for the Appellants.

Messrs. *P. K. Sen* and *Rajendra Prasad*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—The facts of this case are as follows:—

In 1894 Ramjatan Ojha and *Musammat* Phul Koer mortgaged 18 *bighas* of land to Sheo Narain Ojha. The latter and others held mortgages on other property of Ramjatan Ojha on which they brought a suit. In execution of the decree in that suit they brought the mortgaged property to sale but the proceeds of the sale being not sufficient to satisfy the decree they obtained a further decree under section 90 of the Transfer of Property Act and in execution thereof in February 1906 brought to sale the 18 *bighas* above mentioned and purchased the property themselves for Rs. 500. Sheo Narain Ojha subsequently redeemed a mortgage held by one Parmeshur Ojha on the 18 *bighas* by paying to him a sum of Rs. 625.

In the present suit Ramjatan Ojha and others seek to redeem the mortgage of 1894. The Subordinate Judge made a decree for redemption on payment of the original mortgage money and interest and the sum of Rs. 500 paid for the property at the sale of 1906, but he declined to allow Sheo Narain Ojha the sum of Rs. 625 paid by him to Parmeshur Ojha. The defendants appealed and the plaintiffs filed cross-objections, with the result that the District Judge modified the decree of the Subordinate Judge by allowing the defendants the sum of Rs. 625 also.

The defendants have appealed to this Court, contending that the suit should be dismissed and the plaintiffs in their cross-objections contend that they should not be required to pay the sums of Rs 500 and Rs. 625.

The purchase of the 18 *bighas* by the mortgagee of 1894 was contrary to section 99 of the Transfer of Property Act which was then in force, but it is now settled that a purchase contrary to that section or

Order XXXIV, rule 14, which has replaced that section, is voidable only and not absolutely void. In a case to which neither of the provisions mentioned seems to have been applicable their Lordships of the Privy Council affirmed the rule to which those provisions give expression, but said that such a purchase was an irregularity only and not a cause of nullity for want of jurisdiction [see *Khiaraimal* v. *Daim* (1)].

The defendants-appellants rely upon the case of *Pancham Lal* v. *Kishun Pershad* (2), in which it was held in circumstances not unlike those of the present case that the purchase of the equity of redemption by the mortgagee constitutes him a trustee for the mortgagor and that he does not acquire an irredeemable title and that a mortgagor seeking to redeem after such a purchase by the mortgagee is not bound to have the sale set aside. It seems to me that the rule regarding the position of a mortgagee who purchases the equity of redemption was too widely stated in that case, but assuming that the mortgagee becomes a trustee for the mortgagor the trust is what is called a constructive trust, and the mortgagor cannot take advantage of section 10 of the Limitation Act. I am unable to agree with the learned Judges who decided the case of *Pancham Lal* v. *Kishun Pershad* (2) that in circumstances like those of the present case the mortgagor is not bound to have the sale set aside within the time limited by law. The judgment of their Lordships of the Privy Council in *Khiaraimal* v. *Daim* (1) shows that the sale now in question was at most irregular. The mortgagors' interest in the property was in fact sold and so long as that sale holds good, the plaintiffs cannot redeem the mortgage.

The plaintiffs in the present case failed to get the sale set aside within the time limited by law. I would overrule the cross-objections, allow the appeal and dismiss the suit with all costs in all three Courts.

(1) 32 C. 296: 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).

(2) 6 Ind. Cas. 47; 14 C. W. N. 579; 12 C. L. J. 574.

The persons entitled to receive costs from the plaintiffs are the defendants who have appealed to this Court.

JWALA PRASAD, J.—This appeal arises out of a suit by the plaintiffs for redemption of an usufructuary mortgage executed by plaintiff Ramjatan Ojha and *Musammat* Phool Kunwar in 1894 in favour of defendant Shive Narain Ojha. *Musammat* Phool Kunwar is dead and her daughter's son is defendant No. 10 in the suit. The property mortgaged in the bond of 1894 was 18 *bighas* of *raiyati* land belonging to the mortgagors. The mortgagee Shive Narain Ojha and his co-sharers had also held other mortgages on some other property of Ramjatan Ojha in respect of which they obtained a decree and sold the properties covered by those mortgages. The amount realised from the sale of the properties mortgaged being insufficient to satisfy the entire decree, the property covered by the mortgage of 1894 was sold for the balance of the amount due under the decree and was purchased by the mortgagees defendants at a sale held on the 8th of February 1906. The mortgagees defendants thus purchased the equity of redemption of the plaintiffs in the mortgaged property at an auction sale held in execution of their money decree, for a claim which did not arise out of the mortgage of 1894 sought to be redeemed by the plaintiffs.

The present suit was brought by the mortgagors in May 1914, that is, almost after six years from the purchase of the equity of redemption by the mortgagees. The defence set up by the mortgagees appellants was that there was no equity of redemption left in the plaintiffs and that it was extinguished by their purchase of the property at the auction sale in 1906. The Court below overruled the contention of the appellants and gave a decree in favour of the plaintiffs, allowing them to redeem the mortgage of 1894 on payment of the money due under that mortgage as well as the sum for which the property was purchased at the aforesaid auction sale and the money due on certain other prior mortgages on the property which were redeemed by the appellants after their purchase. The mortgagees before us in

appeal have raised the same contention as was raised by them in the Courts below that there is no equity of redemption left in the plaintiffs by reason of the auction sale of 1906, at which the mortgagees purchased the property in dispute. This contention is based upon the ground that the auction sale has become absolute and cannot be set aside and unless the sale is set aside, the plaintiffs can have no claim to redeem the property.

The mortgagors respondents on the other hand contend that they have not lost their right of redemption notwithstanding the sale of the property and its confirmation, and that it is not necessary for them to have the sale set aside. It is not contended before us that the plaintiffs had no knowledge of the sale, or that the sale was fraudulent. There is no prayer in the plaint to have the sale set aside.

It is true that the sale in question was in contravention of section 99 of the Transfer of Property Act in force at the time of the sale, which provides that a mortgagee shall not be entitled to bring the mortgaged property to sale without instituting a suit under section 67 of the Transfer of Property Act in execution of a decree for the satisfaction of any claim, *whether arising under the mortgage or not.*

It may be taken as settled that a sale in contravention of section 99 is not without jurisdiction and is, therefore, not null and void but is only irregular and voidable. Following the principle laid down by their Lordships of the Privy Council in *Khiarajmal* v *Daim* (1), it seems that all the High Courts in India have held that a sale in contravention of section 99 is only irregular, *vide Ashutosh Sikdar* v. *Behari Lal Kirtania* (3), *Lal Bahadur Singh* v. *Abharan Singh* (4), *Muthu* v. *Karuppan* (5), *Sahadu Manaji* v. *Devlya Jaba Mahar* (6) and *Bhola Jha* v. *Kali Prasad* (7).

Notwithstanding that the sale was only irregular, the lower Courts have held that the plaintiffs are entitled to redeem the property. The view taken by the Courts below is no doubt supported by the decision of a Division Bench of the Calcutta High Court in *Pancham Lal* v. *Kishun Pershad* (2). All the other High Courts in India, however, appear to have taken a contrary view. The Full Bench of the Allahabad High Court in *Lal Bahadur Singh* v. *Abharan Singh* (4) has held that where a sale in contravention of section 99 of the Transfer of Property Act is confirmed, the auction-purchaser, whether he be an outsider or the mortgagee bidding with the leave of the Court, obtains an indefeasible title, and the right of the mortgagor and those who represent him to redeem is absolutely extinguished.

The above decision has been recently followed by a Division Bench of the Madras High Court in *Arjuna Reddi* v. *Venkatachala Asari*(8) (January 1916). In the Madras case the mortgagee himself had purchased the equity of redemption in execution of his money decree as in the present case. Similar is the view of the Bombay High Court in *Sahadu Manaji* v. *Devlya Jaba Mahar* (6). It seems, therefore, that the decision of a Division Bench of the Calcutta High Court in *Pancham Lal* v. *Kishun Pershad* (2), above referred to, relied upon by the mortgagors respondents is contrary to the decisions of all the other High Courts. Mr. Justice Woodroffe, who delivered the judgment of the Court in the above case, conceded that the sale in contravention of section 99 was irregular and not void, but the learned Judge held that the right of redemption of the mortgagor was not extinguished by the sale and that it was not necessary for him to obtain relief to have the sale set aside. His view is based upon what the learned Judge says is the established proposition of law that the purchase of the equity of redemption constitutes the mortgagee a trustee for the mortgagor. His view is no doubt supported by that of Macpherson, J., in *Kamini Debi* v. *Ramlochan Sirkar* (9) referred to by Woodroffe, J., in his judgment. But their Lordships of the

(3) 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320.
(4) 27 Ind. Cas. 795; 37 A. 165; 13 A. L. J. 138.
(5) 30 M. 313; 17 M. L. J 163; 2 M. L. T. 181.
(6) 14 Ind. Cas. 780; 14 Bom. L R. 254.
(7) 34 Ind. Cas. 288; 1 P. L. J. 180.

(8) 32 Ind. Cas. 611; 32 M. L. J. 525; 19 M. L. T. 121; 5 L. W. 242.
(9) 5 B. L. R. 450.

Privy Council in *Mahabir Pershad Singh* v. *Macnaghten* (10) declined to accept the view of Macpherson, J, that the mortgagee purchasing the equity of redemption is a trustee for the mortgagor when the mortgagee purchases the property with the leave of the Court. Their Lordships held that "leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any other independent purchaser." It does not appear that the attention of Woodroffe, J., was drawn to the above decision of the Privy Council. The view that the mortgagor can be allowed to redeem the property without having the sale set aside appears contrary to the decisions of their Lordships of the Privy Council in *Malkarjun* v. *Narhari* (11). Their Lordships have distinctly held that a sale, howsoever irregular, must be set aside within due time by the Courts as prescribed in section 311 of the Code of Civil Procedure, or by a suit within one year from the confirmation of the sale under Article 12, Schedule II, of the Limitation Act, before redemption can be allowed, and that a suit for redemption cannot be regarded as a suit to set aside the sale, though the irregularity may be sufficient by itself to entitle the plaintiff to vacate the sale by a proper proceeding under the Civil Procedure Code, or by a suit.

The aforesaid principle in my opinion should also apply to a sale held in contravention of section 99. Hence so long as the sale stands good and has not been avoided or set aside, it is impossible to conceive how the mortgagor can exercise his right of redemption. With great respect I must dissent from the decision of Woodroffe, J., in *Pancham Lal* v. *Kishun Pershad* (2).

The plaintiffs' equity of redemption has been extinguished by the auction sale of 1906 and their remedy to have the sale set aside is barred by limitation. The plaintiffs' suit should, therefore, be dismissed. The appeal is allowed with costs.

The suit having been dismissed, the cross-objections of the plaintiffs that they are not liable to pay the purchase money and also the sum paid by their mortgagee to redeem the prior mortgage are disallowed.

Appeal allowed.

(10) 16 C. 682; 16 I. A. 107; 13 Ind Jur. 133; 5 Sar. P C. J. 345. 8 Ind. Dec (N s.) 451.

(11) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C, J. 739 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NOS. 1044 TO 1046 OF 1916.

March 7, 1917.

Present:—Justice Sir William Ayling, KT., and Mr Justice Napier.

ANANTANARAYANA IYER—PLAINTIFF NO. 2—APPELLANT

versus

KOZHIKOTE PATINHARE KOVIALAKATH THIRUVEERARAYAN *alias* THAMPAN THAMBURAN STYLED THE PRESENT EDATHRAPAD 4TH RAJAH OF CALICUT AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Stani, *grant by, of* melcharth *for* 12 *years*—Melcharth, *validity of*—*Power of* stani *to grant perpetual leases.*

The grant by a *stani* of a perpetual lease of *stanom* properties is not necessarily bad, if it is for the benefit of the *stanom.* [p. 537, col. 2.]

Venkateswara Iyan v. *Shekhari Varma*, 3 M. 384; 5 Ind. Jur. 542; 8 I. A. 143; 4 Sar. P. C. J. 259; 1 Ind. Dec. (N. S.) 822; *Mullath Tarwed Karnavan* v. *Mullath Unni Nambi*, 5 M. L. T. 219, distinguished.

Where a *melcharth* is granted for a certain number of years, its binding nature depends upon whether a reasonable rent is reserved for the period of the lease [p. 538, col. 1]

Where such *melcharth* is sought to be declared void, it rests on the person who seeks to do so to show that it is not of a reasonable nature, and not granted in the ordinary course of business. [p. 538, col 1]

Where *stanom* property was held on *verumpattom* lease for one year and that lease was renewed from time to time in favour of the same tenant and at last the *verumpattom* lease was split up into three different leases and granted to three different lessees, to each of whom a *melcharth* for 12 years was granted:

Held, (1) that the *melcharth* was not necessarily bad, unless it was shown that the grant of a lease of this character was so unusual as evidently not to be in the ordinary course of business; [p 538 col. 2.]

(2) that the fact that consolidation was beneficial to the estate did not render splitting up of a lease invalid, unless it was proved that it was not usual to grant such leases. [p. 538, col. 2]

Second appeals against the decrees of the Court of the Subordinate Judge

South Malabar at Palghat, in Appeal Suit Nos. 455 to 457 of 1915, preferred against those of the District Munsif, Alatur, in Original Suits Nos. 447, 449 and 448 of 1914.

Messrs. *K. R. Subramania Sastri* and *K. P. Ramakrishna Aiyar*, for the Appellant.

Messrs. *A. S. Venku Aiyar* and *P. V. Parameswar Aiyar*, for the Respondents.

JUDGMENT.

NAPIER, J.—This is a suit by a *melcharthdar* from the *stani*, the 4th Raja of Calicut, to recover from certain persons in possession of land under *verumpatom* lease the properties demised in the *melcharth*; the *melcharthdar* is the second plaintiff, the demisor being the 1st plaintiff. The 5th defendant in the suit is a person to whom a *melcharth* had been granted by the predecessor of the 1st plaintiff with respect to the same properties and the plaintiffs claim that that demise was bad and not binding on the present 1st plaintiff as having been given without any consideration and for the purpose of depriving the 1st plaintiff of his lawful income and not for the purpose of the *stani*. This question was made the subject of the 7th issue, namely, "whether the lease relied on by the 5th defendant is valid and binding on the plaintiffs." We have already held in Second Appeals Nos. 581, 582 and 608 of 1916 that the property was held by the defendants in possession on a *verumpatom* lease and that they were, therefore, liable to surrender it. But the question we have to decide in this case is whether the prior *melcharth* granted to the 5th defendant is valid, because, if so, the present 2nd plaintiff has no title on which he can sue. The matter was considered carefully by the District Munsif, who held that the first *melcharth* was good. But it has been pointed out to us that the lower Appellate Court has not given a finding on this issue No. 7, having overlooked the necessity for it as the Court dealt with these cases and the prior cases Second Appeals Nos. 581, 582 and 608 of 1916 in the same judgment.

The point urged by Mr. Subramania Sastri is really a point of law although it has to be applied to the facts of this case, and as we have those facts before us and as they are not really in dispute, we propose to act under section 103 of the Code of Civil Procedure and determine this issue ourselves. The argument put forward by Mr. Subramania Sastri is, that anything beyond a lease for a single year by a *stani* is voidable unless it has been shown to have been for the necessity of the *stani*. And he has invited our attention to a long series of cases beginning with two of the Sudder Adawlat Court. Those two cases are quoted in Moore's Malabar Law, page 353, the subject being dealt with by the learned author from page 348. We do not think that those two cases really lay down anything in the way of a general proposition. They seem to me to have been decided on the facts of each case and are cases where a Zamorin practically on his deathbed and a Raja of Palghat, who had just suffered from a paralytic stroke, endeavoured to defraud the person who would come into possession of the estate in a few months of the whole of what he might legitimately expect to get from the property. Great reliance has naturally been placed by Mr. Subramania Sastri on the decision of the Privy Council, *Venkateshwara Iyen* v. *Shekhari Varma* (1), but I do not think that their Lordships intended to lay down that every lease, for however short a term, must be governed by the same rules as they applied in that case. That was a perpetual lease of *stanom* lands by a Raja, and their Lordships say with regard to that: "The *stanomdar* represents the *corpus* of his *stanom* much in the same way as a Hindu widow represents the estates which have devolved upon her, and he may alienate the property for the benefit or proper expenses of the *stanom*." Now I think it is clear that in using this language their Lordships were referring to alienations by sale and mortgage by a Hindu widow in circumstances which have been held to be binding on the reversioners, and I do not think that they had in their minds in the very slightest the granting of a lease for the purposes of the cultivation of the *stanom* property. Even this proposition has been held in a later case not to be of universal application,

(1) 3 M. 384; 5 Ind. Jur. 512; 8 I. A. 143; 4 Sar. P. C. J. 259; 1 Ind. Dec (N. S) 822.

for it was decided in *Mana Vikraman* v. *Sundaran Pattar* (2) that the granting of a perpetual lease is not necessarily bad if it is for the benefit of the *stanom*, and on the facts the Court held that the approval of 8 *stanis* was sufficient to show benefit. In a later case dealing with a perpetual lease, *Mullath Tarwed Karnavan* v. *Mullath Unni Nambi* (3), it was laid down that such a lease is presumably beyond the powers of a *stani* as it amounts to an alienation. Now I do not think that we have to apply the principles governing these cases at all. It seems to me that dealing with a lease for 12 years we have to consider the matter from a different standpoint. The property has not been 'alienated' in the broad sense of the word. It remains for the benefit of the *stanom* and some rent is coming in and in course of time the lease will come to an end, and the new *stani* will get the benefit of the renewal. The tests to be applied to such a case have been considered in two very recent cases, Second Appeals Nos. 1874 and 1875 of 1914 and Second Appeal No. 1449 of 1912. The first of these was a judgment of this Bench and the second of Sadasiva Aiyar, J., and Bakewell, J. I prefer to take the latter judgment, especially in view of the admittedly close acquaintance which one of those learned Judges has with Malabar customs and conditions. It was the grant of a *melcharth* for 12 years. The learned Judges say as follows:—"The question is whether the previous *stani* in granting the *melcharth* to the plaintiff reserved a reasonable rent for the 12 years' period, she having only a life-interest in the income, and her successor not being bound by a *melcharth* which was not granted in the ordinary course of business or which did not reserve the proper and usual rent obtainable on renewal." This, of course, is an entirely different test to that which has been applied to cases of perpetual leases, and in my opinion it is one which we can very usefully adopt. Applying this test Mr. Subramania Sastri urges that on the facts it is destructive. He points out that these properties were previously granted to the defendants in possession on *verumpatom* tenure, that is, a lease for a year. And he also points out that the properties have been consolidated into one *melcharth*, which has been granted by the *stani* to his own nephew. Giving all weight to these considerations, I do not think that these facts are sufficient to bring the case within the mischief of the doctrine laid down, especially as I am inclined to think that in the view of the learned Judges who decided that case, it rests on the person who seeks to have the *melcharth* declared void to show that it is not of a reasonable nature and not granted in the ordinary course of business. Although it is true that these properties were granted on *verumpatom* lease, namely, a lease for one year, the fact remains that between the year 1870 and the year 1913 there had only been four leases granted. The first was in 1870 and was renewed in 1881. It was renewed in 1888 and again in 1902, and the property was held under the last lease up to the date of this *melcharth*, which is 1912, so that as a matter of fact the same tenant held these properties for periods between 7 and 14 years on the nominal lease for one year. Then as to the question of consolidation, it appears that it is only the last *verumpatom* lease that has been split up into three, for the previous leases were consolidated and the only reason why three different leases were granted in 1902 was because the holders of the lease had made a partition and the parties desired to have a lease of the property held by each in his own name. So I do not think any importance can be attached to the consolidation. The District Munsif has expressed his opinion that consolidation may be very good business and also that it may be a benefit to the *stanom* to get a solvent tenant to take the property on a lease instead of having the troubles of yearly lease with the possible insolvency of any lessee at any time. I think there is a great deal of force in this contention, and unless it was demonstrated by evidence that the grant of a 12 years' lease of this character was so unusual as evidently not to be in the ordinary course of the business, I should not be prepared to hold that was so. On the whole, I have come to the conclusion that there is no-

(2) 4 M. 148; 6 Ind. Jur. 188; 1 Ind. Dec. (N. S.) 938.
(3) 5 M. L. T. 219.

thing in this *melcharth* which offends against the test applied in the judgment of this Court in Second Appeal No. 1449 of 1912, the reasoning of which I adopt.

The result will be that this issue is found against the plaintiff and the suits will have to be dismissed with costs of the tenants (respondents) one set and 2nd respondent one set.

AYLING, J.—I agree.

Appeal dismissed.

V.R.P.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 221 OF 1914.

December 2, 1914.

Present:—Mr. Crouch, A. J. C.

MESSRS. MACDONALD & Co.—PLAINTIFFS—APPELLANTS

versus

MESSRS. HOLLAND AND MOSS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 45—Trade mark, imitation of—Expert, opinions of, as to likelihood of deception by imitation trade mark, admissibility of.

Opinions of experts, as to whether goods of a particular firm bearing particular trade marks alleged to be imitation would be likely to deceive the ultimate purchasers to buy imitation goods in place of genuine ones, are inadmissible under section 45 of the Evidence Act, as they do not relate to any question of science or art. It is for the Court to decide whether the marks complained of are likely to deceive the public. [p. 541, cols. 1 & 2.]

Mr. *E. Raymond*, for the Plaintiffs.

Mr. *F. J. De Verteuil*, for the Defendants.

JUDGMENT —The plaintiffs Macdonald & Co. allege that they have for a number of years been importing certain mulls with certain ticket and marks on the face-lap which have obtained a reputation in the market among the ultimate up country purchasers, and they sue for an injunction to prevent the defendants Holland and Moss importing similar white mulls with similar ticket and marks likely to deceive the ultimate up-country purchasers.

The plaintiffs have proved through their Manager Miller and salesman Jethanand and also their wholesale Agents Lalchand Motiram's Managers, Metharam and Parmanand, that they have imported these particular white mulls with these particular ticket and marks since 1896 and that these have obtained a reputation in the market. The defendants have not denied these facts and have admitted through their Manager Noble that they have been importing similar white mulls with similar ticket and marks since October 1912, or more correctly since the date of the arrival of the first consignment here in July 1913. But they have strenuously denied that there has been any such similarity of ticket and marks as would be likely to deceive the ultimate up-country purchasers such as Pathans.

Now the plaintiffs' ticket and marks are those on the sample face-lap (Exhibit No. 2). The ticket is the head and shoulders of an Indian woman of which the general colouring is gold and red surrounded by a green border, the shape of the whole being a small oblong. Below the ticket are rope numbers repesenting the quality. There are four different numbers forming a range of 16500, 1700[illegible], 17500, and 18000. Below the numbers to the right is a small double circle in blue containing the figures and words "18 yards." Below that again comes an ornamentation worked in the cloth known as "Sacharilla" heading. The defendants' ticket and marks are those on the sample face lap (Exhibits Nos. 4 and 5). The ticket is two nearly full length Indian women, the general colouring being similarly red and gold surrounded by a green border and the shape of the whole being a similar sized oblong. Below the ticket are rope numbers of similar form. These are 2 ranges of 4 numbers each, the first range being Nos. 15[illegible]0, 1600, 1700, 1800, and the second range being Nos 86500, 87000, 875000, 88[illegible]0. Below the numbers is a single circle in blue containing the similar figures and words "18 yards." Below that there is a similar "Sacharilla" heading. It would appear from the evidence of the plaintiffs' Manager Miller corroborated by the evidence of Ralli's Manager Murat that the defendants' white mulls are throughout slightly inferior in quality and cost. It has been proved by these witnesses and by Donald Graham's Manager Stevenson, and it has been admitted that the practice here with regard to numbers

is that there should be at least two figures different between the numbers of different firms, though it was suggested by one witness Kanyalal of Amritsar that a difference of one number is considered sufficient in Amritsar. It would appear from the evidence of the Bombay Co.'s Manager Chapman and their salesman Tarachand, corroborated by the evidence of Fleming Shaw & Co.'s Manager Clayton, that the rope form of numbers, the circular stamps and the 'Sacharilla" headings are common in connection with white mulls. So far there has been no substantial dispute between the parties.

The plaintiffs have, however, further contended that their white mulls have been sent through their wholesale agents Lalchand Motiram to up country dealers for sale for the purpose of making shirts, turbans and such like to more or less illiterate purchasers up-country such as Pathans at Quetta, Peshawar and in Baluchistan, that the up-country dealers order the goods as "Chokri" mulls, signifying thereby that they consist of four qualities, or as the Rani ticket and sometimes by the number, and that the ultimate purchasers such as the Pathans know the goods by the Rani ticket or by their numbers. The plaintiffs' Manager Miller and their wholesale Agents Lalchand Motiram's Managers Metharam and Parmanand have given evidence to this effect, the last named professing to have had personal experience of the ultimate purchasers such as the Pathans. The defendants, on the other hand, have contended that these goods have been known to the dealers up-country as the "Begum" ticket, whereas their own goods are known as the "Lachi & Banto" ticket and that the ultimate purchasers such as the Pathans know the former goods as the "Ek Rani" ticket and the latter as the "Do Rani" ticket. The defendants' Manager Noble and the two dealers Kanyalal and Hariram of Amritsar and the dealer Utamchand, who used to do business at Chaman, have given evidence to the above effect; but the last named professing to have had personal experience of the ultimate purchasers such as the Pathans was not supported by his brother Aratmal, who for some reason or other appears to have decided not to give the required evidence as to the Pathans. Now it does not seem to me that much weight can be given to the allegation that these white mulls have been known and sold as "Chokri" mulls in contradistinction to other white mulls. There would appear to be no doubt that there are numbers of white mulls sold in larges of 4 numbers as "Chokri" mulls, and evidence has been given to the effect that even when the goods were ordered as "Chokri" mulls they were further distinguished by the name of the ticket or the number. So the main question to be decided is whether these goods have been known, as alleged, by the "Rani" ticket or numbers and whether the rival goods have been clearly distinguished from them as the "Do Rani" ticket or their numbers. It does not make much difference what names may have been attached to these tickets by the dealers in Amritsar; but in any case no reliance can, in my opinion, after seeing the witnesses in the box, be placed on the two dealers from Amritsar. On the other hand, the evidence is extremely slender on either side as to how the respective goods are known to the Pathans. No much reliance can be placed either on the personal experience—a very brief experience—of Lalchand Motiram's manager Parmanand or on that of the dealer Utamchand who, as stated before, was not able to come to a clear conclusion on the subject with his brother Aratmal and who has since closed his business in Chaman. The whole matter must, therefore, depend upon common sense and what could be most likely to appeal in selecting these white mulls to the uneducated ultimate purchasers such as the up-country Pathans.

So we have these facts established, namely, that MacDonald & Co. have been importing these white mulls with these particular ticket and marks since 1896; that Holland and Moss have commenced to import similar white mulls with similar tickets and marks not differing as required by local custom and of similar but slightly inferior quality since 1913; and that the ultimate purchasers are uneducated people such as up country Pathans. It is further apparent that Holland and Moss's white mulls can hardly have obtained any wide reputation in the market during the brief period of their sale from July 1913 to July 1914, when

their further sale was stopped owing to notice preliminary to this litigation. It is upon these facts and the general similarity of the get-up of the respective goods that the question has to be decided, whether the imitation would be likely to deceive the ultimate purchasers such as unwary Pathans. It was suggested, but not in my opinion proved, that the imitation work was the work of a broker Asudamal who had left the one firm to join the other. It appeared, however, that he left the other firm a considerable time before the importation of the alleged imitation goods. It was also sought to put in as expert evidence the opinions of certain business men as to whether the goods of Holland and Moss would be likely to deceive the ultimate purchasers such as unwary Pathans. That particular class of evidence was, however, ruled to be inadmissible as not really amounting to expert opinion upon any question of science or art within the meaning of section 45 of the Indian Evidence Act. This ruling was based on the English decisions which appear to have been followed also in India. In the case of *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (1) Lord Halsbury is reported to have said at page 85: "But upon the one question which your Lordships have to decide, whether the one name is so nearly resembling another as to be calculated to deceive, I am of opinion that no witness would be entitled to say that, and for this reason: that that is the very question which your Lordships have to decide." In the case of *Bourne* v. *Swan and Edgar, Ltd., In re Bouene's Trade Marks* (2) Farwell, J., is reported to have made the following remarks: "It has been ruled by the House of Lords in the case of *North Cheshire a d Manchester Brewery Co.* v. *Manchester Brewery Co.* (1), and I think it must now be taken to be finally settled, that it is not a proper question to put to the witnesses—Is the picture or mark complained of calculated to deceive the public? The House of Lords have put it on the ground, and the Lord Chancellor especially has put it on the ground, that that question is the very issue which the Court has to determine. It appears to me that there is also another reason against the admissibility, and that is that I do not see how you can call any individual to give what is in truth expert evidence as to human nature, because what they are asked in this form of question is, not what would happen to them individually, but what they think the rest of the world would be likely to suppose or believe. They are not experts in human nature nor can they be called to give such evidence." And again the learned Judge remarked: "It only remains, then, to call the evidence of people who can say that they themselves would be deceived. Now, it is obviously extremely difficult to get any such evidence. People are reluctant to admit that they are more foolish than their fellows. The result is that unless it is left to the eyesight of the Judge to judge for himself, there is practically no evidence open to the plaintiff in an action of this sort." In *Schweppes, Ltd.* v. *Gibbens* (3) Warrington, J., at page 661 is reported to have observed: "It seems to me that each of these cases must be looked at by itself, and the Judge looking at the label, or the get-up, or the device, whatever it may be that is complained of, with such assistance as to the practice of the trade as he can get from witnesses, must decide for himself whether the article complained of is calculated to deceive or not." In the case of *Nemi Chand* v. *Wallace* (4), Maclean, C. J, is reported to have said at pages 508-509 as follows:—

"In order to arrive at a conclusion as to whether or not one mark is calculated to deceive purchasers into the belief that they are buying the goods of one manufacturer when they are not his goods, we may look at the two marks in question with our own powers of forming an opinion, accompanied by the evidence which is given in the case. If these two pieces of cloth are looked at in the ordinary way by an ordinary up-country purchaser, is there likely to be a mistake? There is no evidence in this case that anybody has been deceived, but the question is not whether a purchaser has been deceived, but whether he is likely to be deceived. Using our own eyes there can be very little doubt that there is a marked resemblance between the marks on these two pieces of cloth. If the two were placed side by side

(1) (1899) A. C. 83; 68 L. J. Ch. 74; 79 L. T. 645; 15 T. L. R. 110.

(2) (1903) 1 Ch. 211; 72 L. J. Ch. 168 87 L. T. 589; 51 W. R. 213.

(3) (1905) 22 R. P. C. 601.

(4) 34 C. 495; 11 C. W. N. 537.

and carefully examined, a purchaser of ordinary intelligence would be able to discover certain differences. But then in practice that is not done." Again the Judge observed: "We must consider whether these marks are calculated to deceive the incautious, ignorant or the unwary up-country purchasers."

Now approaching the present case from the point of view thus indicated by the authorities it seems to me impossible to come to any other conclusion but that Holland and Moss goods would be likely, in view of the general similarity of the ticket, the rope numbers, the circular yard stamp, and the "Sacharilla" heading, looking that is to say to the general effect of the whole get-up, to deceive such ultimate purchasers as the unwary up-country Pathans. That being so, the result must follow that Holland and Moss must submit to the injunction sought. It has, however, been urged that the correspondence between the parties before suit shows that Holland and Moss were quite ready to make all reasonable alterations to avoid the possibility of any such deception. No doubt Holland and Moss approached the matter in a spirit of conciliation and no doubt it is much more to be regretted that it was not possible to arrive at any satisfactory settlement, the fact being that the parties could not come to any agreement as to the main matter, namely, the tickets. But it is not for me, sitting here as the Judge of particular marks and tickets, to say whether the proposed alterations were or were not reasonable or to decide what exact alterations would be necessary to prevent all likelihood of deception. And it seems to me that if one firm chooses to import the goods with the get-up like the goods of another firm they do so at their own risk; and have no ground to complain if they should be unable by subsequent proposals of alterations to appease the very natural annoyance of the other firm and have to submit in the ordinary course to suit at the instance of the other firm for an injunction from the Court.

The findings upon the issue must, therefore, be as follows:—

Upon the first issue: For how many years have the plaintiffs been importing and selling white mulls bearing thereon the ticket numbers and mark specified? that they have been importing the goods since 1896. Upon the second issue: Have the plaintiffs' white mulls bearing the said ticket, numbers and marks acquired a reputation in the market? In the affirmative. Upon the third issue: Are the defendants' white mulls bearing the ticket, numbers and marks specified a coloured imitation? In the affirmative. On the fourth issue: To what relief, if any, are the plaintiffs entitled? that they are entitled to the relief prayed for, namely, a perpetual injunction restraining defendants from importing, selling, causing to be sold, or giving delivery, or taking delivery of white mulls bearing the said combination of ticket, marks and numbers or any combination of ticket, marks and numbers which shall be so contrived so as to present or induce the belief that the white mulls so imported, sold, caused to be sold, given or taken delivery of by them are the merchandise of the plaintiffs. The plaintiffs are entitled to this relief with the usual costs.

Suit decreed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 529 OF 1915.

April 19, 1917.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

SUDHANYA KUMAR PODDAR—DECREE-HOLDER—APPELLANT

versus

GOURANGA CHANDRA SAHA CHOWDHURY—JUDGMENT-DEBTOR—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885*), s.* 148 (h), *scope of—Assignee of decree for arrears of rent, right of, to execute decree.*

Clause (*h*) of section 148, Bengal Tenancy Act, forbids the assignee of a decree for arrears of rent to make any application to execute the decree, even as a simple decree for money under the Civil Procedure Code. [p. 545, cols. 1 & 2]

Appeal against the order of the Additional District Judge, Backergunge, dated the 24th May 1915, reversing that of the Munsif, 6th Court, Barisal, dated the 21st December 1914.

FACTS of the case appear from the judgment.

Babu *Brojendra Nath Chatterjee* (with him Babu *Kali Dass Sen*), for the Appellant.—

The landlord, after having got a decree for arrears of rent, put it into execution and sold away the tenure. The amount fetched by the auction sale did not satisfy the decree in full. The decree was afterwards assigned to my client, who made an application for execution of the decree by the sale of other properties of the judgment-debtor. The application was allowed by the Munsif, but on appeal the District Judge has held that an application for execution of a decree for arrears of rent made by its assignee is not maintainable. I submit the Munsif was right and the District Judge was wrong in his interpretation of section 148 (*h*), Bengal Tenancy Act. Clause (*h*) of the section says that notwithstanding anything contained in section 232, Civil Procedure Code, an application for the execution of a decree for arrears of rent cannot be made by an assignee of the decree, unless the landlord's interest in the land has vested in the assignee. The Bengal Tenancy Act deals with execution of rent-decrees as rent-decrees. It has nothing to do with execution of rent-decrees as money-decrees under the Civil Procedure Code. Here the application was made by the assignee to execute the decree as a money-decree, and there is no reason why he should not be allowed to do so. The recent Privy Council decision in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh*(1) contains certain observations, which go to support my contention. Section 232 of the old Civil Procedure Code, which corresponds with Order XXI, rule 16 of the present Code, lays down that when an assignee of a decree makes an application for execution of the decree, the decree may be executed *in the same manner and subject to the same conditions* as if the application were made by the decree-holder himself. Now what section 148 (*h*) of the Bengal Tenancy Act lays down means that an assignee of a rent-decree should not be allowed to execute the decree in *the same manner and subject to the same conditions* as if the application were made by the decree-holder landlord. By section 143 of the Bengal Tenancy Act, the whole of the Civil Procedure Code is applicable to rent suits, subject to the rules made by the High Court and also to the other provisions of the Bengal Tenancy Act. Section 148 (*a*) lays down what sections of the Code of Civil Procedure shall not apply to any suit for rent under the Bengal Tenancy Act and under those sections, section 232 of the old Code has not been included. This shows that the whole of section 232 of the old Code is not made inapplicable to suits for rent under the Bengal Tenancy Act. If the Legislature intended that an assignee of a decree for rent should not be allowed to make an application for execution of the decree even under the Civil Procedure Code, nothing would have been easier for the Legislature than to say so expressly by enacting that section 232 shall not apply at all to execution of decrees for arrears of rent. But the Legislature has not said so. It does not absolutely forbid the assignee to make an application for execution, unless he has got the landlord's interest in the land. My submission is that the prohibition contained in clause (*h*) of section 148, Bengal Tenancy Act, refers to an application for execution of a rent-decree by its assignee, when he wants to execute it as a rent-decree claiming to exercise the rights of the original decree-holder landlord. Otherwise many anomalies would arise. Suppose after the landlord has got a decree for rent his interest in the land is sold off in execution of a money-decree. Could he not then execute the decree? Should his right to execute the decree be extinguished simply because his interest in the land has ceased by the auction sale? If he could execute his decree after he has ceased to be the landlord, there is no reason why an assignee of a decree for rent could not execute it, unless he has also become the landlord. If a landlord after he has ceased to be the landlord can execute a decree for arrears of rent, the assignee of a rent decree should also be allowed to execute the decree as a money-decree. The decree for rent in the hands of the former landlord is an actionable claim and is transferable property. If the assignee of a rent-decree be held not entitled to execute the decree unless he acquires the landlord's interest, then a decree for rent in the hands of such a

(1) 23 Ind. Cas. 632; 41 I. A. 91 at p. 101; 18 C. W. N. 747; (1914) M. W. N. 397; 15 M. L. T. 380; 12 A. L. J. 653; 27 M. L. J. 4; 41 C. 926; 1 L. W. 1059; 25 C. L. J. 434 (P. C.).

landlord will cease to be transferable property after the landlord's interest has been sold away. A landlord after the sale of the holding in execution of a rent-decree could execute it against the other properties of the tenant. This right of his is a valuable right, why should he not be allowed to transfer it to another by assignment of the decree? Again arrears of rent could be assigned, and suppose the assignee gets a decree for those arrears, should he not be allowed to execute his decree? If an assignee of arrears of rent could, after getting a decree for those arrears, execute it, there is no reason why an assignee of a decree for arrears of rent should not be allowed to execute the decree as an ordinary money-decree. He referred to *Nagendra Nath Bose* v. *Bhuban Mohan Chakravarti* (2), *Manurattan Nath* v. *Hari Nath Das* (3), *Mohendra Nath Kalamoree* v. *Kailash Chandra Dogra* (4), *Rajani Kanta Ghose* v *Rama Nath Roy* (5), *Dino Nath Dey* v. *Golap Mohini Dasi* (6), *Karuna Moyi Banerjee* v. *Surendra Nath Mookerjee* (7), *Guru Charan Nath Bepari* v. *Kartik Nath* (8), *Maharaj Bahadur Singh* v. *Forbes* (9).

JUDGMENT.

RICHARDSON, J.—The determination of this appeal turns on the true construction of clause (*h*) of section 148 of the Bengal Tenancy Act. The clause is in the following terms:—

"Notwithstanding anything contained in section 232 (now Order XXI, rule 16) of the Code of Civil Procedure, an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree, unless the landlord's interest in the land has become and is vested in him."

At first sight the meaning of the language used seems plain, but reported cases show that there are difficulties lurking under the surface. In some cases such as *Karuna Moyi Banerjee* v. *Surendra Nath Mookerjee* (7), the question has arisen whether the decree sought to be executed was a "decree for arrears" within the meaning of the clause. The expressions "assignee" and "landlord's interest" have also been the subject of debate [*Chhatrapat Singh* v. *Gopi Chand Bothra* (10), *Shambhu Nath Singh* v. *Sheo Proshad Singh* (11)]. In the present case there is no doubt that the decree is a decree for arrears obtained by a landlord and assigned for value to a third party and that the landlord's interest has not become vested in the assignee. The contention is that the clause extends no further than to prohibit the execution of an assigned decree under the provision of Chapter XIV of the Bengal Tenancy Act, and does not prohibit execution of the decree as a simple decree for money under the Civil Procedure Code.

As regards execution under the Bengal Tenancy Act, the tenant's holding has already been sold by the landlord, the original decree-holder, though the proceeds of the sale were insufficient to satisfy the decree. What the assignee claims is the right to execution under the Civil Procedure Code for the balance of the decretal debt.

Some observations on the question raised have been made in judgments delivered by my learned brother Mookerjee, J., in the cases of *Manurattan Nath* v. *Hari Nath Das* (3) and *Rajani Kanta Ghose* v. *Rama Nath Roy* (5). The opinion was expressed in those cases that there was such a conflict of authority that a reference to a Full Bench would be necessary when the question arose again for decision. That expression of opinion while it is entitled to all our respect is, of course, not binding on us. In the cases cited the question at issue did not arise or did not necessarily arise. It does arise here and it is our duty to examine the authorities and to decide for ourselves whether a reference to a Full Bench ought or ought not to be made.

Now, so far as I am aware, there are only two cases which lend any support at all to the assignee's contention, namely, the case of *Soshi Bhusun Guha* v. *Gogan Chunder Shaha* (12) and the unreported case men-

(2) 6 C. W. N. 91.
(3) 1 C. L. J 500 at pp. 505, 512.
(4) 4 C. W. N. 605.
(5) 27 Ind. Cas. 56; 20 C. L. J. 200; 19 C. W. N. 458.
(6) 1 C. W. N. 183.
(7) 26 C. 176; 13 Ind. Dec. (N. S.) 717.
(8) 10 C. W. N. 44.
(9) 35 C. 737; 7 C. L. J. 652.
(10) 26 C. 750; 4 C. W. N. 446; 13 Ind. Dec. (N. S.) 1080.
(11) 18 Ind. Cas. 689; 40 C. 462; 17 C. W. N. 276; 17 C. L. J. 227.
(12) 22 C. 364; 11 Ind. Dec. (N. S.) 244.

tioned by Mookerjee, J., in *Manurattan's* case (3). No one suggests that those cases were wrongly decided, but when properly understood their effect is really very slight. In *Soshi Bhusun's* case (12) the earlier case of *Koilash Chunder Roy* v. *Jodu Nath Roy* (13), where a strict and literal construction of section 148 (*h*) was adopted, was apparently not cited. The unreported case followed *Soshi Bhusun's* case (12) and if *Koilash Chunder Roy* v. *Jodu Nath Roy* (13) was cited, it was not expressly dissented from. In both cases the contest was between a mortgagee of the tenancy concerned and a purchaser of the tenancy at an execution sale held at the instance of the assignee of the landlord's decree. In both cases the mortgagee succeeded, and as Mookerjee, J., points out *Manurattan Nath* v. *Hari Nath Das* (3), it was wholly immaterial to the mortgagee whether the sale was an absolute nullity or whether, while it was not operative to pass the tenancy as a sale under the Bengal Tenancy Act, it was still a good sale of the right, title and interest of the tenant under the Civil Procedure Code. It was not necessary in those cases to decide that question. All that it was necessary to say was that in either view of the law the mortgagee was entitled. Any observations which go beyond that appear to be no more than *dicta* [*cf. Guru Charan Nath Bepari* v. *Kartik Nath* (8)].

On the other hand, there is a strong current of authority in favour of giving to the words of the Statute their plain and obvious meaning. In addition to the case already referred to [*Koilash Chunder Roy* v. *Jodu Nath Roy* (13)] mention may be made of the cases of *Dino Nath Dey* v. *Golap Mohini Dasi* (6), *Karuna Moyi Banerjee* v. *Surendra Nath Mookerjee* (7) and *Nagendra Nath Bose* v. *Bhuban Mohan Chakravarti* (2). All these cases no doubt were decided prior to *Manurattan's* case (3), but in the absence of any authority express and direct to the contrary, they are in my opinion still binding upon us, and we must follow them.

It has been suggested (the suggestion was adopted in the Trial Court) that some observations of the Privy Council in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1) favour the assignee. Their Lordships were concerned with the meaning and effect of section 65 of the Bengal Tenancy Act. Mr. Ameer Ali delivering judgment referred to section 148 (*h*) by way of illustrations and said this:—

"The prohibition contained in this section refers to decrees obtained by the landlord under section 65. To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time but the person seeking to execute it by sale of the tenure must have the landlord's interests 'vested' in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists."

These words cannot be read as implying that if the assignee cannot bring the tenure or holding to sale, he can still execute his decree as a money-decree. The point was not before their Lordships and no opinion was expressed upon it.

For the reasons indicated the appeal, in my opinion, fails and must be dismissed. None appearing for the respondent there will be no costs.

WALMSLEY, J.—I agree that the decision of the lower Appellate Court is correct, and that the appeal must be dismissed.

The language of section 148 (*h*) appears to me to be free from all obscurity. In most of the cases that have been cited, the question as to the effect of the section was attended by various complications. It was presented, however, in its simplest form in the case of *Karuna Moyi Banerjee* v. *Surendra Nath Mookerjee* (7), and in the judgment of Maclean, C. J., it is perfectly clear. I am content to follow it and to hold that the clause forbids the assignee to make any application to execute a decree for arrears of rent, unless the landlord's interest in the land has become vested in him.

Appeal dismissed.

(13) 14 C. 380; 7 Ind. Dec. (N. S.) 252.

SOMASUNDARAM CHETTIAR *v.* VAITHILINGA MUDALIAR.

MADRAS HIGH COURT.

APPEALS NOS. 206 AND 207 OF 1908 AND NOS. 10, 11, 12, 14 AND 15 OF 1909.

November 15, 1916.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Burn.

R. M. M. S. T. SOMASUNDARAM CHETTIAR *alias* VAIRAVAN CHETTIAR —DEFENDANT NO. 7—APPELLANT IN NO. 206 OF 1908

ARAMANAI RANGASAMI CHETTIAR—DEFENDANT NO. 8—APPELLANT IN NO. 207 OF 1908

GOVINDASAMI CHETTIAR (DEAD) AND OTHERS - DEFENDANT NO. 14 AND HIS LEGAL REPRESENTATIVES—APPELLANTS IN NO. 10 OF 1909

KOLANDAVELU UDAYAN AND OTHERS—DEFENDANTS NOS. 19 TO 23 AND THE LEGAL REPRESENTATIVES OF THE 23RD DEFENDANT—APPELLANTS IN NO. 11 OF 1909

versus

VAITHILINGA MUDALIAR AND OTHERS—PLAINTIFF AND DEFENDANT NO. 1—RESPONDENTS IN NOS. 206 AND 207 OF 1908 AND NOS. 10 AND 11 OF 1909.

IN NO. 12 OF 1909

SRINIVASA AIYAR AND OTHERS—DEFENDANTS NOS. 36 TO 38—APPELLANTS

versus

VAITHILINGA MUDALIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN NO. 14 OF 1909

VAITHILINGA MUDALIAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SRIRANGATHANNI AND OTHERS—DEFENDANTS NOS. 1, 15 TO 18, 29 TO 35 AND THE LEGAL REPRESENTATIVES OF 29TH DEFENDANT, SUPPLEMENTAL RESPONDENT AND THE LEGAL REPRESENTATIVES OF 18TH, 30TH AND 17TH DEFENDANTS—RESPONDENTS.

IN NO. 15 OF 1909

T. V. GOPALASAMI MUDALIAR—DEFENDANT NO. 5—APPELLANT

versus

VAITHILINGA MUDALIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1871*), Sch. II, Art.* 129, *scope of—Limitation Act (XV of* 1877*), s.* 2*—Adoption by Hindu widow—Possession for over* 12 *years under invalid adoption, effect of—Reversioners' right of suit for possession on widow's death, when adoption not impeached within statutory period—Adverse title, acquisition of, by persons deriving title from adopted son—Prior suit for possession against widow*—Res judicata—*Civil Procedure Code (Act V of* 1908*), s.* 11, *O. XLI, rr.* 4, 33*—Decision in appeal, when extends to non-appealing parties and appellants against whom appeal had abated—Hindu law—Sudra* sanyasi*—Disinheritance.*

The texts of Hindu Law as to disinheritance applicable to a *yathi* or *sanyasi* do not apply to a Sudra ascetic, unless a usage to this effect is established. A Tambiran has rights to family property after becoming a Tambiran. [p. 556, col. 1.]

Reversioners to the estate of a Hindu cannot sue, on the death of the latter's widow, for recovery of property, which was in possession of persons under an alleged invalid adoption made by the widow, when the right to impeach the adoption had already become barred under Article 129 of the Limitation Act of 1871. While Act IX of 1871 was in force, time ran against all the reversioners of the last male owner from the date of the adoption and they all became barred on the expiry of the period prescribed by Article 129, and a suit instituted after Act XV of 1877 did not affect the bar. [p. 550, col. 2; p 551, col. 1.]

The object of that Article was that all questions relating to adoption, including suits for possession of lands depending on questions of adoption, should be determined within 12 years of the adoption and not long after the death of the widow of the last male owner, it might be, 50 years later. [p. 551, col. 1.]

After the extinction of title of the widow or the reversioners to the property by the expiry of the time mentioned in Article 129 of Act IX of 1871, persons in possession under the adoption, whether as heirs or as alienees, acquire title thereto which is saved under section 2 of Act XV of 1877. [p. 551, col. 2.]

A decree for possession of properties in favour of plaintiffs, who had acquired title as aforesaid under the adopted son and who alleged dispossession by the widow after such acquisition of title, will not be *res judicata* in a subsequent suit by the reversioners on the widow's death, inasmuch as no question arose or can be said to have been decided in the former suit as to the right of the reversioners to sue after the widow's death. [p. 548, col. 1.]

Hari Nath Chatterji v. *Mothurmohun Goswami*, 20 I. A. 183; 21 C. 8; 17 Ind. Jur. 481; 6 Sar. P. C. J. 334; 10 Ind. Dec. (N. S.) 638, distinguished.

The decision of a Court of Appeal in favour of appellants extends to the parties who did not exercise the right of appeal when the grounds of the decision are common to all of them. [p. 551, col. 2.]

When an appeal which had abated as against some of the appellants by reason of their representatives not having been brought on the record is allowed, the decree of the Trial Court must be set aside as regards the whole of the claim and not merely in respect of the interests of those appellants whose appeals have not abated when the grounds of appeal are common to all the appellants. [p. 554, col. 1.]

Appeals against the decree of the Court of the Subordinate Judge, Negapatam, in Original Suit No. 26 of 1905.

Messrs. *A. Krishnaswamy Aiyar, A. S. Visvanath Aiyar* and *S. Aravamuda Aiyangar*, for the Appellants.

SOMASUNDARAM CHETTIAR *v.* VAITHILINGA MUDALIAR.

The Hon'ble Mr. *S. Sriniwasa Aiyangar* (Advocate-General), the Hon'ble Mr. *T. Rangachariar*, Messrs. *T. V. Gopalaswami Mudaliar*, *S. Muthiah Mudaliar* and *T. Muthiah Pillai*, for the Respondents.

Appeals Nos. 206 and 207 of 1908 coming on for hearing on the 24th, 26th and 27th October and the 8th and 13th November 1916, Appeal No. 10 of 1909 coming on for hearing on the 27th October and 8th November 1916, Appeal No. 11 of 1909 coming on for hearing on the 27th and 30th October and 8th November 1916, Appeal No. 12 of 1909 coming on for hearing on the 30th October and 8th November 1916, Appeal No. 14 of 1909 with memorandum of cross-objections filed by the 1st respondent coming on for hearing on the 30th and 31st October and the 8th November 1916, and Appeal No 15 of 1909 coming on for hearing on the 31st October and 8th November 1916, and the cases having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—These are appeals from the decree of the Subordinate Judge of Negapatam in a suit brought by the plaintiffs to recover the suit properties as next reversioners of the last male owner, whose widow died in 1902. The defendants relied on long possession under an adoption made by the widow in 1862 and pleaded that the suit was barred by limitation and *res judicata*. The Subordinate Judge overruled both pleas and gave the plaintiffs a decree against which several of the defendants have appealed. We propose to deal, in the first place, with Appeals Nos. 206 and 207 of 1908 filed by the 7th and 8th defendants, who are alienees from the heirs of the alleged adopted son. The main facts are not now in dispute, and may be briefly stated. Arunachala, the last male owner, died in 1849 leaving a widow, Chokkammal. In 1862, Chokkammal adopted one Alagasundara, a younger brother of her deceased husband. This adoption was afterwards impeached on the ground that Alagasundara was not given in adoption by his father who was dead at the date of the adoption and that consequently it was bad. Alagasundara was put in possession of the properties which had not been already alienated, with the exception of certain properties which were retained by Chokkammal for her maintenance, and continued in possession till he died in 1864 leaving a widow, Murugathal, the 4th defendant. Murugathal adopted one Thiyagaraja who enjoyed the properties until 1876, when he appears to have been dispossessed by Arunachala's widow, Chokkammal. He died in 1881 leaving a widow who died in 1882. On her death his adoptive mother Murugathal, the 4th defendant, became his heiress and instituted Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam against Chokkammal to recover the properties of which she had dispossessed him in 1876. In this suit it was held that the adoption on which Murugathal relied was invalid, on the ground that Alagasundara was an orphan at the date of his adoption in 1862, but that he and his heirs had acquired a title by adverse possession and a decree was accordingly given in her favour and affirmed by the High Court in Appeal No. 114 of 1890.

In this state of things Mr. A. Krishnaswami Aiyar for the appellants, the 7th and 8th defendants, alienees from the 4th defendant, contended that the suit was barred both by limitation and by *res judicata*, and also desired to raise the question of estoppel, but as there was no issue raising the question of estoppel as regards the properties concerned in these appeals and as the point was not taken in the Court below, we declined to go into it.

The question of *res judicata* was argued at great length on both sides and many cases were cited, but we think it may be disposed of very briefly. The suit of 1887 was a suit against the widow Chokkammal and was decided against her, as we understand the case, on the ground that she had been out of possession for more than twelve years from 1862 when she took Alagasundara in adoption and put him in possession, and that consequently her right to sue to recover possession became barred under Act IX of 1871 and her title became extinguished at the same time under section 29 of that Act, and thereupon Alagasundara's heirs who were in possession acquired a title as against her, and became entitled to recover the properties from her within twelve years

of her dispossessing them in 1876. In these circumstances, no question arose or can be said to have been decided in that suit as to the right of her husband's reversioners to sue after her death. The case is distinguishable from *Huri Nath Chatterjee* v. *Mothurmchun Goswami* (1), in which, after the death of the widow Pearimoni, Sampurna, one of the reversioners, brought a suit to recover possession of the estate from one Mothoor Mohan which was dismissed on the ground of limitation, a decision which their Lordships held to be *res judicata* in a subsequent suit by another reversioner against the same Mothoor Mohun. This decision, as we understand it, proceeded on the ground that Sampurna when she sued after the death of the widow to recover, as reversioner to her deceased father, the properties in possession of the defendant represented the estate, and a decision that was necessary for the decision of that suit was *res judicata* when the same question arose again in a suit by a subsequent reversioner.

Having disposed of the question of *res judicata*, we have next to consider the question whether the present suit should be held to be barred by limitation. Mr. A. Krishnaswami Aiyar who appeared for the appellants formally raised the contention that the suit is barred under Article 118 of the Act of 1877 which was in force when it was brought, but in the state of the authorities in this Court, he rested his case mainly on the contention that it became barred under Article 129 of Act IX of 1871 which was in force in 1874, when the prescribed period of twelve years from the date of adoption expired without the adoption having been set aside.

Under Act XIV of 1859 in a suit by a reversioner to recover the estate from an alleged adopted son, time did not run against the reversioner until his right to possession accrued on the death of the widow, as held by the Privy Council in *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee* (2). This was the general rule applied by Article 142 of Act IX of 1871 to suits for possession of immoveables by reversioners of the last male owner entitled to succeed to the estate on the death of a Hindu female; but Article 129, which prescribed for suits to establish or set aside an adoption a period of twelve years from the date of adoption, was held in effect to have introduced an exception to the general Article 142 in cases where possession could not be obtained by the reversioner without successfully questioning an adoption. Articles 118 and 119 were substituted in the Act of 1877 for Article 129 of Act IX of 1871; and, as is well known, there have been divergent decisions in India as to whether these Articles which speak of obtaining a declaration that an adoption is invalid or never took place or that it is valid merely reproduced the substance of Article 129 of the Act of 1871 or are limited to declaratory suits, as distinct from suits for possession which depend on the validity of an adoption, in which case the effect of the change as regards this latter class of suits was simply to restore the law as it was under the Act of 1859. The arguments for the first view are forcibly stated in the Full Bench judgment of the Bombay High Court in *Shrinivas Murar* v. *Hanmant Chavdo* (3), and for the latter view in Sir V. Bashyam Iyengar's judgment in *Ratnamasari* v. *Akilandammal* (4). His view has been accepted in this Court since the decision of the Privy Council in *Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh* (5), and is in accordance with the more recent pronouncement of their Lordships in *Muhammad Umar Khan* v. *Muhammad Niaz ud-din Khan* (6).

We have, therefore, only to deal with the contention that under Article 129 of the Limitation Act of 1871 both the widow Chokkammal and her husband's reversioners became barred and their title to the suit

(1) 20 I. A. 183; 21 C. 8; 17 Ind. Jur. 481; 6 Sar. P. C. J. 334; 10 Ind. Dec. (N. S.) 638.

(2) 15 W. R. (P. C.) 41; 14 M. I. A. 67; 7 B. L. R. 216; 2 Suth P. C. J. 422; 2 Sar. P. C. J. 666; 20 E. R. 7-1.

(3) 24 B. 260; 1 Bom. L. R. 799; 12 Ind. Dec. (N. S.) 709.

(4) 26 M. 291 at p. 297; 13 M. L. J. 27.

(5) 33 I. A. 156; 28 A. 727; 10 C. W. N. 1065; 8 Bom. L. R. 722; 16 M. L. J. 440; 3 A. L. J. 695; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377 (P. C.).

(6) 13 Ind. Cas. 344; 39 C. 418; 6 P. W. R. 1912; 39 I. A. 19; (1912) M. W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 182; 16 C. W. N. 458; 126 P. R. 1912 (P. C.).

lands extinguished in 1874 when the period of twelve years from the date of the adoption expired, and the heirs of the adopted son acquired a title as against them. This question has been argued before us mainly with reference to the decisions of the Privy Council as to Article 129 and it is, therefore, necessary to examine carefully those decisions. In the first case in *Raj Bahadoor Singh* v. *Achumbit Lall* (7) the widow in 1860 had executed a deed purporting to adopt two brothers and to make over her properties to them, but the gift was not to take effect until her death. Their Lordships held that this could not be treated as a serious attempt to adopt a son or sons as heirs to her husband. The question, therefore, as to Article 129 did not arise, but their Lordships made certain observations which appeared to be susceptible of the meaning that Article 129 was no bar to suits for possession. In the next case, however, *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (8), their Lordships distinguished this case and pointed out that it was "not a case in which the heir cannot possibly get at the ancestor's property without disturbance of a title and of possession founded on adoption to that ancestor," and they laid down in the clearest terms that in such cases Article 129 of Act IX of 1871 was a bar to the suit as follows:—

"The plaintiffs' Counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow, it may be fifty years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike *at all suits* in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession."

In this passage their Lordships raised the question whether in the case of an adoption by the widow, it must have been questioned under the Act of 1871 within twelve years of the date of the adoption or might be questioned in a suit for possession after the death of the adopting widow, it may be, fifty years later; and they laid down that Article 129 struck at all suits in which the plaintiff could not possibly succeed without displacing an apparent adoption by which the defendant was in possession. This case seems to show that in their Lordships' opinion no suit could be brought, while the Act of 1871 was in force, for possession after the death of the widow, unless the adoption had been set aside within the time prescribed by Article 129. In that case, the adoptions in question were in 1853 and 1853 and the suits were brought by the persons who were the reversioners of the last male owner at the death of his surviving widow in 1868. Act IX of 1871 was in force when that suit was brought, but the same principles were apparently applied by their Lordships in a later case, *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (9), where the suit was brought after Act XV of 1877 had been substituted for Act IX of 1871. In that case, their Lordships considered it unnecessary to determine whether the defendant had been in possession of the estate from the date of the adoption through his adoptive mother and guardian or she herself had been in possession under a deed executed by her husband. They held it sufficient that the right of the defendant to the status of an adopted son of Shib Narain, the last male owner, had been openly and constantly asserted, not only in all actings connected with the estates, but also in his daily life in family with the plaintiff. They pointed out that twelve years from the date of the defendant's adoption expired in 1863 when the plaintiff had come of age, and held that his suit became

(7) 6 I. A. 110; 6 C. L. R. 12; 4 Sar. P. C. J. 15.

(8) 13 I. A. 84 at p. 95; 13 C. 308; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715; 6 Ind. Dec. (N. S.) 705.

(9) 20 I. A. 30; 20 C. 487; 6 Sar. P. C. J. 251; 7 Ind. Jur. 164; 10 Ind. Dec. (N. S.) 330 (P. C.).

barred under Article 129 of the Act of 1871, and that the Act of 1877 could not revive his suit which had become barred under the Act of 1871.

The respondents, however, rely mainly on the more recent decision of the Privy Council in *Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh* (5), and the main question in the case is as to the interpretation to be put upon that judgment. The estate which was the subject of the suit had been confiscated in 1858, and subsequently settled upon the widow of the last male owner in her own right and as her separate property. The defendant took possession after her death claiming that she had adopted him in 1858, and was sued for possession by the plaintiff who claimed to be the next heir of the lady under the Oudh Estates Act, 1869. The defendant pleaded that that Act did not apply, and that if it did, he as the adopted son was the next heir to the lady, and that at all events the plaintiff was not entitled to oust him from possession of the estate without having obtained a declaration that the adoption was invalid, and that a suit for such a declaration was barred. It may also be mentioned that, during the widow's lifetime and while Act IX of 1871 was in force, the defendant sought to recover possession of the estate from the widow on the footing of the adoption and the Judicial Commissioner in 1878 found against the adoption and dismissed his suit, a finding which their Lordships intimated at the close of the case was *res judicata* against him, though they did not rest their decision on that ground, but on the question of limitation, which had been mainly relied on in the argument. Mr. Cohen for the defendant-appellant relied on the cases to which we have referred, and contended that as the right to sue to set aside the defendant's adoption had become barred under Article 129 of the Act of 1871 while that Act was in force, the defendant had acquired a title within the meaning of section 2 of the Act of 1877 which by the terms of the section was not to be affected by the passing of that Act. Their Lordships disposed of this contention very briefly. "Giving full effect", they said, "to the *Jagadamba* case (8), and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption, amounts to acquisition of title within the meaning of section 2 of the Act of 1877. Their Lordships think that the appeal may be disposed of on this short ground whether the alleged adoption was or was not an apparent adoption to which the ruling in the *Jagadamba* case (8) would apply if the Act of 1871 were now in force." This judgment is summarised in the head-note to the report in the Indain Appeals [*Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh* (5)] as a decision that Act, IX of 1871 had no application to that case which was governed by the provisions of the Act 1877 which was in force when the suit was brought. It appears to contain an express ruling that the fact that a suit to set aside the defendant's adoption became barred under Article 129 of the Act of 1871 while that Act was in force, did not amount to an acquisition of title which would be protected by section 2 of the Act of 1877, a ruling which if applicable would be fatal to the appellant. But as regards this question of acquisition of title their Lordships' observations must be taken to have been made with reference to the case before them and are, in our opinion, inapplicable to a case like the present in which the heirs of the alleged adopted son claiming under him were *in possession* of the lands, which are the subject of these appeals, in 1874 when the right to sue to set aside the adoption became barred under Article 129 of the Act of 1871 which was then in force. Section 29 of that Act provided that at the determination of the time hereby limited to any person for instituting a suit for possession of any land, his right to such land should be extinguished. To take, in the first instance, the case of the widow, Chokkammal, who in 1874 was the next heir of her husband, the last male owner, her right to sue for possession of these lands became barred in 1874 according to the decision of their Lordships in *Jagadamba Chaodhrani* v. *Dakhina Mohun Chaodhri* (8), when the period limited to her under Article 129 expired, and thereupon her right to these said lands became extinguished under the section and the

heirs of the adopted son, who were then in possession, acquired a title against her on the strength of which they subsequently recovered possession from the plaintiffs after she had ousted them in 1876. There was thus clearly an acquisition of title by the heirs of the adopted son at any rate against her while the Act of 1871 was in force, and the title so acquired was not to be affected by the enactment of Act XV of 1877.

The only other question then is, whether the suit for recovery of lands now in suit became barred while Act IX of 1871 was in force not only against the widow who was then the nearest heir, but also against all other heirs of the last male owner including the present plaintiffs; as, if it did, we think the effect of section 29 was to confer upon the heirs of the adopted son, who were in possession when such suits became barred, a title against such heirs also which was not affected by the passing of Act XV of 1877. In our opinion, while Act IX of 1871 was in force, time ran against all the reversioners of the last male owner from the date of the adoption, and they all became barred on the expiry of that date. The object of the Legislature in that enactment was that all questions relating to adoption, including suits for possession of lands depending on questions of adoption, should be determined within twelve years and not after the death of the widow of the last male owner, it might be, fifty years later, as observed by their Lordships in *Jagadamba Chaodhrani* v. *Dakhina Mohun Chaodhri* (8). Further the point has been expressly decided in India in *Harnabh Pershad* v. *Mandil Dass* (10), and the same view was taken by the Bombay High Court in *Shrinivas Murar* v. *Hammant Chavdo* (3) under the Act of 1877, which, in their opinion, reproduced Article 129 of the Act of 1871, and by Sir Subramania Aiyar in his Order of Reference in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (11). Our attention has been called to the fact that in *Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh* (5), as in the present case, the reversioners bringing the suit were not in existence when the twelve years limited under Article 129 expired, and reliance has been placed on that fact for the respondents. Their Lordships in their judgment make no reference to the fact that the plaintiffs, who were the nearest reversioners at the death of the widow, were not the nearest reversioners when the period limited under Article 129 expired, and we do not think their judgment can be treated as proceeding on any such ground. What we understand their Lordships to have decided was that, although the right to sue to set aside the defendant's adoption became barred under Article 129 while the Act of 1871 was in force, that fact did not of itself and without possession confer title to the suit lands on the defendant, or prevent the plaintiff from suing for them when Act XV of 1877 was in force within the time limited by that Act. Their Lordships seem to have recognised that defendant had acquired an immunity from a suit by the plaintiff of the kind specified in Article 129 of Act IX of 1871, in other words, that the plaintiff's right to bring such a suit was barred. It may be that the provisions of the Act of 1871 were considered to involve some hardship to persons in the position of the present plaintiff and that may have been the reason for altering those provisions by the Act of 1877, but section 2 of the Act of 1877 expressly saved titles acquired under the repealed Act, and we are of opinion, for the reasons already given, that the title of the heirs of the adopted son and those claiming under them to the lands which are the subject of the appeals was among the titles so saved. Appeals Nos. 206 and 207 of 1908 are allowed and the suit dismissed as against the appellants therein with costs throughout.

The fourth defendant and some of the other defendants who are alienees from her have not appealed, but we think the suit against them ought also to be dismissed by us under Order XLI, rule 33, Civil Procedure Code, for the reasons given by Subramania Iyer, J., in *Kulaikada Pillai* v. *Viswanatha Pillai* (12), and in accordance with the recent decision in *Subbarayalu Naidu* v.

(10) 27 C. 379; 14 Ind. Dec. (N. S.) 251.

(11) 29 M. 390 at p. 392; 1 M. L. T. 183; 16 M. L. J. 307.

(12) 28 M. 229; at p. 234; 15 M. L. J. 212.

Papammal (13), S. A. No. 557 of 1914 reported in 29 Ind. Cas. 579. The point decided in *Kandasamy Chetty* v. *Annamalai Chetty* (14) does not arise and it is unnecessary to consider that decision now. The decree will be reversed and the suit dismissed against the 4th defendant and all the other defendants claiming under her as alienees, including the 5th defendant who has appealed on another point.

In Appeal No. 10 of 1909, the 14th defendant is the 1st appellant, and the appeal relates to the lands in the Ekabogam village of Keerandakudi included in schedule 10 of the plaint. The reversioners claim to recover the property on the ground that it was alienated by Chokkammal in 1855 and that the transaction is not binding on them. There is no doubt that the village did belong to the Kulikarai family and that it was purchased from some member of that family by Subba Chetty, a predecessor-in-title of the 1st appellant. The case of the defendant No. 14 is that the purchase was effected during the lifetime of Chokkammal's husband, that is, prior to 1849. No sale-deed or other document of title is produced on behalf of the 1st appellant. The plaintiffs allege that the sale-deed from Chokkammal was produced during the litigation of 1857 between her and Murugathal. The records show that a cadjan sale-deed in favour of Subba Chetty by Chokkammal was exhibited in that case. The evidence for the plaintiff is that it was produced by the agent of the 14th defendant. The Subordinate Judge has accepted the evidence on the point and after examining it, we see no reason to dissent from the view he has taken. The probabilities are strongly in favour of the plaintiffs' case being true. In Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam, Chokkammal was interested in showing that she had been dealing with her husband's property after his death and it was for this purpose that Exhibit LXXXIV, the sale-deed in question, was produced in that suit. Neither the list of documents, nor the judgment makes mention of the property covered by the deed. The matter was immaterial as far as that suit was concerned. We think there can be no doubt that the witness who produced the document was the agent of the 14th defendant. It has, however, been urged that it is not proved that this sale-deed related to the lands now in question. On this point, there is the direct evidence of plaintiffs' witness No. 35. It is true that he was an agent of Chokkammal, but no one but a person in this position would have had any reason for perusing the document. It is admitted by one of the 1st appellant's own witnesses that Subba Chetty owned no land outside Keerandakudi. This indicates clearly that the sale-deed must refer to this village. If it is once shown to relate to this village, no dispute exists as to the land in suit being covered by this deed. It is noticeable that though the 14th defendant is able to produce *kist* receipts for some years beginning with 1857, he has filed none of a date earlier than 1855. The Subordinate Judge infers from his other findings that the 14th defendant is deliberately suppressing the document which he produced on behalf of Chokkammal in Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam. The reversioners are not in a position to know details of a transaction which occurred so long ago. On the other hand, the 1st appellant who has special knowledge has failed to put before the Court any definite information as to the origin of his title. Instead of furnishing any explanation as to the sale-deed produced by his agent, he has had recourse to a false denial of having produced any document at all. A good deal of oral evidence was given on both sides as to the possession between 1849 and 1855. The Subordinate Judge has rejected it. It has been rightly characterised as vague and unreliable. The Subordinate Judge has attached considerable importance to Exhibit K. This, however, only shows that in 1851 representatives of the Tiruvalur branch of the family treated the Keerandakudi lands as still forming part of the deceased Arunachala's estate. The omission of the land from the property sued for in Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam is easily explained,

(13) 29 Ind. Cas. 579.
(14) 28 M. 67; 15 M. L. J. 402.

Murugathal was seeking to recover what she had been dispossessed of by Chokkammal and Murugathal had never had possession of Keerandakudi.

We think the plaintiffs have established that Subba Chetty did obtain a sale-deed from Chokkammal of the lands in question. The 1st appellant has failed to show that Subba Chetty had possession prior to 1855 and the documentary evidence points to his possession having begun subsequent to that date. The conduct of the defendant is also of importance and supports the plaintiffs' contention. There is nothing in the defence evidence to rebut this presumption, which arises from the facts which the plaintiffs have established. Under the circumstances, we agree with the finding of the Subordinate Judge on the 18th and 19th issues. As regards the question of limitation which has been argued in the other appeals in the case, the heirs of the adopted son admittedly did not acquire title to the suit lands while the Act of 1871 was in force. In these circumstances, we are unable to distinguish this case from *Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh* (5), the next recent decision of their Lordships, and following that case, we think the plea of limitation was rightly overruled. The appeal is dismissed with costs.

The nature of the claim in Appeal No. 11 of 1909 is similar to that in Appeal No. 10 of 1909. The plaintiffs assert a right as reversioners to recover some shares in Engan village on the basis that these were alienated by Chokkammal in 1855 to the predecessors-in-title of the appellants. The defendants allege that the property belonged by ancestral rights to the alleged vendees. The evidence in support of the plaintiffs' case is similar in kind to that produced in the last appeal. In Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam two cadjan sale-deeds were produced in favour of Kumaraswami Udayar and Kathaperumal Udayar (Exhibits LXXXII and LXXXIII in that case). These individuals are stated to be the same as the persons so named for whom defendants claim ancestral rights. The documents are described as having been executed by Chokkammal on 18th December 1855. They were produced by a witness who is alleged to be the 20th defendant in the present suit. This is denied but the Subordinate Judge has found the fact proved, and we see no reason to dissent from his appreciation of the evidence on the point. The records do not indicate to what property the deeds related. On this point, the only evidence is that of plaintiffs' witness No. 35, but it is clear that his recollection is very defective. He speaks of one deed only and the consideration he mentions does not agree with that given in the list of Exhibits in Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam. To show that Arunachella Mudaly had owned lands in the village, an admission by defendants' witness No. 40 is relied upon. He mentions Engan amongst several other villages which Arunachella "had", but gives on information as to the extent of his interest. The Subordinate Judge has treated Exhibit K as "very conclusive evidence" that the late Arunachella owned 4 *velis* in Engan and that those passed to his widow on his decease. As already stated, all that this Exhibit shows is that the representative of the Tiruvalur family asserted in Original Suit No. 1 of 1851 on the file of the Kumbakonam Dewaney Adawlet Court that 4 *velis* and odd in Engan had belonged to Arunachella. The suit was dismissed and there was no finding as to the ownership of the land. It does not appear that Chokkammal denied that she had any rights in the village, but as far as the merits of her defence were concerned the point was immaterial. This assertion by a stranger to the present proceedings can be of little or no weight as against the appellants. The oral evidence as to possession by Chokkammal has been rejected by the Subordinate Judge as unworthy of credit. If the witnesses cannot be believed as to the fact of possession, still less can they be believed when they speak as to particulars such as the extent possessed. Even taking their statements as they stand, they do not agree with one another or with the claim put forward. The explanation tendered that the witnesses were agreed as to the shares owned by the Kulikarai

family and differed only as to the extent is unacceptable. They were never asked anything about shares. Under the circumstances, there is no reliable evidence as to the extent of Arunachella's and Chokkammal's interest in the village, assuming that they had some interest Further, we are unable to agree with the Subordinate Judge that Chokkammal is proved to have held any interest at all. The plaintiffs' case as to this rests on Exhibit K and the deposition of plaintiffs' withess No. 35, and for reasons already given, we do not consider that these form a sufficient basis for the finding. We are not satisfied that the sale deeds have been satisfactorily connected with land in this village. Even if they did relate to it, there is nothing to show that interest was conveyed. It is the weakness of the plaintiffs' case on these points that differentiates the claim in this appeal from that in Appeal No. 10 of 1909. We think the appeal should be allowed and the plaintiffs' claim to recover these properties dismissed with costs.

The 20th and 22nd defendants died after the appeal had been preferred and their representatives have not been brought on the record. It has been argued that as the appeal has abated as regards these appellants, the decree of the lower Court cannot be modified as far as their interests are concerned. The grounds of appeal in which the appellants have succeeded are common to all the appellants and we think the terms of Order XLI, rule 4, of the Code of Civil Procedure are wide enough to cover this case [*Chintaman* v. *Gangabai* (15)], and enable this Court to set aside the decree as regards the whole of the plaintiffs' claim and not merely in respect of the interest of those appellants whose appeals have not abated. Any other conclusion would lead to "incongruity in judicial decisions on the same facts" [*vide Dhuttaloor Subbayya* v. *Paidigantam Subbayya* (16)].

The appellants in Appeal No. 12 of 1909 are the representatives of the 12th defendant added as defendants Nos. 36 to 38. The subject-matter of the appeal is land in Kamalapram village which was mortgaged by Chokkammal. It was brought to sale in execution of a decree obtained by the mortgagees and purchased by the decree-holders, who sold the property to the 12th defendant. The contentions of the appellants are two-fold. In the *first* place, they allege that the land never formed part of Arunachella Mudaly's estate, and, *secondly*, that if it did belong to him, the alienation by his widow is such as to be binding on the reversioners.

The Subordinate Judge rightly says that there is absolutely no direct evidence that Arunachella Mudaly ever possessed any land in the village. He bases his finding in favour of the plaintiffs on three documents. The first is Exhibit K. It is stated that land in Kamalapuram was claimed by the plaintiff in Original Suit No. 1 of 1851 on the file of the Kumbakonam Dewaney Adawlet Court, *i.e.*, the representative of the Tiruvalur branch of the family. From this fact, it is argued that Chokkammal was in possession of lands in Kamalapuram within two years of her husband's death. The Subordinate Judge finds that she had no private funds with which she could have made a purchase and that if she had bought the land with the income of her husband's estate, she would have placed this in her written statement in Original Suit No. 1 of 1851. There is, however, no ground for drawing this inference. On the claim which the plaintiff in that suit was putting forward, a plea of this kind would have been useless. If the plaintiff had succeeded in establishing that the family was undivided, Chokkammal would have lost the land whether she put forward this plea or not. If, on the other hand, Chokkammal succeeded in her general defence of division and adoption, the plea was unnecessary.

The next document is an extract from a *sammathipatram*, which is incorporated in paragraph No. 9 of the judgment of the Subordinate Judge of Negapatam in Original Suit No. 9 of 1887. The document was filed as Exhibit B in that suit for the purpose of proving that Chokkammal consented in 1862 to revenue registry being transferred from her name to that of Alagasundra Mudaly. She made an exception of five villages of which Kamalapu-

(15) 27 B. 284; 5 Bom. L. R. 90.
(16) 30 M. 470; 17 M. L. J. 119; 2 M. L. T. 104.

ram is one. The whole of the document is not available and from the extract quoted there is nothing to show on what ground Chokkammal wished to retain the registry of the Kamalapuram lands in her own name. It is suggested for the appellants that this may well have been because she had acquired this property herself and that a recital to this effect may have appeared in an earlier portion of the document. The extract given cannot, in our opinion, be relied upon as establishing that the lands in question formed part of Arunachella Mudaly's estate. The last document on which the Subordinate Judge bases his finding is Exhibit M. This is an agreement between the late husband of the 9th defendant and the late father of the plaintiff as to their reversionary rights. Land in Kamalapuram is referred to therein. This agreement was executed in 1884 while Chokkammal still had an interest in the property. It cannot be assumed that because these persons chose to include this land as forming part of Arunachella's estate, it, therefore, did form part of it. Persons setting up to be reversioners are not unlikely to make their claims as extensive as possible by including whatever the female heir may have been in possession of. The Subordinate Judge has been influenced mainly by the inference he draws from Exhibit K and treats the other documents as corroborating that inference. It has been shown that the inference itself is unwarranted and the later documents of little weight. It has been suggested that it is unlikely that Chokkammal would have had savings so soon after her husband's death with which to make a purchase. The property was, however, of small value as is evidenced by the prices realized at much later dates, and we are unable to see that any inference against a self-acquisition can be drawn from these facts. The burden is on the plaintiffs to establish that Arunachella Mudaly owned lands in Kamalapuram during his lifetime. [*Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh* (17)]. For reasons given above, we consider that this burden has not been discharged No argument has been advanced on the basis of the property, if self-acquired—having been subsequently incorporated with the husband's estate. In view of the finding that the plaintiffs have failed in this part of the case, it is unnecessary to deal with the question of necessity for the mortgages executed by Chokkammal. We think this appeal must be allowed and the plaintiffs' claim to the 8th schedule lands dismissed with costs.

Appeal No. 15 of 1909 has been argued on the question of costs only. The additional Court-fee payable on account of the inclusion of the property in the suit is Rs. 25 and the additional Vakil's fees Rs. 33. The 5th defendant's liability for costs will not in any case exceed this amount. The suit as against the 5th defendant has been dismissed and the decree against him reversed, but his contention as to costs appears to be well-founded to the extent above indicated, and he was entitled to appeal as to this. His liability for costs would, in any event, be limited as stated above. The appellant will have proportionate costs of this appeal.

The appellants in Appeal No. 14 of 1909 are the plaintiffs in Original Suit No. 26 of 1905 on the file of the Court of the Subordinate Judge of Negapatam. Although our decision in Appeals Nos. 206 and 207 of 1908 governs this appeal, we think that as the questions involved have been argued before us, it is desirable that we should give findings on the questions raised. The grounds of appeal relate, *firstly*, to the findings of the Subordinate Judge as to the property comprised in the 9th to 14th schedules attached to the plaint. Mr. T. Rangachariar did not press the appeal as far as these items of property are concerned.

The *second* question concerns the rights of the 1st defendant. She is the widow of Bava Krishnaswamy Mudaly. He was a reversioner to the estate of the late Arunachella Mudaly and stood in the same degree of relationship as the plaintiffs to the last male holder. Under ordinary circumstances, the 1st defendant would be entitled to one fourth share of the estate recovered by the reversioners. The case of the plaintiffs appellants, however, is that Bava Krishnaswamy had severed his connection with his family by having "renounced the world and entered the order of religious ascetics known as Tambirans.' It

(17) 26 C. 871; 26 I. A. 226; 4 C. W. N. 1; 2 Bom. L. R. 1; 7 Sar. P. C. J. 578; 13 Ind. Dec. (N. S.) 1158.

is further alleged that by this act "he forfeited all rights of property and all future rights of succession as a member of the secular family to which he belonged." It has not been disputed in appeal that Bava Krishnaswamy did enter the order of Sudra ascetics known as Tambirans. It is, however, clear on the authorities that the texts as to disinheritance applicable to a *yathi* or *sanyasi* do not apply to a Sudra ascetic, unless a usage to this effect is established [*Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai* (18), *Harish Chandra Roy* v. *Atir Mahmud* (19)]. In the Court of first instance an attempt was made to prove that Bava Krishnaswamy belonged to a special class of Sudras who may according to some *agamas* be admitted into the order of *sanyasis*. This contention was rejected by the Subordinate Judge and has not been advanced before us.

The Subordinate Judge has also found against the existence of any usage such as is referred to in the cases cited above. We agree with this finding. The 46th and 47th witnesses for the plaintiffs are both heads of Sudra *mutts*. The latter is Pandara Sannadi of the Dharmapuram Athinam which Bava Krishnaswamy joined. He admitted that he was unable to state positively what the custom is regarding property belonging to a Sudra ascetic prior to his admission to the order. He knew of no case in which a contention had been raised that a Tambiran could not succeed to property of his family. It may be noted that the case of *Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai* (18) relates to this institution and that no attempt was made at that time to set up any special custom. Plaintiffs' witness No. 45 was unable to give any opinion without referring to the Shastras as to whether a Tambiran has rights to family property after becoming a Tambiran. This evidence, coming from the side of the plaintiffs and from persons holding the position these witnesses do, is a strong indication that no custom exists of the kind which the appellants seek to establish. Numerous instances appear in the evidence on both sides of dealings with family property of Tambirans which are inconsistent with their having lost their rights in it and with any consciousness on the part of those dealing with them that there was anything unusual in such transactions. In no case do they appear to have been questioned. As far as the evidence before us goes, we have no doubt that the plaintiffs have failed to establish that Sudra ascetics are by custom subject to the same disabilities as *sanyasis*. The appeal must be dismissed with costs of the respective respondents.

The only question argued in the memorandum of cross-objections filed by the 1st respondent in this appeal relates to costs. The 1st defendant has been directed to bear her own costs in the contest with the plaintiffs as to her husband's position. We see no reason to interfere with the discretion the Subordinate Judge has exercised in making this order. The memorandum of cross-objections is dismissed with costs.

Appeals Nos. 206 *and* 207 *of* 1908 *and No.* 12 *of* 1909 *allowed; Others dismissed.*

V.R.P.

(18) 22 M. 302; 8 Ind. Dec. (N. S.) 215.
(19) 18 Ind. Cas. 474; 40 C. 545; 17 C. W. N. 517.

MADRAS HIGH COURT.

FULL BENCH.

APPEAL AGAINST ORDER NO. 333 OF 1914.

August 17, 1916.

Present: - Mr. Justice Oldfield, Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

PANAKKAL IYYAPPAN AND ANOTHER—PETITIONERS—APPELLANTS

versus

ELACHAR CHAKKUNNI—RESPONDENT.

Will, execution of—Execution on different dates—Disposition of property, rules for—Revocation—Extraneous evidence, admissibility of—Evidence Act (I of 1872*), s* 94.

Where several Wills are executed on different dates by a person, if the subsequent instrument does not profess to be a codicil and is adequate to the disposition of the entire property, there is no such *a priori* impossibility that it was intended wholly to supplant the prior instrument. The case then rests on the true construction of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first [p. 560, col 2]

Where there is something on the face of the instrument raising doubt or ambiguity as to whether

it was intended by the testator to be in substitution for or addition to a previous Will, the Court is justified in having recourse to external evidence to ascertain the testator's intentions. [p. 561, col. 1.]

A testator had properties both in Cochin State and in British territories He executed four Wills by which he disposed of all his properties, *viz*,

1. In 1901 a Will bequeathing certain properties to his wife

2. A Will in 1905 bequeathing all his properties in Ponnani to his wife Elchar.

3. A Will in 1906 bequeathing 38 items of properties to Elchar for her maintenance during life.

4. A last Will making certain additional bequests to Elchar and others and bequeathing the rest of his property to his niece's children:

Held, that the last instrument superseded the earlier ones; [p. 561, col. 1.]

Held, further, that the fact that the properties were situate in different jurisdictions did not affect the question. [p. 561, col. 2.]

Pereira, In re, Worseley v. *Society for Propagation of the Gospel*, (1912) 28 T. L. R. 479; 56 S J. 614, followed.

Appeal against the order of the District Court, South Malabar at Calicut, dated the 19th August 1914, in Civil Miscellaneous Petition No. 63 of 1913.

This appeal coming on for hearing on the 24th November 1915, upon perusing the petition of appeal, the order of the lower Court and the material papers in the case, and upon hearing the arguments of Mr. *A. Duraiswami Aiyer*, for Mr. *C. P. Ramaswami Aiyar*, for the Appellants and of Messrs. *J. L. Rosario* and K. *Govinda Marar*, for the Respondent, and the case having stood over for consideration till the 7th December 1915, the Court (Abdur Rahim and Ayling, JJ.) made the following

ORDER OF REFERENCE TO THE FULL BENCH.

ABDUR RAHIM, J.—The decisive question in these appeals is whether the Will Exhibit X of one Chakkunni, dated the 18th December 1905, is revoked by a later Will of his, Exhibit A, dated the 24th September 1907. He also executed another Will Exhibit H between these two dates, *i. e.*, on the 26th November 1906. I have used the Exhibit marks in the appeal against order The testator resided in the State of Cochin and had properties not only there but also some in British India. The latter properties he devised to his wife Elachar by Exhibit X, the earliest Will, by the next Will Exhibit H, he devised to her 38 items of property for her maintenance and by the last Will Exhibit A he gave "all the rights which I have in the moveable and immoveable properties which I own this day and in those which I may acquire in future, inclusive of the right of succession similar to that which I have, and the freedom to buy and to alienate will pass to the children of my younger brother's daughter Panakkal Iyyakku's wife Ittyenam, *viz.*, (1) Iyyappan, and (2) Chakkunni who are minors." Then he proceeds to provide for the management of the properties by his wife Elachar during the minority of the two devisees, expressly maintains the dispositions made by him under Exhibit H and makes certain specific bequests. Then he winds up by saying: "All the moveable and immoveable properties which are found left by me after my lifetime, with the exception of those properties which are specified in this Will to be given to particular persons and the keys of the rooms, compartments and almirahs, etc., should be kept in your possession and when Iyyappan (the elder of the two minor residuary legatees) is 16 years of age you should surrender them to him."

The testator was a Christian and the Succession Act applies. Section 57 of that Act compendiously lays down the law as to how a Will can be revoked. This is not a case of express but of implied revocation and the question is one of construction, as pointed out in *Townsend* v. *Moore* (1) cited by Mr. Rosario, who contended that there has been no revocation of Exhibit X by Exhibit A. The principle to be applied in such cases is set out in a passage from Williams on Executors quoted by the Appeal Court at the same page and adopted by it as enunciating the correct law: "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to Probate as together containing the last Will of the deceased. And if a subsequent

(1) (1905) P. 66 at p. 78; 74 L. J. P. 17; 92 L. T. 335; 53 W. R. 338.

testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent." Mr. Rosario has especially relied upon a passage in the judgment of Vaughan Williams, L. J., at page 81 but the passage lays down nothing different, only it makes clear two things, that the question is entirely one of construction and if the words used are capable of being so read as to enable the two documents to be both admitted to Probate, that is the construction which should be adopted. *Townsend* v. *Moore* (1) was a case of two contemporaneous Wills, but I agree that every reasonable attempt should be made to reconcile two Wills whether executed on the same date or on consecutive dates though in the former class of cases the Court will naturally feel itself to be under a greater necessity for reconciling the two documents, as otherwise neither of them would be admitted to Probate and the testamentary intentions of the testator would be entirely defeated. In any case the words of the testator must be capable of yielding to a construction which will make the two Wills stand together, and not that we are at liberty to secure that result by reading in important operative words which are not to be found in the later document in order to save the earlier disposition. And that is what we shall have to do in this case if we were to accept the contention on behalf of Elachar. The intention of the testator must be sought in the language which he has used and is not to be made the subject of mere speculation. By his last Will the testator disposes of all the properties moveable and immoveable, which he owned on the day of its execution in favour of the two minor male relations of his, except those that he specifically gives to others; if effect is to be given to his words at all, the properties comprised in Exhibit X, which are not expressly excepted from their operation like those dealt with by Exhibit H, passed like the rest of his estate to the two boys. If authority was needed for the proposition that a second Will disposing of the whole estate revokes a former disposition, I would refer to the case of *Henfrey* v. *Henfrey* (2) mentioned in *Townsend* v. *Moore* (1). It may be pointed out that not only is it the law that until the testator's death the properties comprised in his earlier Will, Exhibit X, were still his to dispose of, but he was fully conscious of this for he expressly provides in Exhibit X itself that they were to vest in her only on his death.

Mr. Rosario, however, argues that since the properties disposed of by Exhibit X were situate in British India and those were all the properties he had there, therefore, we should infer that when afterwards by Exhibit A he disposed of *all* hislproperties, he meant only those that were situate in Cochin. That is only possible if we were to add the words 'situate in Cochin' or some words of similar effect and this in my opinion is not open to us to do. He also points out in support of his contention that in Exhibit X the testator says: "But even I should alter this Will by registered instrument" and though the subsequent Will Exhibit A was in fact registered, it was registered in Cochin and not in British India. Here again he wants us to modify what the testator actually says in Exhibit X. It is also said that another Will, which the testator had executed in 1901, was revoked by a registered *karar* executed on the same day as Exhibit A, but as pointed out by the District Judge there was no reason why Exhibit X should have been mentioned in that *karar*. Mr. Rosario in fact builds his entire argument on the hypothesis that as the testator lived in amity with his wife till his death, there was no reason why he should deprive her of what he had given her by the Will of 1905 (Exhibit X). But this overlooks the fact that subsequently in 1906 (Exhibit H) he has given her 38 items of property for maintenance and this latter disposition he expressly upholds in his last Will. The District Judge was, therefore, in my opinion entirely right in holding in his judgment in the second appeal that the Will of 1905 was revoked by that of 1907.

In dealing, however, with the petition for revocation of the Letters of Administration with the Will, Exhibit X, annexed to Elachar the learned District Judge has clearly gone wrong. That Will having been revoked, the Letters of Administration obtained on the allegation—untrue in fact though made in good faith—that it was the last Will and testa-

(2) (1842) 4 Moore P. C. 29; 13 E. R. 211; 59 R. R. 331.

ment of the deceased must be revoked under section 234 of the Succession Act. I can find nothing in any circumstances that are mentioned in the District Judge's judgment which would justify our refusing to act under that section. I would, therefore, direct that the grant of Letters of Administration with the Will, dated 18th December 1905, annexed to Elachar be annulled.

My learned brother is of opinion that the Will of 1905 was not revoked by the Will of 1907, but he agrees that in the view that if the former Will was revoked, the Letters of Administration granted to Elachar should also be revoked

AYLING, J.—This appeal turns entirely on the question of whether the registered Will, Exhibit X, executed by Chakkunni on 18th December 1905 was revoked by another registered Will, Exhibit A, executed by him on 24th September 1907. The revocation is not express, and Exhibit X is not referred to in Exhibit A: but inasmuch as Exhibit A purports to dispose of 'all the rights which I (testator) have in the moveable and immoveable properties which I own this day," it is argued that this covers the four items of property bequeathed by Exhibit X, and that it operates as an implied revocation of the latter.

On the other hand Mr. Rosario has drawn our attention to various circumstances tending to show that the testator at the time of executing Exhibit A did not intend to revoke Exhibit X. He argues that (as it is expressed in Halsbury's Laws of England, Vol. 28, p. 564) "an intention to revoke must be as clear and free from doubt as the original intention to bequeath and must be shown with reasonable certainty."

The testator, Chakkunni, was a resident in the State of Cochin, but he owned, besides a good deal of property in Cochin, four items of property in Ponnani Taluq in British India. He appears to have executed four Wills, all registered:

(1) A Will executed in 1901 bequeathing certain property in Cochin to his niece, Mathiri.

(2) Exhibit X executed in 1905 bequeathing all his property in Ponnani (and nothing else) to his wife Elachar.

(3) A Will, Exhibit H, dated 26th November 1906, bequeathing 38 items of landed property in Cochin to Elachar for her maintenance during her life.

(4) His last Will, Exhibit A, making certain additional bequest to Elachar and others and bequeathing the rest of his property to his niece's children.

Now it is to be noticed that there is a natural distinction which was probably present in the mind of the testator between his British and Cochin properties. The former were completely disposed of by Exhibit X, which was registered for the purpose at Ponnani Registration Office. All the others were registered in Cochin. It is strongly argued by Mr. Rosario that the testator regarded the disposition of his British properties as settled by Exhibit X, had no intention of altering such disposition and executed Exhibit A without reference to these British properties. It is pointed out that he was not a man careless in such matters, and that as shown in Exhibit X, he clearly realised the necessity of making any revocation unequivocal and beyond doubt. As regards the other two Wills prior in date to Exhibit A, he has taken pains to do so. The Will of 1901 was expressly revoked by a *karar* executed on the same day as Exhibit A: and Exhibit H is specifically referred to in Exhibit A so as to show that its dispositions were not affected. Why then was the fate of Exhibit X left in doubt? It seems to me that it was probably for the simple reason that the testator had only his Cochin properties in mind and had no idea of affecting by Exhibit A the previous disposition of his properties in British India. No motive is suggested to account for his depriving his wife of the benefit which she was to derive under Exhibit X.

I am not satisfied that any intention to revoke Exhibit X is to be inferred from Exhibit A.

I would, therefore, dismiss with costs Appeal against Order No. 333 of 1914.

BY THE COURT.—Under section 98 of the Civil Procedure Code we refer the question whether the Will Exhibit X of 1905 was revoked by Exhibit A the Will of 1907 to a Full Bench. The learned Vakils for both the parties agree that the decision of Second Appeal No. 124 of 1912 will depend on the answer to this question.

PANAKKAL IYYAPPAN *v.* ELACHAR CHAKKUNNI.

This appeal coming on for hearing on the 10th and 11th August 1916, on the question referred for the decision of the Full Bench, upon perusing the order of reference and upon hearing the arguments on both sides, the case having stood over for consideration till this day, the Court expressed the following

OPINION.

OLDFIELD, J.—I agree with the judgment, which Seshagiri Aiyar, J., is about to deliver, and will observe only that the case has really to be decided almost entirely on the law generally applicable to the construction of documents, recourse to the decisions relating to the construction of Wills being unnecessary except on one point.

On that point both the learned Judges, before whom the case first came, were agreed that "an intention to revoke an earlier Will by a later must be as clear and free from doubt as the original intention to bequeath and must be shown with reasonable certainty." We have then the testator's bequest of all his property in Exhibit A, twice unambiguously expressed. It is then in my opinion unnecessary to go further than Chapter VI of the Indian Evidence Act in order to justify the conclusion in favour of an intention to revoke the earlier Will, which disposed of some only of the testator's property, and the refusal to consider the collateral circumstances, which Mr Rosario has pressed on us so clearly.

I concur in answering the question in the affirmative.

SADASIVA AIYAR, J.—I agree and have nothing to add.

SESHAGIRI AIYAR, J.—The testator, in this case, executed three successive Wills. He had properties both in the Native State of Cochin and in South Malabar. The first was in 1901. The second in 1905 (Exhibit X). The third in 1906 (Exhibit H) and his last Will and testament (Exhibit A) in 1907. The second Will dealt, admittedly, only with the testator's property in British India. The third Will dealt with a few items of property in Cochin. The last Will, *ex facie*, disposes of all the properties which the testator had at the time.

This reference relates to the question whether Exhibit X was revoked by the last Will, Exhibit A. *Prima facie*, the dispositions in the earlier one are inconsistent with those of the last Will. The general rule of law is well understood that every endeavour should be made "to preserve either wholly or in part the contents of the prior document." See per Lord Tabbot in *Weld* v. *Acton* (3). A qualification was added to this proposition in *Freeman* v. *Freeman* (4) that this attempt should not be made unless the rejection of the prior document will lead to a partial intestacy. It was further held that where the subsequent testament is styled a codicil, the intention of the testator must be taken to be that the Will and codicil should stand together. *In the goods of Howard* (5). After examining these and the other authorities the law is thus stated in Jarman on Wills, Vol. I, at page 176: "If the subsequent instrument does not profess to be a codicil, and is adequate to the disposition of the entire property, there is no such *a priori* improbability that it was intended wholly to supplant the prior instrument. The case then rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first." See *Henfrey* v. *Henfrey* (2). The decision in *Townsend* v. *Moore* (1) states the law as we find it stated in section 57 of the Indian Succession Act.

Now, these being the principles on which we have to act, is there anything in the present case to enable us to depart from the rule as stated in Jarman's book? Mr. Rosario's contention was that in construing the comprehensive phrase "all my moveable and immoveable properties" in Exhibit A, we must consider the circumstances under which the Will was made; and he relied on some passages (they were really quotations) in the judgment of the President of the Probate Division in *In re the Estate of Bryan* (6). The learned Judge quotes in that case, with approval, *Jenner* v. *Ffinch* (7), where it is stated "the sub-

(3) (1735) 2 Eq. Cas. Abr. 777; 22 E. R. 661.
(4) (1854) Kay 479; 69 E. R. 203; 101 R. R. 712.
(5) (1869) 1 P. & D. 636; 38 L. J. P. 32; 20 L. T. 230.
(6) (1907) P. 125; 76 L. J. P. 30; 96 L. T. 584.
(7) (1880) 5 P. D. 106; 49 L. J. P. 25; 42 L. T. 327; 28 W. R. 520.

ject was fully discussed by Sir H. Jenner in *Thorne* v. *Rooke* (8), and he came to the conclusion that where there is something on the face of the instrument raising doubt or ambiguity as to whether it was intended by the testator to be in substitution for or addition to a previous Will, the Court is justified in having recourse to external evidence to ascertain the testator's intentions." The President finally held that there was authority for the proposition that in cases of doubt, external evidence is admissible, but that in the case before him there was no such doubt. This rule of construction has been accepted by the Indian Legislature (Section 94 of the Evidence Act). Reference may also be made to *Raven, In re*; *Spencer* v. *National Association for Prevention of Consumption* (9), for the position that Courts should not enter into an enquiry regarding external circumstances to gather the intention, when the language of the document is clear. Therefore, our first duty is to see whether the language is clear and consistent and applies accurately to existing facts. Mr. Rosario conceded that if Exhibit A were the only Will ever made by the testator, there can be no contention that it is not sufficient to dispose of all the properties which the testator died possessed of. If this is so, it is impossible to see how the fact that the tesator knew well enough to expressly revoke previous testaments can affect the construction of the Will in question.

Another contention of Mr. Rosario was that as the testator stated that Exhibit X shall be revoked only by a registered document and as the subsequent Will was registered in Cochin territory, the properties comprised in Exhibit X were not affected by Exhibit A. The learned Vakil does not say that in order to be effectual the last Will should have been registered in South Malabar as well; but he suggested that the testator, a shrewd man of business, was, by the clause about registration, apparently under the impression that a registered Will dealing with property in British India will not be affected by a Will registered in the Native States and *vice versa*. This may or may not have been the view of the testator, but it seems to me that all that the testator said was that he would take care that subsequent testaments should be registered, but not within any particular jurisdiction.

Another argument of the learned Vakil was that the expression "*all my properties*" should not apply to properties in two different jurisdictions. It is true that none of the decided cases exactly covers this case, where the first Will deals with a particular property in a particular place and the second Will in terms deals with the properties in both the places. The nearest approach to the present case is the case of *In re Pereira*; *Worsley* v. *Society for Propagation of the Gospel* (10). But what difference can it make on principle? If it is good law that an earlier Will dealing with all the properties and distributing them in a particular manner is revoked by a later Will disposing of all the properties in a different manner, it is difficult to see how the fact that the first one comprised properties less in extent than those included in the second can make any difference. It seems to me that this is an *a fortiori* position.

For the above reasons, the answer to the question must be in the affirmative.

Reference answered in the affirmative.

V. R. P.

(8) 2 Curt. 799.

(9) (1915) 1 Ch. 673; 84 L. J. Ch. 489.

(10) (1912) 28 T. L. R. 479; 56 S. J. 614.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 23 OF 1916.

March 28, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice N. R. Chatterjea.

Raja BEJOY SINGH DUDHURIA—PLAINTIFF—APPELLANT

versus

KRISHNA BEHARI BISWAS AND ANOTHER DEFENDANTS—RESPONDENTS.

Abwab—*Regulation V of* 1812, *s.* 3, *construction of*—*Rent, meaning of.*

In a *kabuliyat* executed in the year 1883 in respect of a *patni* tenure, the rent was fixed at Rs. 3,315-4-0

BEJOY SINGH *v.* KRISHNA BEHARI BISWAS.

and in a subsequent clause it was stipulated by the tenant, "besides this I shall continue to pay in the month of *Bhadra* every year the sum of Rs. 15 as the *mamuli* for the Iswar Thakur (idol) at your house." In the details of instalments, the said sum of Rs. 15 was not included. The sum of Rs. 3,315-4-0 was referred to throughout the *kabuliyat* as the rent, and the Rs. 15 was neither described nor treated as part of the rent in any part of the *kabuliyat*:

Held, that the sum of Rs. 15 could not be recovered by the *zemindar*, as it was an *abwab* and was not intended by the parties to form part of the rent or to be payable in respect of the use and occupation of the land. [p. 566, col. 2 p. 571, col. 2.]

Per *Chatterjea, J.*—Even assuming that the sum of Rs 15 did form part of the consideration for the use and occupation of the land, it was not recoverable under Regulation V of 1812 as it did not form part of the rent, nor was it treated by the parties as part of the rent. [p. 567, col. 1.]

The concluding portion of section 3 of Regulation V of 1812 does not mean that the Court is to enforce payment of every sum which is not indefinite and which may have been specifically agreed upon between the parties, but it is only the rent, and not any other item, though neither indefinite nor arbitrary and though agreed upon to be paid in the written engagement of the tenant, which can be recovered under the Regulation. [p. 569, col. 2.]

The interpretation of section 3 of Regulation V of 1812 by the Full Bench in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri*, 17 C. 726 at p. 759; 8 Ind. Dec. (N. s.) 1026, adopted. [p. 565, col. 1; p. 569, col. 2.]

Per *Chatterjea, J.*—As regards the question whether an additional sum (claimed by the landlord) under a *kabuliyat* is or is not an *abwab* there is no difference between a *ryoti* holding and a permanent tenure. [p. 570, col. 1.]

For the purpose of deciding whether a certain sum specified in a *kabuliyat* is or is not an *abwab*, every consideration for a lease is not necessarily "rent" within the meaning of section 3 of Regulation V of 1812. [p. 571, col. 1.]

The fact that a certain item is dealt with in a *kabuliyat* in a separate clause or that it is not included in the instalments of rent specified, has an important bearing upon the question of the intention of the parties to the *kabuliyat*, as to whether the item is or is not rent. [p. 571, col. 2.]

Per *Sanderson, C. J.*—Whether a particular sum specified in a lease or agreed to be paid by the tenant is or is not an *abwab*, must depend upon the proper construction of the contract made by the tenant and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, *i. e*, if it is really part of the rent although not described as such, the landlord can recover it. [p. 566, col. 1.]

Appeal against the decree of Mr. Justice Newbould, dated the 28th January 1916, in Appeal from Appellate Decree No. 3881 of 1913.

FACTS appear from the following judgment of

NEWBOULD, J.—The plaintiff-appellant sued the defendants-respondents to recover Rs. 3,330-4-0 as arrears of *putni* rent. The defendants pleaded that Rs. 15 had been claimed in excess and that this sum was only an *abwab*. Both the lower Courts have held that this sum of Rs. 15 is quite distinct from the rent and irrecoverable.

I do not think it necessary to refer to all the cases that have been discussed in the course of argument of this appeal. The real point in issue seems to narrow down to whether this sum of Rs. 15 is part of the lawful consideration for the use and occupation of the land, that is to say, whether it is really part of the rent. The case on which the appellant chiefly relies in support of his argument is that of *Kalanand Singh* v. *Eastern Mortgage and Agency Co. Ltd.* (1), and it was there held that two sums of Rs. 5 each, described in the lease as *selami tourji* and *tehwari dasahra*, and not as rent, were in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid and that these sums could be recovered as rent. In my opinion the present case can be distinguished on the ground that on a construction of the lease the sum of Rs. 15 cannot be regarded either as a consideration for the use and occupation of the land or as part of the rent. The stipulation to pay the sum of Rs. 15 is in a separate clause which runs as follows: "Besides this, I shall continue to pay in the month of *Bhadra* of every year the sum of Rs. 15 as the *mamuli* (usual) for the Iswar Thakur at your house at Azimgunj. If I fail to pay the aforesaid sum amicably, then you shall deduct the same from the money remitted by me as the rent or include the same into the arrears of rent or realise separately by bringing suits." Although the sum may be realised as a part of the rent it is not described in the lease as payable as part of the rent. It is nowhere added to the *jama* of Rs. 3,315-4-0, which throughout the lease is spoken of as the annual rental. Even in the list of instalments which have to be paid the total

(1) 19 Ind. Cas. 701; 18 C. L. J. 83.

jama is described as Rs. 3,315-4-0 and no provision is made for payment of this sum of Rs. 15 in addition to any of the instalments. With regard to the manner in which throughout the lease this sum of Rs. 15 is treated as entirely distinct from the annual rental, it appears to me that it cannot be regarded as a part of the rent but must be regarded as an irrecoverable *abwab*.

The lease in this case was executed before the passing of the Bengal Tenancy Act and consequently, as was held in the case of *Aparna Charan Ghose* v. *Karam Ali* (2), the provisions of section 179 of that Act have no application to the present case. It was suggested in the argument that this decision is incorrect. But sitting as a Single Judge I am bound to follow the ruling of a Division Bench and cannot enter into the question of its accuracy.

On the above findings the appeal must be dismissed with costs.

Babu *Ram Chandra Majumdar*, for the Appellant.

Babus *Mohendra Nath Roy*, *Monmotha Nath Roy* and *Sasodhur Roy* (Junior), for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of Newbould, J., whereby he affirmed the judgment of the first Appellate Court.

The plaintiff's claim was for Rs. 3,330 as arrears of rent. The defendants pleaded that the rent was Rs. 3,315 per annum and that the further sum of Rs. 15 claimed by the plaintiff was in the nature of an *abwab* and was not recoverable.

It appears that in 1883 a *kabuliyat* was executed by Ram Sharan Biswas, the predecessor-in-interest of the defendants, in favour of one Roy Dhanapat Singh Bahadur, who subsequently sold the *mahal* to the plaintiff.

In this *kabuliyat* the annual rental is stated to be Rs. 3,315-4-0, but it was further provided by the document that the defendants' predecessor should pay in the month of *Bhadra* every year the sum of Rs. 15 in respect of a Thakur. The words of the clause, according to a translation which was agreed upon by the learned Vakils who argued the case, were as follows :—

"Besides this I shall continue to pay in the month of *Bhadra* of every year the sum of Rs 15 as the *mamuli* (usual) for the Iswar Thakur at your house at Azimgunj. If I fail to pay the aforesaid sum amicably, then you shall deduct the same from the money remitted by me as the rent or sue for the amount along with or separately from the arrears of rent. I shall not take objections thereto."

The clause relating to the annual rental was near to the beginning of this document, and the clause relating to the Rs. 15 was near the end of the *kabuliyat*.

A schedule setting out "details of instalments" was attached to the *kabuliyat*. Therein the total *jama* was stated to be Rs. 3,315-4-0 and neither any of the monthly instalments nor the total included the payment of Rs. 15 in respect of the Thakur.

The learned Judge held that the sum of Rs. 15 could not be regarded as part of the rent but must be regarded as an irrecoverable "abwab." From this decision the appeal has been brought.

It was argued on behalf of the appellant that the learned Judge's decision was wrong and that the Rs 15 was recoverable because the liability to pay it was created at the same time as the *putni*, and in the same document, that the agreement to pay Rs. 15 was part of the consideration for the grant of the *putni*, that the said sum was neither an arbitrary nor an indefinite cess within the meaning of section 3 of Regulation V of 1812 and that being so and the sum of Rs. 15 being part of the consideration for the *putni* it could not be an "abwab"

On the other hand, it was argued on behalf of the defendants that the sum of Rs. 15 was not part of the rent and was not money payable for the use and occupation of the land, but was a sum which was stipulated and understood by the parties as being additional to the rent and was, therefore, an *abwab*, even though the sum itself was not indefinite and though the clause relating to the payment thereof was definite.

The *kabuliyat* was executed in 1883 and it was agreed by both sides that the matter was governed by section 3 of Regulation V of 1812. The words of the section are as follows :—

(2) 4 C. L. J. 527; 10 C. W. N. 527.

BEJOY SINGH *v.* KRISHNA BEHARI BISWAS.

"Such part of Regulation VIII of 1793, and of Regulation IV of 1794 as require that the proprietors of land shall prepare forms of *pattas*, and that such forms shall be revised by the Collectors, and which declare that engagements for rent contracted in any other mode than that prescribed by the Regulations in question shall be deemed to be invalid, are likewise hereby rescinded, and the proprietors of land shall henceforward be considered competent to grant leases to their dependent *talukdars*, under-farmers and *ryots* and to receive correspondent engagements for the payment of rent from each of those classes, or any other classes of tenants, according to such form as the contracting parties may deem most convenient and most conducive to their respective interests: provided, however, that nothing herein contained shall be construed to sanction or legalise the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mathat* or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void, but the Courts shall, notwithstanding, maintain and give effect to the definite clauses of the engagements contracted between the parties, or in other words, enforce payment of such sums as may have been specifically agreed upon between them."

There is no definition of the term "abwab" in the Regulation, but for the appellants it was argued that the accurate definition of the term "abwab" was that which was approved by O'Kinealy, J., in his judgment in *Radha Prosad Singh* v. *Bal Kowar Koeri* (3) as follows: —

"The term is particularly used to distinguish the taxes imposed subsequently to the establishment of the *asul*, or original standard rent, in the nature of addition thereto. In many places they had been consolidated with the *asul*, and a new standard assumed as the basis of succeeding impositions."

That being the meaning of the word, it was urged that it would not be applicable to the payment of Rs. 15 in this case, for it was agreed between the parties at the time the original rent was agreed, and in the very document by which the rent was reserved: and that inasmuch as the sum in question is neither arbitrary nor indefinite, and was part of the consideration for the *putni*, it can be recovered even though it cannot strictly be said to be part of the "rent" agreed upon

To this argument the respondents reply that unless it was part of the "rent" or understood and agreed by the parties to be part of the "rent" properly so called it cannot be recovered, and they rely principally upon two cases—1*st*, a Full Bench decision in *Chultan Mahton* v. *Tilukdari Singh* (4) and a decision of the Judicial Committee of the Privy Council in the same case reported as *Tilukdari Singh* v. *Chultan Mahton* (5) and 2*nd*, *Radha Prosad Singh* v *Bal Kowar Koeri* (3).

In my judgment the actual decisions in these cases do not cover this case, though expressions of opinion in some of the judgments of the learned Judges in this Court are certainly material.

In the case of *Chultan Mahton* v *Tilukdari Singh* (4), the items in dispute were claimed as "abwabs" and the Judicial Committee's decision was that the High Court was right in holding them to be "abwabs" and that if they were payable at the time of the Permanent Settlement, they ought to have been consolidated with the rent under section 54 of Regulation VIII of 1793 and not being so consolidated they could not be recovered: and if they were not payable at the time of the Permanent Settlement, they would come under the description of new "abwabs" in section 55 and so would be illegal.

There was no written agreement, as in this case, providing for the payment of a definite sum, made at the same time as the agreement for rent, and the Judicial Committee did not decide the point now before us.

In the Full Bench case reported as *Radha Prosad Singh* v. *Bal Kowar Koeri* (3), the reference was :—

"Whether the portions of the claim that are

(3) 17 C. 726 at p 759; 8 Ind. Dec. (N. S.) 1026.

(4) 11 C. 175; 5 Ind. Dec. (N. S) 876.

(5) 17 C. 131; 16 I. A. 152; 13 Ind. Jur. 251; 5 Sar. P. C. J. 408; 8 Ind. Dec. (N. S.) 625 (P. C.).

objected to as coming under the denomination *sarak neg* and *khuruch* are illegal cesses, or whether they are recoverable as rent by reason of their having been paid for a long time along with the rent and without any specification in the rent receipts?" and the Court held that the amounts sued for under the head of *sarak neg* and *khuruch* were *abwabs* and not recoverable.

The point now before us was not involved in this decision.

In this case, however, the judgments were of an elaborate nature and entered upon a consideration of the subject of the recovery of *abwabs*, much of which was not necessary for the decision as was pointed out by O'Kinealy, J. at page 742.

The opinions of these learned Judges, however, even though not strictly necessary for the decision of the case, must carry great weight and the majority seem to have come to the conclusion that the last four lines of section 3 of Regulation V of 1812 referred to the ground-rent of the Permanent Settlement, confirming in this respect Mitter, J.'s opinion in *Chulton Mahton* v. *Tilukdari Singh* (4), where he said: "This provision...refers only to the amount which is by the contract fixed as the rent payable to the landlord."

This is the view as to the construction of the section which seems to have been acted upon in this Court since 1885 and whatever one's own views might have been if the matter were free from judicial opinion, I do not think it would be right for us sitting in a Division Bench of this Court to depart from a construction which has been adopted for so many years.

In *Radha Prosad Singh* v. *Bal Kowar Koeri* (3) Petheram, C. J., however, went further and expressed the opinion as follows at page 739:—

"By this judgment I understand the Privy Council, while affirming that of the High Court, to go beyond it and to hold that under the Regulations nothing could be recovered for the occupation of land, except one sum which must include everything which was payable for such occupation arrived at either by agreement or by some judicial determination between the parties, and that any contract, whether express or implied, to pay anything beyond that sum under any name whatever, for or in respect of the occupation of the land, could not be enforced", and he emphasizes the point by declaring at page 740 that the judgment of the Privy Council "decided that nothing can be recovered from the tenant except the one sum fixed as the rent of the land."

On the other hand Ghose, J., at page 767, interpreted the decision of the Privy Council as follows:—

"I do not understand that they intended to go any way beyond what Mr. Justice Mitter said in his judgment, and to lay down, as it is said they did lay down, that nothing, save and except *one* sum, including every item of payment could be recovered as payable for the occupation of land; and that an agreement to pay anything beyond that sum, although it might be a lawful consideration for the lease, could not be enforced.

"It appears to me that if in any given case the Court finds that any particular sum specified in the lease or agreed to be paid is a lawful consideration for the use and occupation of any land, that is to say, if it is really part of the rent, although not described as such, it would be justified in holding that it is not *abwab*, and is recoverable by the landlord."

It is to be noticed that the interpretation placed upon the Privy Council's judgment by Petheram, C. J., has not been followed in this Court, as, for instance. *Kalanand Singh* v. *Eastern Mortgage and Agency Co., Ld.* (1). In that case it was agreed that the lessee should pay a fixed sum of Rs. 4,3 0, of which Rs. 4,300 was described as *jama*, Rs. 5 as *selami towji* and Rs. 5 as *tehwari dasahra*.

It is to be noticed that the sum fixed for rent was Rs. 4,300 and the other two sums could not be called rent in the strict sense, yet it was held that they could be recovered on the ground that the payment of the specific sums was provided for and agreed upon in the lease creating the tenancy and that the stipulation for such payment was not a stipulation or reservation for the payment of arbitrary or indefinite cesses but were, in the language of the section 3 of Regulation V of 1812, "a definite clause in the engagement contracted between the parties which should be maintained and given effect

to: and that in fact the two sums then in question, though not described in the lease as rent, were in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid." See the judgment in that case at page 85*.

There are other cases in which the interpretation given by Petheram, C. J., to the decision of the Privy Council in *Radha Prosad Singh* v. *Bal Kowar Koeri* (3) has not been followed, *e.g.*, *Assanulla Khan Bahadur* v. *Tirthabashini* (6), *Mathura Prasad* v. *Tota Singh* (7) and *Upendra Lal* v. *Ataulla* (8). In the first of these cases it was argued by the Vakil for the respondents that the mere fact of the amount claimed on account of *chowkidari* tax not being consolidated with what was called the *patni* rent but being kept separate, was enough to render it an *abwab* and, therefore, not recoverable and *Tilukhdari Singh* v. *Chultan Mahton* (5) and *Radha Prosad Singh* v. *Bal Kowar Koeri* (3) were cited as authorities for the proposition. The learned Judges, however, though they said that there were passages in some of the judgments delivered in these cases which, taken alone, might appear to lend support to the respondents' contention, did not adopt the argument.

It seems, therefore, that the rule which has been followed in this Court is that each case must depend upon the proper construction of the contract before the Court and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, *i. e.*, if it is really part of the rent although not described as such, the landlord can recover it, and I apply this rule to the present case. It is necessary, therefore, to consider the nature of the payment which is in question.

It is a yearly payment for the Iswar Thakur at the lessor's house at Azimgunj, and the nature of it is shown by the fact that the plaintiff who is the assignee of the lessor has nothing to do with the Thakur at Azimgunj and does not maintain it in any way.

Further, the clause relating to the payment of the sum of Rs. 15 and to its recovery is couched in terms which led me to think that this payment cannot have been intended by the parties to be part of the rent or to be payable in respect of the use and occupation of the land: in addition to this there is the absence of any reference to this sum in the details of the instalments at the end of the document, and on the true construction of the terms of the lease I have come to the conclusion that this sum of Rs. 15 was not intended by the parties to be part of the consideration for the use and occupation of the land or as part of the rent and, therefore, is not recoverable. Consequently, in my judgment, this appeal should be dismissed with costs.

CHATTERJEA, J.—The question involved in this appeal is whether a sum of Rs. 15, which was agreed upon to be paid by a permanent tenure-holder under a *kabuliyat* as the "*mamuli* for the Iswar Thakur at the house" of the *zemindar* is or is not an *abwab*. The *kabuliyat* was in respect of a *patni* tenure and was executed in the year 1882. The rent of the *patni* was fixed at Rs. 3,315-4-0. In a subsequent clause it was stipulated—"Besides this, I shall continue to pay in the month of *Bhadra* of every year the sum of Rs. 15 as the *mamuli* for the Iswar Thakur at your house at Azimgunj. In the details of instalment the total rent stated to be Rs. 3,315-4-0, which was distributed into twelve monthly instalments specified in the lease and did not include the said sum of Rs. 15 which was made payable only once, in the month of *Bhadra* every year. The sum of Rs. 3,315-4-0 is referred to throughout the *kabuliyat* as the rent, and the Rs. 15, as already stated, was neither described nor treated as part of the rent in any part of the *kabuliyat*. Then it was provided that if the *patnidar* failed to pay the said sum of Rs. 15 amicably, the *zemindar* would be entitled to deduct the said amount from the money which might be remitted by the *patnidar* as the rent, or realise the amount along with the arrears of rent, or separately, by instituting suits, thus clearly distinguishing the said sum of Rs. 15 from the rent. These provisions would have been wholly unnecessary, had the sum of Rs. 15 been part of the rent. There is no doubt, therefore, that the sum of Rs. 15 did not form part of the rent, nor was it treated as part of the rent.

(6) 22 C. 680 at p. 688; 11 Ind. Dec. (N. S.) 453.
(7) 17 Ind. Cas. 177; 16 C. L. J. 296; 40 C. 806.
(8) 36 Ind. Cas. 404; 21 C. W. N. 108.

*Page of 18 C. L. J.—*Ed.*

It is contended on behalf of the appellant that the said sum of Rs. 15 formed part of the consideration for the *patni* lease and is, therefore, recoverable. But in the first place, I do not think the said sum is part of the consideration for the *patni*. The sum was agreed to be paid as the customary present to the deity at the house of the then *zemindar*, Dhanpat Singh. The plaintiff is an assignee of Dhanpat and he has nothing to do with the Thakur at Azimgunj which is maintained by the sons of Dhanpat, the original lessor. The "*mamuli* for the Iswar Thakur," I think, cannot be claimed by the plaintiff, as it was not money payable on account of the use and occupation of the land. In the next place, even assuming that it did form part of the consideration for the use and occupation of the land, I am of opinion that it cannot be recovered as it did not form part of the rent.

It is contended on behalf of the appellant that if a specific sum which is neither uncertain nor indefinite is agreed upon to be paid in the lease creating the tenancy as part of the consideration for the use and occupation of the land, the stipulation to pay such a sum is not void and must be given effect to, and reliance is placed on the provisions of section 3 of Regulation V of 1812 (which is the law applicable to the present case) and certain decisions of this Court. Now section 3 of that Regulation runs as follows: "Such part of Regulation VIII of 1793, and of Regulation IV of 1794, as require that the proprietors of land shall prepare forms of *pattas*, and that such forms shall be revised by the Collectors and which declare that engagements for rent contracted in any other mode than that prescribed by the Regulations in question shall be deemed to be invalid, are likewise hereby rescinded; and the proprietors of land shall henceforward be considered competent to grant leases to their dependent *talukdars*, underfarmers and *ryots* and to receive corresponding *engagements for the payment of rent* from each of those classes, or any other classes of tenants, according to such form as the contracting parties may deem most convenient and most conducive to their respective interests; provided, however, that nothing herein contained shall be construed to sanction or legalise the imposition of arbitrary or indefinite cesses, whether under the denomination of 'abwab' or 'mathat' or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void; but the Court shall notwithstanding maintain and give effect to the definite clauses of the *engagements contracted* between the parties, or in other words, enforce payment of such sums as may have been specifically agreed upon between them." It will be seen that the section clearly prohibits the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mahtut* or *any other denomination*. It is true that the concluding portion of the section says: "The Court shall notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties or, in other words, enforce payment of such sums as may have been specifically agreed upon between them." But I think that does not mean that the Court is to enforce payment of every sum which is not indefinite and which may have been specifically agreed upon between the parties. If that is the meaning of the section, a stipulation to pay a fixed sum (in addition to the rent) expressly described as *abwab* or *mahtut*, if specifically agreed upon in the contract creating the tenancy, must be enforced. It may be said that an *abwab* or *mahtut* is an arbitrary cess and is expressly prohibited by the section, and, therefore, cannot be recovered even if specifically agreed upon. But the section prohibits the imposition of cesses not only under the denominations of *abwab* or *mahtut*, but of any arbitrary or indefinite cess under any other denomination.

The concluding portion of section 3 of Regulation V of 1812 came up for consideration before the Full Bench in the case of *Chultan Mahton* v. *Tilukdari Singh* (4) and Mitter, J., (Tottenham and Pigot, JJ., concurring with him) referring to the last four lines of the section observed at page 184 of the report:—"This provision, it seems to me, refers only to the amount which is by the contract fixed as the rent payable to the landlord. The section in question provides mainly that the proprietors of land shall thenceforth be competent to grant leases to *ryots*, etc., and to receive corresponding engagements *for the payment of rent from them*,

Having regard to the words of the section in question italicised, I think the words 'sum specified' refer to the amount of the rent specified." It is true the question referred to the Full Bench was whether certain items over and above the rent described in the *zemindari* papers and in the plaint as *abwabs* were legally recoverable. One of the arguments, however, before the Court was that as there was a *contract* between the parties for the payment of the sums claimed in that case, under the latter portion of section 3 of Regulation V of 1812, the plaintiffs were entitled to recover them. So that the construction of that section came up for consideration before the Full Bench. On appeal the Judicial Committee, no doubt, affirmed the decision in that case upon a consideration of the provisions of sections 54 and 55 of Regulation VIII of 1793, and held that if the *abwabs* claimed existed at the time of the Permanent Settlement, they ought to have been consolidated with the rent under section 54 of that Regulation, and if they were not payable at that time they would come under the descriptions of new *abwabs* under section 55, and, therefore, could not be recovered. But their Lordships did not disapprove of the view taken by the Full Bench as to the construction to be placed on section 3 of Regulation V of 1812.

A similar view was taken by the Full Bench in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (3). The question in that case was whether certain cesses under the denomination of *sarak neg* and *khuruch*, which had been paid for a long time along with the rent and without specification in the rent receipts, were recoverable. They were not agreed upon to be paid by any written engagement at the creation of the tenancy or as part of the rent, and appear to have been subsequent impositions. But the correctness of the decision in *Pudmanund Singh* v. *Baij Nath Singh* (9) having been questioned in the order of reference the provisions of section 3 of the Regulation V of 1812 were considered by the Full Bench in dealing with the question of *abwabs*, and the opinion of the learned Judges is certainly entitled to great weight. O'Kinealy, J., (Prinsep and Pigot, JJ., agreeing with him) observed at page 752: "By section 2 of the Regulation AVIII of 1812, the proprietors were empowered to grant leases of any form for *rent*, and by section 3 of Regulation V of 1812 they were empowered to receive from the tenants 'corresponding engagements for the payment of rent' and it only. No further power was given. And as if to mark the distinction between cesses and rent, the former are referred to as paid under stipulations or reservations, the latter under engagements, and it was the engagements for the payment of rent, and not the stipulations for cesses, that were to be enforced. It was not the intention of the framers of this Regulation to allow the parties to contract for anything in money or in kind not then known as rent, and when they described *abwabs* and *mahtuts* as arbitrary or indefinite they were only using words applied to these assessments from 1772. Bearing this in mind, a comparison of the latter portion of this section with sections 54 and 57 of Regulation VIII of 1793 shows that the words 'specifically agreed' in Regulation V of 1812 are the same as 'specifically stated' in section 57, and refer to the one specific sum of section 54 in the Permanent Settlement. They have no reference to cesses. This is the view taken by the Full Bench in *Chultan Mahton's* case (4), where it is said that the last four lines of section 3 of Regulation V of 1812 refer to the ground rent in the Permanent Settlement."

We have been referred to certain observations of Banerjee, J, in the case of *Assanulla Khan Bahadur* v. *Thirthabashini* (6) in support of the appellant's contention. The amount objected to in that case was *chowkidari* cess, which the *patni ar* agreed to pay to the *zemindar*. The agreement to pay *chowkidari* tax by a *patnidar*, as pointed out in that case, could not possibly be considered as a stipulation to pay an arbitrary or indefinite cess in the nature of an *abwab* within the meaning of section 3 of the Regulation. It is true Banerjee, J., [in referring to the fact that the majority of the learned Judges in the Full Bench case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (3) took the same view of Regulation V of 1812 as was taken by the Full Bench in *Chultan Mahton's* case(4)] observed that "the majority of the Full Bench in the former case based

(9) 15 C. 828; 7 Ind. Dec. (N. S.) 1135.

their conclusion that *Pudmanund's* case (9) was wrongly decided, not upon the ground that the items there claimed.....were kept separate from the amount styled the rent, and were, therefore, not recoverable; but upon the ground that they were from their very nature no part of the ground-rent, the items being *selami* and *tehwari*." But that involves a distinction between rent and cesses; and Banerjee, J., himself in the case of *Sree Kanta Pershad* v. *Irshad Ali Sarkar* (10) disallowed the "price of presents and unpaid labour" in addition to the rent stipulated for in the *kabuliyat*, on the ground (among others) that they were dealt with separately from the actual rent in the *kabuliyat*.

The construction of section 3 of Regulation V of 1812 now put forward on behalf of the appellant was distinctly set up in the case of *Pudmanund Singh* v. *Baij Nath Singh* (9). That was also a case of a permanent tenure and the tenant agreed to pay a certain fixed sum as rent and also certain other items designated *selami* and *tehwari* in the contract creating the tenancy. Tottenham and Ghose, JJ., held "that they were not illegal cesses within the Full Bench ruling of *Chultan Mahton* v. *Tilukdari Singh* (4), not being uncertain and arbitrary in their character, but specific sums which the tenants agreed to pay to the landlords and the payment of which, no less than the payment of rent itself, formed part of the consideration upon which the tenancy was created, and which were in fact part of the rent agreed to be paid, although not so described; they were recoverable, therefore, under Regulation V of 18 2." In the Full Bench case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (3), however, Ghose, J., although he repeated the same observations, said at page 763 with reference to the opinion expressed in *Pudmanund's* case (9) as follows: "And I may here observe that it was not intended thereby to hold that anything that is not arbitrary and indefinite is recoverable, although it may not be part of the rent. In that case, both the elements were supposed to be present, *viz.*, that the items in question were not of an arbitrary or indefinite character; and *secondly*, they formed part of the rent agreed to be paid. I am, however bound to say that having since more carefully considered the subject, I have come to the opinion that we were not right in holding that the items of *tehwari* and *selami* were part of the rent stipulated to be paid under the lease. They were, I now think, *abwabs*." So that according to the opinion of Judges in the two Full Bench cases (including Ghose, J., himself) it is only the rent, and not any other item though neither indefinite nor arbitrary and though agreed upon to be paid in the written engagement, which can be recovered under the Regulation and the contrary view taken in *Pudmanund's* case (9) was dissented from.

The question, therefore, is what is the rent which is recoverable under the Regulations. Is it the single item which may be called the rent proper, or does it include any other item which is consolidated with it, and agreed upon by the parties as the rent. In *Radha Prosad's* case (3), Petheram, C. J., was of opinion that the Judicial Committee in *Tilukhdari Singh* v. *Chulhan Mahton* (5) while affirming the judgment of the High Court went beyond it, and held that "under the Regulations nothing could be recovered except one sum, which must include everything which was payable for such occupation arrived at either by agreement or by some judicial determination between the parties, and that any contract to pay anything beyond that sum under any name whatever for or in respect of the occupation of the land could not be enforced." O'Kinealy, J., also (as stated above) observed with the concurrence of two other Judges that it is only one specific sum being the "ground rent" of the Permanent Settlement which can be recovered. The view, however, that nothing beyond "one sum" can be recovered has not been followed in the subsequent cases, unless the expression "one sum" was meant to include a consolidated sum agreed upon as "the rent" though consisting of more items than one. In all the subsequent cases the only distinction which has been drawn is that between the sum agreed upon as the rent (*i.e.*, the amount which is fixed by the contract as the rent) and sums not so agreed upon, and the decisions proceed upon the view that more items than one may constitute the rent, if it appears from the lease that more items than one have been treated by the parties as part of and included

(10) 17 Ind. Cas. 173; 16 C. L. J. 225.

in the 'rent' and described as such in the lease. It is unnecessary to go into all these cases in detail. Where a lease provides for payment of a fixed sum as rent and also provides for the payment of certain other fixed sums *apart from the rent* (for instance as the price of certain articles), such amount has been held to be an *abwab* though stipulated to be paid by the written contract creating the tenancy and though the amount payable is not indefinite; and in determining whether such item did or did not form part of the rent, the fact that it has been stipulated to be paid separately from the rent, and also the fact that it is not included in the instalments of the rent, have been considered as having a material bearing on the question. For instance, in the case of *Radha Charan Ray Chowdhry* v. *Golak Chandra Ghose* (11), a fixed amount mentioned in the lease as payable annually for collection charges, which together with the rent was described as the *jama* and which was included in the *kistbandi*, the total being referred to as the rent, was held not to be an *abwab*. On the other hand a certain sum stipulated to be paid for Iswar *puja* [*Norendra Kumar Ghose* v. *Gora Chand Poddar* (12)], or as holi *selami* [*Bipin Behary Mitter* v. *Sarat Chandra Sirkar* (13)], or as the "price of presents and unpaid labour" [*Sree Kanta Pershad* v. *Irshad Ali Sarkar* (10)] or as price of husk [*Mathura Prasad* v. *Tota Singh* (7) and *Kalar Singh* v. *Mathura Prosad* (14)], where the sum was treated in the *kabuliyat* separately from the rent or was not included in the *kistbandi*, was held to be an *abwab*. In all these cases, there was a written engagement at the creation of the tenancy, and there was express stipulation to pay a specific sum of money which was not uncertain or indefinite, and yet it was held that the sum did not form part of the rent but was an *abwab* and could not be recovered. Some of these cases relate to *raiyati* holdings and not to permanent tenures. But so far as the question whether the additional sum claimed under the *kabuliyat* was or was not an *abwab*, is concerned, there is no difference between a *raiyati* holding and a permanent tenure.

(11) 31 C. 834; 8 C. W. N. 529.
(12) 33 C. 683; 3 C. L. J. 391.
(13) 7 Ind. Cas. 760; 13 C. L. J. 148.
(14) 25 Ind. Cas. 547; 19 C. L. J. 402.

The latest cases on the point are *Kalanand Singh* v. *Eastern Mortgage and Agency Co., Ltd.* (1) and *Upendra Lal* v. *Ataulla* (8). In the first case a permanent tenure was created by a lease dated 31st January 1874, and in the lease it was specifically provided that the lessee should pay to the lessor year by year a fixed sum of Rs. 4,310, of which the sum of Rs. 4,300 was described as *jama* and Rs. 10 as *selami* and *tehwari*. Chitty and Teunon, JJ., held that they were not *abwabs* as they were specific sums provided and agreed upon in the lease creating the tenancy, and such stipulation was not for the payment of arbitrary or indefinite cesses, but in the language of section 3 of Regulation V of 1812 is "a definite clause in the engagement contracted between the parties" which should be "maintained and given effect to." The learned Judges were of opinion that the two sums in question, though not described in the lease as rent, were in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid. In *Upendra Lal* v. *Ataulla* (8) a sum of Rs. 3-1 0 described as enhanced rent for collection charges together with the rent proper was fixed as the total rent, the details of the *kistbandi* dealt with the whole amount including the said sum of Rs. 3-1-0, and the total amount was throughout referred to as the rent. It was under these circumstances that the amount was held to be part of the rent and not an *abwab*, in accordance with the view taken in the previous decisions on the point since *Radha Prosad's* case (3). The case of *Kalan nd Singh* v. *Eastern Mortgage and Agency Co., Ltd.* (1) was referred to in the judgment (to which I was a party) as the learned Judges in that case had held, upon a construction of the *kabuliyat* (the terms of which were not fully set out in the report), that the two items were *part of the rent* agreed upon to be paid. If, however, the learned Judges took the same view as had been taken by Tottenham and Ghose, JJ, in *Pudmanund's* case (9) (in which the very same items *selami* and *tehwari* were in dispute), it is opposed to the view taken not only by the majority of the Full Bench (and in a manner by Ghose, J., himself as stated above) in *Radha*

Prasad's case (3) and in *Chultan Mahton's* case (4) but in all the cases decided subsequently.

The actual decision in *Upendra Lal's* case (8) proceeded upon the ground that the sum objected to was part of the rent. The expression "consideration for the lease" used in the judgment was qualified by the words "and part of the rent," and these words were repeated more than once in our judgment. It was not meant that any consideration for the lease mentioned in the *kabuliyat* creating the tenancy is rent and not an *abwab*. Any sum agreed upon to be paid as "rent" is consideration for a lease, but for the purpose of deciding the present question every consideration for a lease is not necessarily 'rent' within the meaning of section 3 of the Regulation, and anything which is prohibited by Statute cannot be said to be lawfully payable. In fact the distinction between what upon a construction of a lease is rent and a sum not treated nor described as rent but which may have been agreed upon to be paid by the *kabuliyat* was recognised in that judgment, as the references to the several cases cited show [though the fact that such a distinction was not observed by Garth, C. J., in *Mahomed Fayez Chowdhry* v. *Jamoo Gazee* (15) was overlooked in citing that case], and the judgment was in fact founded upon the distinction, though not clearly expressed. The observation that since the Full Bench decision, the question has been treated as one of construction, "although more items than one are described as constituting the rent," was made with reference to the view taken by some of the Judges in *Radha Prosad's* case (3) that only one sum is rent and the rest are *abwabs*. What was meant to be said was that if the item other than the rent proper is consolidated with it and appears from a construction of the lease to have been included in and treated as part of the rent, so that the two items constitute the 'rent' agreed upon at the creation of the tenancy, then the mere fact that there are two items would not make the item other than the rent proper an *abwab*.

It is contended that the mere fact that a certain item is dealt with in the *kabuliyat* in a separate clause or that it is not included in the instalments of rent ought not to make any difference in determining whether the item is or is not rent. But those facts have an important bearing upon the question of intention of the parties to the contract. They show whether the parties intended to treat a particular item as part of the rent agreed upon to be paid or as something different from the rent, and those facts have accordingly been taken into consideration in all the cases decided since the Full Bench.

The question whether a particular item is or is not rent, no doubt depends upon the construction of the lease in each case. But once it is held that a particular item has not been agreed upon by the parties as the "rent" nor described in the lease as such, the further question whether such sum, although it may form part of the consideration mentioned in the contract, is recoverable or not must depend upon the law as laid down in the Regulations and Acts on the point. So far as the construction of the lease in the present case is concerned, the sum of Rs. 15 as Thakurbari *mamuli* is not, for the reasons already stated, part of the rent. The sum, therefore, cannot be recovered, having regard to the provisions of Regulation V of 1812, and the cases decided on the point. I, accordingly, agree in dismissing the appeal.

Appeal dismissed.

(15) 8 C. 730; 4 Ind. Dec. (N. S.) 471.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL NO. 11 OF 1916.

September 19, 1916.

Present.—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

RADHIBAI WIFE OF VASANMAL—APPELLANT

versus

DR. VASANMAL *alias* MAHOMED YACOOB RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 7, 17, 19 (b)—Natural guardian, legal rights of—Court, power of, to interfere with legal rights of natural guardian—Conversion of father to Islam—Right to continue guardian after conversion—Minors, welfare of

Both in equity and under the Guardians and Wards Act, a Court has power to interfere with the legal rights of guardianship of the parents. The

welfare of the children should primarily be considered. [p. 573, col. 2; p. 574, col. 1.]

Where a Hindu mother applied for the appointment of a guardian of the person and property of her minor children owing to their father having embraced Islam:

Held, that the Court could not reject the application on merely legal grounds as showing no unfitness in the father under section 19 (*b*) of the Guardians and Wards Act to be the guardian of his children, but should ascertain what would be for the welfare of the minors, whether any of them were sufficiently advanced to make an intelligent preference for one mode of life or the other, to what rules of life had the children hitherto been subjected, what means were at the disposal of each parent to provide for them in future, and whether under the altered circumstances arising from his conversion the father would be able to provide a fit home for his children. If the father should not be able or prepared to provide such a home, he should be held not to be fit to be the guardian of his children within the meaning of section 19 (*b*) of the Guardians and Wards Act. [p. 574, col 1]

Per *Crouch, A. J. C.*—English decisions in which the conflict has been between the Protestant and Roman Catholic religions cannot be considered to have any authority in India when dealing with a conflict between Islam and Hinduism The provisions of the Guardians and Wards Act are in no way limited by the English practice. [p. 576, col. 1.]

Change of religion by itself does not necessarily render a father unfit to be the guardian of his children. [p. 575, col. 2.]

Sections 17 and 19 of the Guardians and Wards Act must be read together. [p 576, col 1.]

Quære.—Whether the general rule that a child should follow the religion of his father could apply without qualification to a case where the religion has been newly adopted by the father and is not that in which the child was born or reared.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *T. G. Elphinstone*, for the Respondent.

JUDGMENT.

HAYWARD, J. C.—This is an appeal against the decision of the acting District Judge, Hyderabad, refusing the appellant's application for guardianship of her six children in place of the respondent father, who has recently become a converted Mahomedan.

The appellant mother, who is a Hindu Amil, based her application on three grounds, *viz.*, (1) that the respondent father had become a convert to Mahomedanism; (2) that the six children, who were a boy of 14 years of age, a girl of 12 years of age, a boy of nearly 11, a little girl of six years of age, and 2 boys aged three years and nine months respectively, require the care of their mother who, still being a Hindu, could not be expected to live any longer with the father who has become a Mahomedan, and (3) that the respondent father had to be frequently absent from Hyderabad as he was a Sub-Assistant Surgeon in the employ of Government. The appellant mother filed, at the same time, subsidiary applications for the production and *ad interim* custody of the children and for an *ad interim* injunction against the marriage of the girls. The appellant mother did not take the necessary steps to get notices issued on her main application, but had notices issued on her subsidiary applications The respondent father thereupon filed an affidavit against the subsidiary applications, and his Counsel appeared and argued that they ought not to be granted in view of the fact that the main application could not be legally supported on the grounds mentioned in that application. No evidence was recorded, but the legal aspect of the case would appear to have been fully argued, and the main application as well as the subsidiary applications were rejected by the District Court.

It has been contended here by the appellant that she was taken by surprise and had no real opportunity of adducing the evidence which she intended upon the main application, and that the hearing ought to have been adjourned until formal notices had been served and the main application was regularly before the Court. This contention appears to me not to be altogether unfounded so far as it relates to the omission to record evidence. The parties do not appear to have had notice that evidence would be recorded on that particular day and appear to have argued the case solely upon its legal aspect. It has been contended here and not denied that there was no demand at the hearing for the record of evidence beyond some vague suggestions, which were indignantly denied at the time and not pressed, as to the general immorality of the respondent father. Some affidavits in support of these suggestions appear to have been offered to the effect that the respondent father was believed to have married a Mahomedan wife at Aden, who had followed him to,

Hyderabad. But no attention appears to have been paid to those affidavits, as they purported to open up an entirely new ground which had not been mentioned in the main application. Subsequently, after the hearing had been completed, a formal plea appears to have been filed demanding an opportunity to produce evidence to show that as regards the 2 girls and the 2 infant boys the respondent father was not fit to be their guardian since his conversion to Mahomedanism. That application has since been developed here into a somewhat more definite charge of immorality, but expressed in the extraordinary form that though the respondent father was acquitted of having run away with a Mahomedan woman at Aden, there was a Mahomedan woman in whom he was interested living in some remote quarter of Hyderabad. It appears to me that what really happened was this, that neither side was prepared at the hearing to go into evidence on the merits of the main application but that they agreed to consider that application on the question of law. Subsequently the applicant, anticipating defeat on these questions of law, attempted to retrieve the situation by extending the legal grounds of the application so as to cover a charge of general immorality of the respondent father. It seems to me that the attempt ought not to be countenanced here, particularly looking to the manner in which it has been sought to support it, *viz.*, by the altogether improper reference to the acquittal of the respondent father of having run off with a Mahomedan woman in Aden, and the veiled suggestion that the acquittal was wrong and that he was still interested in the same Mahomedan woman now living, not in his own house, but in an entirely different quarter of Hyderabad. It seems to me for these reasons that the application made to us to amend the grounds of the main application must be rejected and that the appellant ought, in any further proceedings which may be necessary to be limited strictly to the grounds as originally laid in the District Court.

It has been contended on behalf of the appellant, on intimation of this view having been given, that her main application ought to have been granted on the merits as laid. It has been contended that the children have all along been brought up as Hindus by their Hindu mother in accordance with the religion or in other words the rules of life of their ancestors, who were also Hindus; that their preference, at all events the preference of the elder children, ought to have been ascertained and considered; that it ought to have been decided that it was not for their welfare that their rules of life should undergo the violent change involved in the conversion of the respondent father to Mahomedanism and that the respondent father had lost any rights of guardianship he previously had and had become unfit any longer to be their guardian owing to his conversion to Mahomedanism. It has been argued that he lost those rights of guardianship according to Hindu Law, and that loss would not be saved by the provisions of Act XXI of 1850. But even assuming that those rights of guardianship would, in the circumstances, have been forfeited under the Hindu Law, still the authorities are against the view that they would not be saved by the provisions of Act XXI of 1850. Reference should be made to the case of *Kaulesra* v. *Jorai Kasaundhan* (1). It has, however, also been argued that in any case we have jurisdiction to interfere in equity in proper cases with the rights of guardianship vested in the father. It seems to me that the authorities support that view and lay down the general rule that it is the welfare of the children which should be primarily considered, and what that is must be decided by a consideration of the circumstances in the case and not merely of the rights of guardianship vested in the father. Reference should be made to the case of *Pollard* v. *Rouse* (2), where a number of leading decisions have been cited and paragraph 214 of Mayne's Hindu Law, 8th edition. Moreover, the rule that it is the welfare of the children which has primarily to be considered has been expressly laid down in section 17 of the Guardians and Wards Act, VIII of 1890. And it has been further laid down that the welfare of the children must be decided by considering such circumstances as age, sex, religion and

(1) 28 A. 233; A. W. N. (1905) 205; 2 A. L. J. 663.
(2) 6 Ind. Cas. 754; 33 M. 288 at p. 292; (1910) M. W. N. 187; 8 M. L. T. 97.

intelligent preference of the children and the rules of law to which they have been subjected in section 17 of the Act, though it has also been provided that the father should not be deprived of his guardianship unless found to be unfit for that office in the opinion of the Court by section 19 (*b*) of the Act.

So that it seems to me clear that what we have to consider is the welfare of the children and not the prejudices of the parents. But it also seems to me that there are not sufficient materials before us to come to any clear conclusion on this very important matter. It would, in my opinion, be necessary before deciding that matter that the children should be produced and examined in order to ascertain whether any of them are sufficiently advanced to express an intelligent preference for the one mode of life or the other. The parents ought also to be examined in order to ascertain the rules of life to which the children have hitherto been subjected and the means at the disposal of either for making adequate provision for them in the future and the nature of the provision proposed to be made for the children under the new circumstances arising from the conversion of the respondent father. The parties ought to be given an opportunity to produce evidence bearing directly on these questions, which might briefly be said to be comprised in the one general question whether the respondent father will be able to provide a fit home for his children in the altered circumstances arising from his conversion to Mahomedanism. If the respondent father should not be able or prepared to provide such a home, then it seems to me that he should be held not to be fit to be the guardian of the children in the opinion of the Court within the meaning of section 19 (*b*) of the Guardians and Wards Act of 1890. All evidence fairly bearing on these questions ought to be received and considered, but it is not my intention to suggest that any evidence should be allowed which would in effect be a repetition of the vague attacks upon the general character of the respondent father contained in the application for amendment, which for reasons already stated ought, in my opinion, to be rejected by this Court. The result is that, in my opinion, the order of the District Judge must be set aside as having been passed without due enquiry upon the real question to be decided, namely, the welfare of the children but with reference merely to the legal rights of guardianship vested in the father respondent owing to the particular course which the proceedings happened to take in the District Court. The application must, therefore, be re-heard and decided on the merits in the light of the remarks now made under Order XLI, rule 23, Civil Procedure Code. It must also be remembered that the application included a demand for the appointment of a guardian of the property of the children. No specific order has as yet been passed on that part of the application. That ought also to be considered and disposed of by the learned District Judge when dealing with this matter again under Order XLI, rule 23, Civil Procedure Code.

CROUCH, A. J. C.—This is an appeal against an order purporting to have been passed under section 19 (*b*) of the Guardians and Wards Act dismissing the application of one Radhibai to be appointed guardian of the person and property of her minor children. Both parents were born Hindus belonging to a caste of Hyderabadi Amils. Recently, the husband Vasanmal declared himself a Mahomedan and he now styles himself Mahomed Yakub.

In her application, Radhibai alleged that all the children were, upto the early part of August last, living with her in the family house at Hyderabad; that they were forcibly taken away by their father and lodged with some Sheikhs. The grounds of application were that (1) the father had embraced Islam; (2) that he was a Government servant and called upon to frequently shift his residence and (3) the younger children required a mother's care.

The order of the Court on this application was "notice to issue." But it is stated that, as a matter of fact, no notice of this main application was issued either to the respondent Vasanmal or to the several relations whose names were detailed in the

application. This application was filed on 12th August last.

On the same day, two other applications were filed by Radhibai under section 12 of the Guardians and Wards Act, praying that the father and the Sheikhs alleged to have custody of the children might be orderd to produce them. The Sheikhs, who live in Hyderabad, were ordered to produce the children on the 14th. They evaded service and search warrants were issued. None of the children were, however, found and this Court has not been able to ascertain where the four children have been since August last.

Vasanmal was ordered to produce all six children on the 19th August, and meanwhile he was prohibited from taking any steps towards the marriage of any of the minors and from disposing in any way of any of the family property.

At the hearing of the application under section 12 on the 19th August, Mr. Elphinston, for the respondent, contended that, in view of section 19 of the Guardians and Wards Act, the application was not competent, that is to say, that the application should be rejected under Order VII, rule 11, as not disclosing any cause of action. Mr. Lalchand Chuhermal, for the applicant, accepted the challenge and argued the point. During the hearing of this preliminary question Mr. Elphinston put in an affidavit of his client containing several allegations of fact which served to support his opposition to the application. Mr. Lalchand also tendered five affidavits alleging immoral conduct on the part of Vasanmal. The Court, however, refused, and, in my opinion, correctly, to read these five affidavits, on the ground that no allegations of immorality could be listened to unless the main application was amended and there were definite and specific acts of immorality set forth.

Obviously, the question before the Court was not whether or not the husband was, as a matter of fact, unfit to remain guardian, but whether or not the application contained any allegation which, if established, would entitle the applicant to the relief sought. But the learned Judge seems to have forgotten that he was dealing only with the objection *in limine*. He referred to the affidavit of Vasanmal and assumed that the facts therein alleged could be established, and in his order dealt not only with the technical question whether the application as framed lay, but discussed and decided, on the wholly inadequate materials before him, the question of fact whether or not the father had been proved to be unfit.

At the hearing of this appeal Mr. Rupchand put in a petition praying for leave to amend the original main application which, if granted, would have provided further material on which to form an opinion of the father's fitness or unfitness. We did not consider it proper to allow this amendment; for, *firstly*, no such application had been tendered to the lower Court, and, *secondly*, it was clearly impossible for this Court to go into questions of fact, and the facts alleged do not necessarily constitute such immorality as would disqualify respondent from continuing to be guardian.

The mere fact that the man is a Government servant and has to sometimes reside in distant places cannot, of course, constitute disqualification to act as a guardian of his children, nor is a man necessarily unfit to be guardian of those of his children who are still infants. The only question which, in my opinion, we could properly consider in appeal is whether or not the application, as framed, disclosed such a case that the trying Judge should have proceeded to a regular hearing and taken such evidence as might be adduced in support of it.

Before the lower Court, both sides admitted that change of religion by itself does not necessarily render a father unfit to be the guardian of his children. This is, indeed, obvious. Religion is a subjective matter designating the feelings and acts of a man which relate to God. A so-called "change of religion" may be nothing more than a public announcement by a man that he has rejected as untrue certain dogmas and has accepted as true certain others, and that he will in future practise a different ritual. Change of religion does not necessarily act as a violent departure from domestic and family tradition, or a break in the continuity of the domestic and spiritual life of the children. But the question of a particular man's unfitness to be guardian cannot be dealt with as an

isolated or abstract question. Before deciding whether or not Vasanmal is unfit to be guardian of his children, we must know something of the previous history of his children, something of their previous environment, of their intellectual development and of their religious teaching up to the present and of their preferences. We must know, also, something more about Vasanmal himself, what effect on the man's domestic life the change of religion is likely to have. It is impracticable in fact to do as Mr. Elphinston suggests, and confine ourselves to the narrow issue suggested by section 19 (*b*) and entirely exclude the many questions raised by section 17. The two sections must inevitably be read together. Until we know of the circumstances of the family, know what the father intends to do with his children, and ascertain how far their welfare is guaranteed, we cannot determine his fitness or unfitness to continue as guardian.

Mr. Elphinston has quoted several English cases in which the conflict has been between the Protestant and the Roman Catholic religions. I do not think that such cases present a reliable authority when dealing with the conflict between Islam and Hinduism. For, in the former cases, there is a deep common foundation of dogmas and tradition; no change of status is involved and it is possible for a person to revert after conversion. I prefer to consult, and to follow, what seems to me the clear instructions given to Indian Courts by the Guardians and Wards Act, rather than the *dicta* of English Judges who had an entirely different set of conditions to deal with. So far as the English decisions and *dicta* are not consistent with the provisions of the Guardians and Wards Act, they cannot be considered to have any authority in this country. And I am not prepared to admit that any discretion given to the Courts by the Act is limited by English practice.

Nor am I prepared to hold that the general rule that a child should follow the religion of his father applies without qualification to a case where the religion has been newly adopted by the father and is not that in which the child was born or reared.

I would, therefore, set aside the order and remand the case for hearing on the merits under Order XLI, rule 23, Civil Procedure Code.

The parties consent to an order that, pending the disposal of the main application by the lower Court, both the appellant Radhibai and her husband Vasanmal, *alias* Mahomed Yakub, be prohibited from taking any steps towards effecting the marriage of any one of the minors and also from disposing, in any way, of any family property.

Costs to be costs in the cause.

Order set aside ; Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2632 OF 1916.

June 15, 1917.

Present:—Mr. Justice LeRossignol.

BUDHA SHAH—PLAINTIFF—APPELLANT

versus

SULEMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Mortgage—Mortgagor in possession as tenant—Rent, default in payment of—Suit for arrears—Subsequent suit for arrears and principal debt, maintainability of.

A mortgage-deed of May 1897 provided that the mortgagors would retain possession of the mortgaged property as tenants by executing a separate deed of lease and would pay rent monthly, six monthly or annually. On failure to pay rent the mortgagee was at liberty to recover the principal sum secured and the rent, or to recover the rent and eject the mortgagors. The rent was not duly paid, and in 1902 and in 1904 the mortgagee sued and obtained decrees for sums of rent then due. On default being again made in the payment of rent, the mortgagee sued the mortgagors for the principal mortgage-debt and arrears of rent:

Held, that the causes of action in this and the previous suits were not the same, inasmuch as in the absence of evidence to the contrary the previous suits must be taken to have been based on the lease alone. [p. 577, col. 1.]

Ganga Ram v. *Abdul Rahman*, 28 P. R. 1907; 93 P. L. R. 1908; 140 P. W. R. 1907, distinguished.

Pindi Das v. *Lal Chand*, 36 Ind. Cas. 209; 102 P. L. R. 1916; 177 P. W. R. 1916, followed.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 13th May 1916, affirming that of the Munsif, 1st Class, Pathankote, dated the 22nd December 1915, dismissing the plaintiff's claim.

Bakhshi *Tek Chand*, for the Appellant.

Khwaja *Zia-ud-Din*, for the Respondents.

JUDGMENT.—The only question for decision in this appeal is whether the suit is barred under rule 2 of Order II, for on all other issues the findings are in favour of the plaintiff.

The suit is by a mortgagee against his mortgagor to recover the principal of his mortgage-debt and arrears of rent.

The mortgage which bears date of May 1897 is with possession, but provides that mortgagors shall retain possession as tenants and shall execute a separate deed of lease. The conditions were that the rent would be payable monthly, six monthly or annually; on breach of payment of rent, the mortgagee was at liberty to recover the principal sum secured and the rent, or to recover the rent and eject the mortgagors.

The rent was not duly paid and in 1902 and again in 1904 the mortgagee sued and obtained decrees for sums of rent then due.

Does that litigation bar the present suit? In my opinion it does not. The previous suits were suits based on the lease; in the absence of evidence to the contrary it must be taken so. In setting forth his ground of action in those cases the plaintiff had no necessity to refer to his mortgage but only to his lease and the defendants would have been estopped from denying his title on the lease. In short the cause of action in this and the earlier cases was not the same and the case is clearly distinguishable from *Ganga Ram* v. *Abdul Rahman* (1), and is analogous to the case reported as *Pindi Das* v. *Lal Chand* (2).

I accordingly accept the appeal and reversing the lower Appellate Court's decree, decree plaintiff's prayer with costs throughout.

Appeal accepted.

(1) 28 P. R. 1907; 93 P. L. R. 1908; 140 P. W. R. 1907.

(2) 36 Ind. Cas 209; 102 P. L. R. 1916; 177 P. W. R. 1916.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1266 OF 1916.

May 29, 1917.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

KRISHNA CHANDRA MANDAL—DEFENDANT—APPELLANT

versus

RAM SAHAY KATARI AND ANOTHER—PLAINTIFFS, LAKSHMI CHARAN NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Easement by prescription, whether can be acquired by tenant—Right to raise water for irrigation—User for 50 years—Presumption of lost grant.

An easement by prescription under the Limitation Act cannot arise between landlord and tenant. [p. 578, col. 2.]

Where the plaintiff's predecessor-in-title has openly and notoriously used the water from the tank of the defendant as of right and without any objection by the latter for 50 years, the Court is justified in presuming the existence of a lost grant. [p. 579, col. 1.]

Appeal from a decision of the Special Sub-Judge, Singhbhum, dated the 9th September 1916.

Mr. *Atul Krishna Roy*, for the Appellant.

Mr. *Lal Mohan Ganguli*, for the Respondents.

JUDGMENT.

ATKINSON, J.—The plaintiff in this suit claims a declaration that he is entitled to take water from a certain tank on the defendant's land for the purpose of irrigating his holding bearing survey plot No. 12 in *Mouzah* Lohanalya. He claims that he has enjoyed this right for very considerable time through his ancestors and his predecessors-in title, and that the defendant is not justified in endeavouring to obstruct him in taking the water and using the same for the purpose of irrigation. In paragraph 4 of the plaint the plaintiff sets out the right under which he claims to use the water from the tank in question and he says "that the plaintiffs from the time of their ancestors have all along taken water from the said tank as of right peaceably and openly for over 20 years from the places mentioned in the schedule."

The learned Munsif came to the conclusion that this plea of the plaintiff's right to the use of the water for irrigation was justified; and that the plaintiffs were entitled under the doctrine of lost grant

to a declaration of the easement they claimed as against the defendant No. 1, who was the plaintiff's landlord. The defendant No. 1 was the sole defendant who contested this appeal. The wording of the plea set out in the plaint is more in accordance with a plea of the acquisition of a right by prescription under the Limitation Act than with the acquisition of a right based upon the doctrine of lost grant. No doubt, strictly speaking, a right based upon lost grant ought to be expressly pleaded as such. But in this country pleadings must not be construed with an excessive degree of exactness and precision. If the plea as framed did not accord in form with the precise nature of a plea of right founded on the fiction of a lost grant, it would have been right and proper for the trial Court to have allowed an amendment of the pleadings so that the true issue arising between the parties might be determined. In truth there is very little difference between the wording of a plea claiming a right by prescription and alternatively by lost grant. And it appears to me that on the form of the plea set forth in paragraph 4 of the plaint it would be open to any Court to hold on a reasonable construction of the plea that the plaintiff was entitled to the relief he sought on the basis of a lost grant, if the right claimed was unsustainable by prescription. The lower Appellate Court agreed with the decision of the Munsif and held that as between landlord and tenant no right by prescription could be established by the plaintiff as against the defendant No. 1 his landlord, that nevertheless the plaintiff on the evidence was entitled to relief on the basis that the Court should presume a lawful origin to support long continued and undisputed user as of right. The evidence is all one way and the consistent acts of user by the plaintiff and his predecessors-in-title of the water in the defendant's tank established affirmative evidence sufficient to justify any Court in finding a lost grant to support a user which had extended over a period of 50 years. The law with regard to lost grant appears to me clear. The legal direction given by a Judge to a Jury in England trying an issue of this kind founded on the basis of lost grant is that if the plaintiff has openly and notoriously enjoyed the particular right in question for a period of 20 years, the Jury may presume a grant to support such user; and if the plaintiff proves that he has enjoyed the right or easement in question for a period of 40 years, then the Jury must presume a lost grant.

The point raised by Mr. Roy on second appeal before us on behalf of the defendant-appellant is that he looked upon the plea in paragraph 4 of the plaint as one under the Limitation Act; and he, therefore, was taken by surprise by the Court holding that the case was one to which the doctrine of lost grant was applicable; and he argues that if he had known that the Court intended to adopt that view, he could have adduced evidence to show that the plaintiff only enjoyed the right in question by way of permission and not as of right, and that this evidence, if believed, would have defeated the question of the plaintiff's right founded on the basis of a lost grant. However, we cannot yield to Mr. Roy's argument, because it appears to us that the question of permission was equally consistent whether the case was one under prescription or lost grant. But I cannot think that the defendant was in any way prejudiced by reason of the course adopted by both the lower Courts. The relationship of the parties being that of landlord and tenant, the question of prescription under the Limitation Act could not possibly have arisen between them. The defendant might have reasonably inferred from this fact that the plaintiff's claim and evidence was such as would justify the Court in holding that the plaintiff was entitled to a declaration founded on the basis of a lost grant, to support a lawful origin for the long and continued exercise of the right claimed. This is the only point which has been urged in appeal by Mr. Roy on behalf of the appellant in this second appeal. Mr. Roy now asks us to send the case back in order to enable him to adduce evidence for the purpose of showing that the plaintiffs really only enjoyed the right which they now claim to have established by permission from the defendant No. 1. We are not disposed to adopt that course, having regard to the general evidence in the case. We think that the evidence on the record shows and it has been proved

by the witnesses on behalf of the defendant that the plaintiff's predecessors-in-title openly and notoriously used the water from the tank in question as of right without any objection by the defendant; and that there was, therefore, ample evidence in the case to justify the Court in presuming the existence of a lost grant to support the declaration sought by the plaintiff. We, therefore, must disallow this appeal with costs.

CHAPMAN, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 144 OF 1916.

May 4, 1917.

Present:—Mr. Justice Maung Kin.

MA SHWE THET AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MA HLA SHIN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Appendix D, Nos. 17, 20—Decree, form of—Succession—Suit for possession of share of estate, nature of—Procedure.

Although a suit for a share of inheritance is not brought in the form of an administration suit, the trial Court should treat it as an administration suit and after due trial of the matters involved pass a decree on the lines of the model decrees Nos. 17 and 20 in Appendix *D.* to the Civil Procedure Code. [p. 579, col. 2.]

Mr. *Ba Dun*, for the Appellants.

JUDGMENT.—Plaintiff Ma Hla Shin sued for a third share of a piece of land belonging to the estate of her deceased grand-parents as against her aunt and uncle, the defendants. She based her claim upon the fact that her father Maung San Hla, who pre-deceased one of the grand-parents, was their *auratha* child. The defendants raised the following defence:—Plaintiff's father had spent a sum of Rs. 1,320 which his mother borrowed for him. Afterwards the plaintiff was asked to pay off this debt but as she could not do so, it was agreed that defendants should pay it off and take the whole of the land on payment of Rs. 100 to her. Plaintiff assented to this agreement and accordingly received Rs. 100 from the defendants, and they alleged that by reason of this agreement the plaintiff had no longer any claim to any share in the land. The issue on this point was put as follows:—"Whether a debt of Rs. 1,320 was incurred by Ma Tha Dun on account of her son Maung San Hla (father of plaintiff)?" It was answered in the negative by both the lower Courts. But their finding only comes to this, that Maung San Hla did not spend the money. This being the case, the foundation of the agreement alleged by the defendants was removed and the defendants could not succeed. The allegation of the payment of Rs. 100 was also negatived by both the lower Courts. But the questions whether there was the debt against Ma Tha Dun and whether it was paid off by the defendants remain undetermined. If there was this debt against the old lady and the defendants paid it off, they may have a claim to be re-imbursed the amount out of the estate. I say they may, because the matter must depend upon a variety of circumstances. The plaintiff inherits the good and the bad of the inheritance (* * * * *). She cannot take a share in the land and say she is not responsible for any debt. In fact moneys payable out of the estate must first be deducted and paid out of the estate and only the balance can be shared by the heirs.

Although the suit was not brought in the form of an administration suit, the trial Court should have treated it as such a suit and after due trial of the matters involved passed decrees on the lines of the model decrees in Appendix D Nos. 17, preliminary decree in administration suits by next-of-kin, and 20, final decree in a similar suit by next-of kin, to the Civil Procedure Code. The course suggested should be adopted in all cases where a claim is made for a share of inheritance, for in the interests of all parties further litigation arising out of the distribution of the estate should be prevented. There have been too many instances of such a suit as this, in which the plaintiff sues for possession of a share and is given it by a decree for possession of a certain specified fractional share in the subject-matter of the suit. But what the plaintiff is entitled to is that fractional share in the net amount of estate available, after payment of all that is due from the estate, for distribution among the co-heirs. Unless the Court gets at a balance of the estate which is free from any liability and then distributes it among the co-heirs, there is a likelihood of the parties being molested by

In re KESHWAR SINGH.

persons whose claims may very well have been considered in the suit. Following the precedent set in *Ma Thet* v. *Ma San On* (1) I will set aside the decrees of the lower Courts and in lieu thereof there will be a preliminary order as follows:—

1. It is declared that the plaintiff as a daughter of Maung San Hla, an *auratha* child of Maung Shwe Ok and Ma Tha Dun, is entitled to a share in the estate of the said Maung San Ok and Ma Tha Dun equal to that to which her father would have been entitled to, had he survived both of his own parents.

2. It is ordered that the following accounts and enquiries be taken and made; that is to say:—

1. An inquiry who are the heirs of Maung San Ok and Ma Tha Dun, both deceased, entitled to a share in their estate.

2. An enquiry as to what share in the estate each heir is entitled to.

3. An account of the funeral expenses paid out of the estate.

N. B. Contributions, if any, which each heir made to the funeral expenses out of charity or in discharge of his or her duty to bury the deceased, must not be taken into account; contributions in the nature of loans to help carrying out of funeral obsequies should be taken into account.

4. An account of the moveable property of the deceased come to the hands of the parties or to the hand of any other person by their order or for their use.

5. An account of the moveable property of the deceased still outstanding and unrecovered.

6. An account of what immoveable property the deceased were seized of at the time of their deaths.

7. An inquiry what were the incumbrances, if any, affecting the immoveable property of the deceased or any part thereof at the time of their deaths.

8. An account so far as possible of what is due to the several incumbrancers.

9. An account of what was and is due to the creditors of the deceased.

It is further ordered that this suit be adjourned until the 1st day of August 1917 for consideration of the inquiries and accounts ordered to be made and taken.

(1) 2 L. B. R. 85.

The inquiries should be made by the trial Court itself, as I think most of the inquiries and accounts ordered will be found unnecessary and so far as I can see, there is only one matter which it may be necessary to inquire into and that is as to the debt alleged to have been incurred by Ma Tha Dun and alleged to have been paid off by the defendants.

When the inquiries have been made and accounts settled, the trial Court will be in a position to pass a final decree on the lines of the model decree No. 20 above referred to, deciding how much is payable to the plaintiff and to each of the other co-heirs respectively out of the estate.

The costs of both sides in all Courts should come out of the estate.

Decree set aside; Suit remanded.

COURT OF THE BOARD OF REVENUE, PATNA.

May 28, 1915.

Present: - Mr. Maude, Member in charge.

In re KESHWAR SINGH—PETITIONER.

Bengal Estates Partition Act (V B. C. of 1897), s. 113 (c)—Appeal, when to be preferred—"Confirming or amending a partition," meaning of

An appeal will lie to the Board against an order making allotment, only when a partition has been re-cast and confirmed by the Commissioner. The expression "confirming or amending a partition" in section 113 (*c*) of the Act must be taken to mean a definite amendment which disposes of the case. The amendment and re-arrangements suggested by the Commissioner must be carried out before an appeal will lie. [p. 580, col. 2; p. 581, col. 1.]

Read a petition against the order of the Commissioner of the Patna Division, dated the 21st April 1915, remanding to the Collector of Patna the partition case of Estate Kharagpur Kanchan, Pargana Maner, *Tauzi* No. 4187, in the District of Patna, for a re arrangement of *takhtas* on the lines indicated in the Commissioner's judgment.

RESOLUTION.—No appeal appears to lie to the Board at this stage of the case. The expression in section 113 (*c*), Act V B. C. of 1897, "confirming or amending a partition" must be taken to mean a definite amendment which disposes of the case. In the present case the Commissioner has not as yet amended the partition at all, but has simply pointed out that in his opinion it is defective and should be

re arranged on certain broad lines which he has indicated. It is obvious that there can be no appeal to the Board against a partition which has not yet been made. When the partition has been re-cast and confirmed by the Commissioner, an appeal under section 113 (*c*) will lie to the Board.

Petition returned.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1965 OF 1914.

February 23, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

DORAISAMI PADAYACHI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

VAITHILINGA PADAYACHI (DEAD) AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 21—Civil Procedure Code (Act V of 1908), Sch II, cl. 22—Arbitration, reference to—Suit pending reference, maintainability of—Death of arbitrator, whether restores right of suit—General Clauses Act (X of 1897), s. 6 (c)—Limitation Act (IX of 1908), ss. 14, 15, Sch. I, Art. 120.

A contract to refer a dispute to arbitration confers on the parties a right to have the question decided by arbitrators and not by suit. This is a substantive right of an important character, and section 21 of the Specific Relief Act bars a suit pending disposal of the reference by the arbitrators. [p. 582, col. 2; p. 583, col. 1.]

The repeal of section 21 of the Specific Relief Act by clause 22 of Schedule II, Civil Procedure Code, does not affect a right which had accrued under the former Act where the contract to refer was made before the enactment of Act V of 1908. [p 582, col. 2; p. 583, col 1.]

The institution of a suit after the contract to refer is a sufficient refusal to perform such contract to bar the suit under section 21 of the Specific Relief Act. [p. 582, col 1; p. 583, col. 2]

Opinion of Richards, J, in *Ram Kumar Singh* v. *Jagan Mohan Singh*, 9 Ind. Cas. 80; 33 A. 315; 8 A. L. J. 66, approved.

The death of the arbitrator, however, without disposing of the reference removes the bar created by section 21 and restores to the parties the right of suit, and time commences to run for the suit from the date of the arbitrator's death. [p. 582, col. 2; p. 584, col. 2.]

Per *Wallis, C. J.*—Whether the effect of section 21 of the Specific Relief Act is merely to suspend the running of time under the Limitation Act or to bring the case under Article 120 of the latter Act, the cause of action for a suit arises only when, by the death of the arbitrator, further proceedings in the arbitration became impossible. [p. 582, col. 2.]

Per *Seshagiri Aiyar, J.*—A right of appeal granted under a repealed Act is not affected by the new Act. [p. 583, col. 1.]

A vested right is not ordinarily taken away by a new Act. [p. 583, col. 1.]

The right created by section 21 of the Specific Relief Act is not a mere incident of processual law and it operates as an effective bar to a suit so long as the arbitration is operative. [p. 583, col. 1.]

The institution of a suit pending a reference to arbitration would be an overt act on the plaintiff's part indicative of an intention not to perform the contract entered into by him. [p. 583, col. 2.]

Tahal v. *Bisheshar*, 8 A. 57; A. W. N. (1885) 331; 4 Ind. Dec. (N. S.) 1063, explained.

Crisp v. *Adlard*, 23 C. 956; 12 Ind. Dec. (N. S.) 635, distinguished.

A suit instituted, however, after the death of the arbitrator in regard to matters referred to and not disposed of by him is governed by the residuary Article 120 of the Limitation Act. [p. 584, cols. 1 & 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Kumbaconam, in Appeal Suit No. 491 of 1913, preferred against that of the District Munsif of Shiyali, in Original Suit No. 15 of 1912.

FACTS are clearly set forth in 39 Ind. Cas. 220.

The plaintiffs and defendants are said to have been partners. The partnership is said to have come to an end in 1905. Disputes having arisen between the parties, the matter was referred to arbitration in January 1907. Nothing was done by the arbitrator till September 1910, when, according to the plaintiffs, the 1st defendant in the presence of the plaintiffs gave a statement to the arbitrator which is marked as Exhibit A. The latter was in these terms: "As my sons Govindan and Ponnan are not in the village to settle the accounts relating to the trade carried on by me and Sinan, I shall bring and deliver the said two persons at Vilandidasamudram before to-morrow 10 o'clock, and I shall settle the said accounts. In default I shall pay the amount due as per account together with interest thereon at the rate of 3 pies per rupee per day." The arbitrator died in October 1910. The present suit was instituted in 1911. The plea of the defendants was that the suit was barred by limitation. Both the Courts below upheld that plea and dismissed the suit.

The second appeal came on for hearing before a Divisional Bench consisting of Seshagiri Aiyar and Phillips, JJ., who referred the following question to a Full Bench:—

"Whether the clause in the agreement already referred to, 'I shall pay the amount

due as per account' is a promise to pay a debt satisfying the requirements of section 25 of the Indian Contract Act?"

The Full Bench having answered the question in the negative, remitted the case to the Divisional Bench for final disposal.

Mr. *R. Kuppusami Aiyar*, for the Appellants.

Mr. *S. Muthiah Mudaliar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—The answer to the Full Bench reference being against him, Mr. Kuppusami Aiyar for the appellants has relied on another of the grounds taken here and in the lower Appellate Court, that time did not run between the 8th March 1906, the date of the reference to arbitration, and 31st October 1910, when it is alleged the arbitration proceedings came to an end by the death of the arbitrator. Section 21 of the Specific Relief Act provided that "if any person who has made such a contract (to refer to arbitration) and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such a contract shall bar the suit". As to this, I agree with Richards, J., one of the referring Judges in *Ram Kumar Singh* v. *Jagan Mohan Singh* (1), that the institution of a suit after the contract to refer is a sufficient refusal to perform such contract to bar the suit under the section. The result of this provision, while it was in force, was, it seems to me, to bar the plaintiff's right to sue for dissolution of partnership so long as the arbitration had not broken down or the other side had not refused to go on with it. If the arbitration had become impossible as by the death of the arbitrator, or the other side had refused to go on with it, section 21 would have ceased to operate as a bar to the plaintiff. The question then is, what is the effect to be attributed to the removal of this statutory bar by the repeal of this provision of sections 21 by sections 22 of the Second Schedule of the Code of Civil Procedure of 1908. The effect of the provision, while it was in force, was to confer upon the other parties to the contract a right to have the question decided by arbitration and, not by suit, and this was a substantive right of an important character. This being so, the repeal of this provision of section 21 by the Code of Civil Procedure of 1908 did not affect the right of the other parties to the contract which had accrued under it [General Clauses Act, 1897, section 6 (*c*)], and consequently if the plaintiff had brought the present suit immediately on the coming into force of the Code, he would still have been liable to be met by a plea founded on the repealed provision, and it was only when by the death of the arbitrator in 1910 further proceedings in the arbitration became impossible that the plaintiff's right to sue was restored to him. It is, I think, clear that the special provision in section 21 prevented time running against the plaintiffs under the Limitation Act while it was in force, and whether the effect of this provision was merely to suspend the running of time under the Limitation Act, or to take the case out of the Article and bring it under Article 120, in either case, the suit would be within time. I may say, however, that I do not think that the Judicial Committee should be considered in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (2) to have departed from the view clearly expressed in *Soni Ram* v. *Kanhaiya Lal* (3). We allow the appeal, reverse the decree of the lower Courts, and remand the case for disposal according to law. Costs incurred hitherto to abide.

SESHAGIRI AIYAR, J.—The points raised by Mr. Kuppusami Aiyar on this second occasion are by no means easy of solution. Upon one point my mind is clear. The parties referred the matters in dispute to arbitration before the new Code of Civil Procedure came into force. At that time the rights of the parties were regulated by section 21 of the Specific

(1) 9 Ind. Cas. 80; 33 A. 315; 8 A. L. J. 66.

(2) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

(3) 19 Ind. Cas. 291; 40 I. A. 74; 17 C. W. N. 605; 11 A. L. J. 389; 13 M. L. T. 437; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 35 A. 227 (P. C.).

Act. That section says that the existence of a contract to refer "shall bar the suit". Mr. Muthiah Mudaliar's ingenious argument that the bar affects only the agreement to refer and not a pending reference is obviously untenable. As I read the section, a right is conferred on one of the parties to a contract to prevent the other from enforcing his rights otherwise than through the Tribunal chosen by the parties. Such a right cannot be said to be a mere incident of processual law. It is well established that a right of appeal granted under a repealed Act is not affected by the new Act. *Colonial Sugar Refining Company* v. *Irving* (4), *Sadasiva Pillai* v. *Kalappa Mudaliar* (5) and *Nana* v. *Sheku* (6). A vested right is not ordinarily taken away by a new Act *Gopeshwar Pal* v. *Jiban Chandra* (7). Applying these principles, it seems to me that section 22 of the Second Schedule to the new Code of Civil Procedure did not deprive the defendant of the right which he had of objecting to the suit, the matter in dispute having been referred to arbitration. It follows from this that, so long as the arbitration was operative, the plaintiff was incapable of enforcing his rights in a Court of Law.

It is admitted that the proceedings were pending until October 1910 when the arbitrator died. In my opinion, the plaintiff was debarred from seeking the assistance of the Court till then. It was next argued that a bare institution of a suit would not amount to "a refusal to perform" so as to attract the provisions of section 21 of the Specific Relief Act, and that as the plaintiff had always expressed his willingness to abide by the decision of the arbitrator, the defendant never had any right to plead the bar of section 21. In *Ram Kumar Singh* v. *Jagan Mohan Singh* (1) Mr. Justice Richards (as he then was) held in the judgment from which a Letters Patent Appeal was preferred, that the filing of a suit would amount to refusal to perform. Mr. Justice Tudball, who differed from him, expressed no opinion on this question. The learned Judges who heard the Letters Patent Appeal did not question this dictum of Mr. Justice Richards. In my opinion, the institution of a suit by the plaintiff would be an overt act indicative of an intention not to perform the contract entered into by him.

The head-note to the decision in *Tahal* v. *Bisheshar* (8) is somewhat too broadly expressed. The learned Judges based their decision upon the view "that the contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract and not a contract broken up by the conduct of all the parties to it." If there was no enforceable contract, the question of refusal to perform could not have arisen. *Crisp* v. *Adlard* (9), relied on by the learned Vakil for the respondent, has no application to the present case. I am, therefore, of opinion that if the plaintiff had brought a suit before the arbitrator died, he could have been prevented from enforcing his rights in the suit by virtue of the last clause of section 21 of the Specific Relief Act.

The further point, whether the period during which the bar operated should be regarded as having been merely suspended or whether the cause of action for the suit itself should be regarded as not having accrued until the death of the arbitrator, is one on which there is room for considerable difference of opinion. The suspension of the period is provided for by sections 14 and 15 of the Limitation Act. I do not think that the present case is covered by either of the sections. Ordinarily that would be a sufficient answer. But the Judicial Committee have recently [*Nrityamoni Dassi* v. *Lakhan Chunder Sen* (2)] given their general adherence to the conclusion expressed in *Lakhan Chunder Sen* v. *Madhusudan Sen* (10) That decision seems to lay down that apart from the Statute, a party who is prevented from enforcing his claim has

(4) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.
(5) 24 M. 39.
(6) 32 B. 337; 10 Bom. L. R. 330.
(7) 24 Ind. Cas. 37; 41 C. 1125; 18 C. W. N. 804; 19 C. L. J. 549.
(8) 8 A. 57; A. W. N. (1885) 331; 4 Ind. Dec. (N. S.) 1063.
(9) 23 C. 956; 12 Ind. Dec. (N. S.) 635.
(10) 35 C. 209; 7 C. L. J. 59; 3 M. L. T. 90; 12 C. W. N. 326.

a general right that the period of his disability should not count against him, although the difficulties in his way may not be of the nature contemplated by sections 14 and 15 of the Limitation Act. An examination of the authorities relied on in *Lakhan Chunder Sen* v. *Madhusudan Sen* (10) does not support the general propositions laid down therein, but the question must be taken to have been set at rest by the Privy Council by their pronouncement in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (2). Mr. Justice Ayling and myself recently followed *Lakhan Chunder Sen* v. *Madhusudan Sen* (10) in Appeal against Order No. 354 of 1915. We had not then to consider whether there was only a suspension of the period and not of the cause of action itself as, in any event, the plaintiff would have been in time. There is an earlier decision of the Privy Council which seems to throw some doubt on this theory of the suspension of the cause of action. In *Soni Ram* v. *Kanhaiya Lal* (3) it was argued that the period during which there was a fusion of the interests of the mortgagor and of the mortgagee should be excluded in calculating the period allowed by Article 148. Their Lordships expressed the opinion that section 9 of the Limitation Act was against the plea. It is inferable from the judgment that the fusion created either an inability or disability to sue and that as section 9 expressly enacted that time which had once commenced to run should not be stopped by such a subsequent inability or disability, the period of fusion of the rights should not be excluded. It may be possible to distinguish *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (2) from the earlier case on the ground that no question of inability or disability arose in the latter. But the extension of the principle contained in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (2) must be made with great caution. I think it would be more logical to hold that as a result of the interposition of the bar, Article 91 is not applicable to the present case. In another case which was argued subsequently, I have stated my reasons for invoking the aid of the residuary Articles whenever a specific Article in all its bearings is not applicable. Acting on that view. I am prepared to say that the residuary Article 120 applies to this case and that as the cause of action arose for the suit only on the death of the arbitrator in 1910, for as pointed out by the learned Chief Justice, under section 6, clause (*c*) of the General Clauses Act, the bar continued till then, the suit is within time.

The decree of the Court below must be reversed and the suit must be remanded for disposal on the merits. Costs to abide the result.

Appeal allowed; Case remanded.

V. K. P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2880 OF 1915.

June 15, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

MIDNAPUR ZEMINDARY COMPANY, LTD.—DEFENDANT—APPELLANT

versus

JOGENDRA KUMAR BHAUMICK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Res judicata—*Rent suit—Decision as to* jama *payable.*

The case of *res judicata* may arise in a rent suit just as much as in any other suit. [p. 585, col. 1.]

Where in a rent suit the question as to what is the *jama* payable is raised and adjudicated upon, the decision operates as *res judicata* on that question in a subsequent suit for rent. [p. 585, col. 1.]

Appeal against the decree of the Subordinate Judge, Nadia, dated the 7th June 1915, affirming that of the Munsif, Krishnanagar, dated the 20th March 1914.

FACTS of the case appear from the judgment.

Mr. U. N. Sen Gupta (with him Babu *Probodh Coomar Das*), for the Appellant.—This is a suit for rent against the Midnapur Zemindary Company. Plaintiff took settlement from Government and let out to Messrs. Watson & Co., predecessors of the Midnapur Zemindary Company. There was a previous compromise decree which assessed rent at $15\frac{1}{2}$-annas per *bigha* of land That obviously cannot operate as *res judicata* in the present suit. No case of *res judicata* arises in a rent suit. A decision in a previous rent suit cannot operate as *res judicata* in a subsequent rent suit. Refers to *Maharani Beni Pershad Koeri* v. *Raj Kumar*

Chowbey (1), *Kali Roy* v. *Pratap Narain* (2), *Kailash Mondul* v. *Baroda Sundari Dasi* (3).

[Babu *Ram Chandra Mazumdar*, for the Respondent, referred to *Kali Kumar* v. *Bidhu Bhushan* (4)].

The real question is whether the matter was adjudicated upon. There cannot be *res judicata* unless the matter has been adjudicated upon, see *Kailash Mondul* v. *Baroda Sundari Dasi* (3). In *Kali Kumar* v. *Bidhu Bhushan* (4) there was a distinct issue raised as to the amount of rent payable, so the present case can be clearly distinguished from that case.

Babu *Ram Chandra Mazumdar* (with him Babu *Phanindra Kumar Guha*), for the Respondent, was not called upon.

JUDGMENT.

FLETCHER, J.—This appeal must be dismissed. The very satisfactory judgment given by the learned Judge of the lower Appellate Court is quite clear and I think the reasons are unanswerable. For the idea that is said to have been got from the books that no case of *res judicata* arises in a rent suit, there is no authority at all. The case of *res judicata* may arise in a rent suit just as much as in any other suit. The case need not rest only on the questions of constructive *res judicata* as found by the learned Judge of the lower Appellate Court, but also on actual case of *res judicata*. There was an issue as to what was the *jama* payable, and the answer which the learned Judge gave was that the rent must be assessed on the land at $15\frac{1}{2}$ annas per *bigha* according to the compromise decree. There was an express adjudication on that point that the rent was payable at the rate of $15\frac{1}{2}$ annas per *bigha* and, therefore, the case is really a much stronger one than set out in the judgment of the learned Subordinate Judge. At the same time, I think that the judgment pronounced by the learned Judge of the lower Appellate Court is quite sufficient to dispose of the appeal preferred by the defendant. The present appeal, therefore, fails and must be dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

(1) 6 C. W. N. 589. (2) 5 C. L. J. 92.

(3) 24 C. 711 at p. 714; 1 C. W. N. 565; 12 Ind. Dec. (N. S.) 1143.

(4) 10 Ind. Cas. 382; 16 C. L. J. 89.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2602 OF 1914.

February 12, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

VADLA NAGIAH—DEFENDANT—APPELLANT

versus

VALURU DIVAKARA MUDALIAR, DECEASED, BY HIS LEGAL REPRESENTATIVE VALURU PURUSHOTHAMA—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Mortgage—Attestation—Admission by mortgagee—Proof, necessity of.

Even where the defendant admits execution of what purports to be a mortgage-deed, the transaction does not amount to a valid mortgage, if the defendant does not admit that it was attested by two witnesses who saw him execute it or if it is not proved that it was attested by two such witnesses. [p. 585, col. 2.]

Ram Narayan Singh v. *Adhindra Nath Mukhurji*, 34 Ind. Cas. 900; 4 L. W. 15; 20 C. W. N. 989; (1916) 1 M. W. N. 428; 31 M. L. J. 251; 20 M. L. T. 216; 14 A. L. J. 1017; 18 Bom. L. R. 862; 25 C. L. J. 115; *Shamu Patter* v. *Abdul Kadir Rowthan*, 16 Ind. Cas 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218, followed.

Second appeal against the decree of the District Court, Kurnool, in Appeal Suit No. 21 of 1914, preferred against that of the District Munsif, Nandiyal, in Original Suit No. 698 of 1913.

Mr. *V. C. Seshachariar*, for the Appellant.

Mr. S. *Ranganadha Aiyar*, for the Respondent.

JUDGMENT.—We are bound by the Privy Council decisions in *Ram Narayan Singh* v. *Adhindra Nath Mukhurji* (1) and *Shamu Patter* v. *Abdul Kadir Rowthan* (2) to hold that even where the defendant admits execution of what purports to be a mortgage-deed, the transaction would not be a valid mortgage, if the defendant does not admit that it was attested by two witnesses who saw him execute it or if it is not proved that it was attested by two such witnesses (section 59 of Act IV of 1882).

(1) 34 Ind Cas. 900; 4 L. W. 15; 20 C. W. N. 989; (1916) 1 M. W, N. 428; 31 M. L. J. 251; 20 M. L. T. 216; 14 A. L. J. 1017; 18 Bom. L. R. 862; 25 C. L. J. 115.

(2) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218.

We, therefore, set aside the District Judge's judgment and restore that of the Munsif. The parties will bear their respective costs throughout.

Appeal allowed; *Suit dismissed.*

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 35 OF 1915.

March 19, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

BHARAT CHANDRA NATH AND ANOTHER —DECREE-HOLDERS—APPELLANTS

versus

YASIN SARKAR—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 9—Execution—Orders, whether fall within O. IX, r. 9—Dismissal for default of petition of objection to sale in execution—Remedies open to petitioner—Review, inherent power of Court for.

A fresh application for execution is competent where a previous application is dismissed for default, as Order IX, rule 9, Civil Procedure Code, does not apply in such a case. [p. 587, col. 2; p. 588, col. 1.]

Asim Mandal v. *Raj Mohan Das*, 11 Ind. Cas. 385; 13 C. L. J. 532, followed.

Ex parte orders or decrees and orders of dismissal for default, made in the course of execution proceedings, lie outside the scope of the remedies provided by Order IX, Civil Procedure Code. But where in relation to such proceedings no special remedy is provided by the Code, the Courts have, under the general law, aided perhaps by section 151, Civil Procedure Code, an inherent power to review *ex parte* orders and orders for dismissal for default [p 588, cols. 1 & 2; p. 589, col. 1.]

Where on an application for execution of a decree by the sale of an occupancy holding, the judgment-debtor preferred an objection on the ground that the holding was not transferable, but for his non-appearance on the day fixed for its hearing, the petition of objection was dismissed for default:

Held, (1) that until it was set aside, the order of dismissal for default must be held to be binding upon the judgment-debtor, at any rate for the purpose of the application for execution with reference to which the objection was preferred, and the judgment-debtor was not entitled to ignore it and file a fresh petition of objection; [p. 589, col. 1.]

(2) that the order of dismissal could not be set aside on an application purporting to be made under Order IX, rule 9, Code of Civil Procedure, as Order IX, rule 9, was inapplicable, but that the Court had inherent power on a proper application made by the judgment-debtor to review the order and enquire whether the judgment-debtor had or had not a reasonable cause for non-appearance on the date appointed for the hearing of his petition of objection. [p. 589, col. 1.]

Under the circumstances of the case the judgment-debtor's application under Order IX, rule 9, was directed by the High Court to be treated as an application for review by the lower Court in the exercise of its inherent power to review the order of dismissal for default. [p. 589, cols. 1 & 2.]

Appeal against the decree of the first Subordinate Judge, Tipperah, dated the 24th October 1914.

Babu *Heramba Chandra Guha*, for the Appellant.

Babu *Jatindra Mohun Ghose*, for the Respondent.

JUDGMENT.

FLETCHER, J.—I agree in the result of the judgment about to be delivered by Mr. Justice Richardson.

RICHARDSON, J.—The appellant is a decree-holder and the respondent is his judgment-debtor. The appellant having applied for the execution of his decree by the attachment and sale of the respondent's holding, the latter preferred an objection on the ground that the holding was a *raiyati* holding, not transferable without the consent of the landlord. The petition of objection was filed on the 20th February 1914. Notice of it was duly given to the decree-holder and the matter was set down for hearing. There were several adjournments, the last being to the 18th July 1914. On that date the petitioner did not appear and the petition was dismissed for default.

The petitioner then applied to have the order of dismissal set aside. The application purported to be made under rule 9 of Order IX. On the 24th October 1914 the learned Subordinate Judge held that the order having been made in the course of proceedings in execution, the case did not come within the purview of Order IX. He refused, therefore, to set the order aside. But he further held that nowithstanding the order, the respondent was at liberty to file a fresh petition to precisely the same effect as the original petition. The respondent having done so, his objection was allowed and the holding was released from the attachment.

Now it is obvious that if this is the law, a judgment-debtor would be in a position to file an unending series of objections on the

same ground to the execution of the decree. By neglecting to appear on the date fixed for the hearing of a petition, he would obtain the right to present another. Any order of dismissal for default would be nugatory. The Court would be powerless and the decree-holder might be kept at bay for an indefinite time. The position, therefore, requires some examination.

It can hardly be doubted that the proceedings in question were proceedings in execution, and there is authority in this Court for the proposition that section 141 of the Code has no application to proceedings in execution and that in consequence such proceedings are outside the scope of the general provisions of the Code relating to suits, such for instance as those contained in Order IX. In this connection the term 'suits' is distinguished from proceedings in execution, which are proceedings in suits, in the nature of interlocutory proceedings. This view appears to be founded on such decisions of the Privy Council as those in *Ram Kirpal* v *Rup Kuari* (1), *Beni Ram* v. *Nanhu Mal* (2) and *Thakur Prasad* v. *Fakir-Ullah* (3).

In *Ram Kirpal's* case (1), which was followed in *Beni Ram's* case (2), it was held that the provisions of the Code of 1877 on the subject of *res judicata* (corresponding to section 11 of the present Code) did not apply to decisions arrived at in execution proceedings and that the binding force of such decisions depended not on the Code but on general principles of law.

In *Thakur Prasad's* case (3) the question was whether an application for execution having been withdrawn without the express permission of the Court to make a fresh application, the decree-holder was debarred from again applying for the execution of his decree. It was held that section 647 of the Code of 1882 (corresponding to section 141 of the present Code) could not be so construed as to make section 373 of the Code (corresponding to Order XXIII, rule 1, of the present Code) applicable to the case. In stating the reasons for the decision Lord Hobhouse used the language of a general kind. He said:—

"It is not suggested that section 373 of the Civil Procedure Code would of its own force apply to execution proceedings. The suggestion is that it is applied by force of section 647. But the whole of Chapter XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as applicable. Their Lordships think that the proceedings spoken of in section 647 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions. That is the view taken by the High Court of Calcutta, after consideration of the Allahabad decisions, in the case of *Bunko Behary Gangopadhya* v. *Nil Madhub Chuttopadhya* (4)."

Lord Hobhouse added:—"On this construction of section 647 the reasoning of the Allahabad High Court in *Sarju Prasad's* case (5) falls to the ground. And it is clear both from the Code itself, and from the provisions of the Limitation Act of 1877, that the Legislature contemplated that there might be a succession of applications for execution. Under the enactments a course of practice has grown up all over India. Whether it is an injurious practice, as intimated by the High Court in this case, is not a question for their Lordships. It appears to be allowed by the law, and it has never been successfully impugned except in Allahabad. The High Court of Bombay, after one contrary decision, and the High Courts of Calcutta and Madras have repeatedly affirmed the legality of the procedure which is struck at by the ruling in *Sarju Prasad's* case (5)."

The law is still the same. Successive applications for execution are still permissible and it has been expressly held that a fresh application may be made even though the previous application was dismissed for default:

(1) 11 I. A. 37; 6 A. 269; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718.

(2) 11 I. A. 181; 7 A. 102; 4 Sar. P. C. J. 564; 4 Ind. Dec. (N. S.) 138.

(3) 22 I. A. 44; 17 A. 106; 5 M. L. J. 3; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.).

(4) 18 C. 635; 9 Ind. Dec. (N. S.) 423.

(5) 10 A. 71; A. W. N. (1888) 1; 6 Ind. Dec. (N. S.) 48.

Asim Mandal v. *Raj Mohan Das* (6). Order IX, rule 9, of the Code does not apply in such a case.

A further illustration of the view taken in this Court will be found in the case of *Hari Charan Ghosh* v. *Manmatha Nath Sen* (7). There an application made by a claimant against a decree-holder under the provisions of Order XXI, rule 100, was allowed *ex parte*. It was held that Order IX, rule 13, was inapplicable to the case and that the decree-holder's remedy was to institute a regular suit under Order XX, rule 10[1].

From the two cases last cited it would seem to follow that *ex parte* orders (or decrees) and orders of dismissal for default made in the course of execution proceedings lie outside the scope of the remedies provided by Order IX when similar decrees and orders are made in "suits." It will be observed, however, that the Code provides special remedies in respect of applications for execution dismissed for default and in respect of orders made on applications under Order XXI, rule 100. Subject to the question of limitation, successive applications for execution may be made and a party aggrieved by any order made on an application under Order XXI, rule 100, has the right to institute a regular suit.

Occasions, however, arise in execution proceedings where the Code provides no remedy for an order made against a party in his absence. If on the face of the record it is clear that the order was made without notice to the party there is no difficulty. On general principles such an order is not binding on him, and he can come in and demand to have the matter heard in his presence. But when on the face of the record the order was apparently made against him in a proceeding of which he had notice, the position is not so easy. Reference may be made to the case of *Krishna Chandra Pal* v. *Protap Chandra Pal* (8) and to the case of *Diljan Mihha Bibi* v. *Hemanta Kumar Roy* (9), where the decision of the Madras High Court in *Subbiah Naicker* v. *Ramanathan Chettiar* (10) is cited.

In *Diljan Mihha Bibi's* case (9) it seems to have been laid down broadly that an application under Order XXI, rule 90, to set aside an execution sale was in the nature of an original proceeding which was not excluded from the purview of section 141 of the Code. It was, therefore, held that Order IX, rule 9, applied when such an application had been dismissed for default. It may be expedient, if not necessary, that some means should exist of reviewing such an order, but the doubt may be expressed without disrespect, whether it was necessary for the learned Judges to go quite so far in their search for a remedy and whether some other solution of the difficulty which has been felt cannot be found. It will lead to considerable confusion if it be held that section 141 of the Code applies to some proceedings in execution and not to others. It is not merely a question of Order IX. Difficult questions may arise in regard to other parts of the Code.

It is true that some decisions in execution proceedings are decrees by force of the definition clause in section 2 of the Code, but the fact does not affect the nature of such proceedings or the distinction above indicated between such proceedings and "suits." It is clear for instance from their language that rules 9 and 13 of Order IX were intended primarily at any rate to apply to "suits."

In the particular case of applications to set aside execution sales, Order XLIII, rule 1 (*j*), gives an appeal from an order under Order XXI, rule 92, setting aside or refusing to set aside a sale. The words of Order XLIII, rule 1 (*j*), are wide enough to include an order allowing an application to set aside a sale *ex parte*, or dismissing such an application for default [*Kali Kanta* v. *Shyam Lal Das* (11).] The Code, therefore, seems to provide a remedy in such cases by way of appeal.

In those cases (such as the present) where no special remedy is provided by the Code, it will, in my opinion, be simpler and more satisfactory to maintain the generally received construction of section 141, that it does not apply to proceedings in execution and to hold that the Courts have, under the general law, aided perhaps

(6) 11 Ind. Cas. 385; 13 C. L. J. 532.
(7) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.
(8) 3 C. L. J. 276.
(9) 29 Ind. Cas. 395; 19 C. W. N. 758.
(10) 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251.
(11) 38 Ind. Cas. 598; 25 C. L. J. 163.

by section 151, an inherent power to review *ex parte* orders and orders of dismissal for default. This view of the matter was suggested in *Krishna Chandra Pal's* case (8) and is consistent with the decision of the Privy Council in *Ram Kirpal's* case (1) and with the decision of the Full Bench of the Allahabad High Court in *Dhonkal Singh* v. *Phakkar Singh* (12).

At any rate for the purposes of the present case it will not be necessary to go further. Here, an application for execution was made. The judgment-debtor preferred his objection and it was dismissed for default. Clearly for the purpose of the application for execution in reference to which the objection was taken, the order of dismissal for default must be binding until it is set aside. The judgment-debtor was not entitled, as the learned Subordinate Judge has held, to ignore the order and to file a fresh petition. If that were the law, the order would be a nullity and the Court would be stultified. We need not consider the effect of the order in reference to a subsequent application for execution, supposing the present application were to be itself dismissed for default. That question does not arise here.

The order, then, being binding at the present stage, and in the present proceedings, until it is set aside, it is natural to suppose that there should be some way open to the judgment debtor of getting rid of it, if he could show that his default was not due to his own laches. If the Subordinate Judge was right, as I think he was, in holding that Order IX, rule 9, was inapplicable he had, nevertheless, in my opinion, inherent power on a proper application being made by the respondent to review the order and to enquire whether the respondent had or had not a reasonable cause for not appearing on the date appointed for the hearing of his petition. Upon the result of that inquiry would depend the question whether the order should or should not be set aside.

In this view the appeal must be allowed and the case remanded to the lower Court. The respondent's petition of 12th August 1914, purporting to be made under Order IX, rule 9, will be treated as an application to the Court in the exercise of its inherent power to review the order of dismissal for default. If that order is set aside, the Court will then hear and decide the respondent's petition of objection. If the application for review fails, the respondent's petition of objection will remain dismissed and the appellant will be entitled to proceed with his application for execution.

The costs of this appeal will abide the result of the application for review in the Court below. The hearing fee is assessed at three gold *mohurs*.

Appeal allowed; Case remanded.

(12) 15 A. 84; A. W. N. (1893) 36; 7 Ind. Dec. (N. S.) 770.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEALS NOS. 1643 AND 1644 OF 1914.

January 16, 1917.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

BOIDYO GAURANGA SAHU—DEFENDANT IN NO. 1643 AND PLAINTIFF IN NO. 1644—APPELLANT

versus

SUDEVI MATA—PLAINTIFF IN NO. 1643 AND DEFENDANT IN NO. 1644—RESPONDENT.

Hindu Law—Religious and charitable trusts—Nomination of trustee, right of, by founder's heirs on extinction of line of original trustees.

Per *Wallis, C. J. and Abdur Rahim, J.*—It is competent to the heir of the founder of a religious or charitable trust, in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees. [p. 592, col. 2; p. 593, col. 1.]

Per *Srinivasa Aiyangar, J.* dissenting.—Whatever other rights the founder's heirs may have, they have no right of nominating new trustees. Where a founder of a charity commits the management to a trustee, the presumption raised or the legal inference drawn in cases where he makes no arrangement for the management, does not arise; and there is no presumption under the Hindu Law, any more than under the English Law, that he reserves any right of interference or reversion of management after he has once definitely placed the properties given by him in the possession and management of third parties. [p. 595, col. 2; p. 596, col. 1.]

Second appeals against the decrees of the Court of the Temporary Subordinate Judge, Ganjam at Berhampore, in Appeal Suits Nos. 32 and 19 of 1913, preferred against the decrees of the Principal District Munsif, Berhampore,

in Original Suits Nos. 412 and 455 of 1911 respectively.

These second appeals coming on for hearing on the 20th and 25th September 1916, upon perusing the grounds of appeals, the judgments and decrees of the lower Appellate Court and the Court of first instance, and the material papers in the suits and upon hearing the arguments of Mr. *A. Krishnaswami Aiyar*, for the Appellant, and of Mr. *V. Ramesam*, for the Respondent, in both the second appeals, and these second appeals having stood over for consideration till the 11th October 1916, the Court (Seshagiri Aiyar and Srinivasa Aiyangar, JJ.) made the following

ORDER OF REFERENCE TO FULL BENCH.

The facts found are these: The grandfather and the father of the plaintiff, Bavuri and Brundavan, acquired certain properties on *darkhast* and dedicated them to a shrine which they consecrated in or about the year 1887. The plaintiff was admittedly born during the lifetime of the grandfather. When the shrine was established, one Gangadhara Doss Bavaji was appointed to perform the *pooja* in the shrine. The grandfather died about 1893. The father made his Will in 1908. He has therein prescribed the course of devolution regarding the trusteeship of the shrine. The plaintiff questions the validity of the disposition in the Will.

Before dealing with the main question argued in the case, we might dispose of the minor contentions. Mr. Krishnaswami Aiyar's contention, that under the Will the plaintiff is the trustee, is opposed to the plain language of the document. It is clear that the testator intended Sudevi Mata and her disciples to be the trustees. Mr. Ramesam's contention that the dedication was not complete during the lifetime of the father cannot be accepted. We think the finding of the Subordinate Judge, "that Bavuri and Brundavan (the grandfather and the father) were joint founders of the *mutt*," is supported by evidence. The dedication must be taken to have been completed in the grandfather's lifetime.

The main contention related to the powers of the father to prescribe the course of devolution for the management of the trust. It was contended that as the *pujari* trustee appointed originally died, the right of nomination reverted to the joint founders and their heirs, and that it was open to Brundavan to have created a line of trustees. In the first place, if this right is exercisable by the heirs, the father alone is not competent to exercise the right, as the son was admittedly alive at the time. But the more serious question is, whether the right of nomination accrues to the heirs of the founders.

Under English law, there can be no question that after dedication, the founder or his heirs would have no right to be or to appoint trustees. Is the law different in India? It was held in *Musammat Jai Bansi Kunwar* v. *Chattar Dhari Singh* (1) that where the line of trustees had become extinct, the trusteeship would vest in the founder's family. No usage is referred to in the judgment, nor is any text of Hindu Law quoted in support of this position. However, this view has been regarded as unassailable by a long course of decisions. The Judicial Committee of the Privy Council have recognised the soundness of this rule. *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (2), *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (3) and *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4). In none of the cases before the Privy Council, was there any suggestion that the right of nomination would vest in the founder's heirs. But the Allahabad High Court in *Sheoratan Kunwari* v. *Ram Pargash* (5) and *Sheo Prasad* v. *Aya Ram* (6) have laid down that proposition on the basis of the ruling of the Privy Council in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (2).

In Calcutta the exact question did not arise for decision. But in *Sital Das Babaji*

(1) 5 B. L. R. 181; 13 W. R. 396.

(2) 16 I. A. 137; 17 C. 3; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec. (N. S.) 541 (P. C.).

(3) 31 I. A. 203; 1 A. L. J. 585; 32 C. 129; 6 Bom. L. R. 765; 8 C. W. N. 809; 8 Sar. P. C. J. 698 (P. C.).

(4) 19 Ind. Cas. 337; 40 I. A. 97; 35 A. 283; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27 (P. C.).

(5) 18 A. 227; A. W. N. (1896) 37; 8 Ind. Dec. (N.S.) 858.

(6) 29 A. 663; 4 A. L. J. 565; A. W. N. (1907) 210.

v. *Pertap Chunder Sarma* (7), Mr. Justice Mookerjee apparently regarded the right of nomination as appurtenant to the right of management. There are some observations in *Raj Krishna Dey* v. *Bipin Bihari Dey* (8) to the same effect.

In Madras, until very recently, there has been no definite pronouncement on the question. In *Sathappayyar* v. *Periasami* (9) Mr. Justice Muttusami Ayyar had to deal with the right of appointing to office of trustee claimed by the *zemindars* of Sivaganga. The learned Judge whose knowledge of these questions was unique held that the founders had only the right to offer suggestions for filling up the vacancy and that the power of appointment was in the Civil Courts. As some doubt was felt regarding this position, we sent for the decree in the suit and we are satisfied that under the decree, the only right reserved to the founder's family was to offer advice. When we remember that the learned Judge had to consider elaborately the right of appointment in the *Tiruppanandal Mutt* case reported as *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (10), it is clear that he advisedly held in *Sathappayyar* v. *Periasami* (9) that the founder had not the right of appointment. Reference may be made to another case decided in this Court. In *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (11) Bhashyam Ayyangar, J., enumerates the classes of persons who would have the right of appointing in case there is a vacancy. The founder and his heirs are not among those mentioned. More recently, the learned Chief Justice and Coutts Trotter, J., have held that the reverter of trusteeship carries with it the right of appointment. With all deference, we are of opinion that this position requires re-consideration.

By the Indian Trusts Act, section 73, the power to appoint new trustees is reserved to "the author of the trust, if he be alive and competent to contract." The heirs of the author of the trust are not among those to whom the power of appointment is given. The vesting of the power in the author of the trust is in itself a departure from the rule of English Law. The exercise of the power by the founder's heirs will lead to difficulties. Is the right to be exercised by all the members, or at a family council or by the senior in age for the time being? If the manager exercises the function and dies, are his brothers or the direct lineal heirs to possess that right? The introduction of the principle of primogeniture in such case was vetoed in *Sri Sethuramaswamy Iyer* v. *Sri Meruswami Iyer* (12).

A further question would be, whether the right of appointment is a species of property. We must take it that the right of trusteeship is property. Can the same be said of the power of appointment?

We think that in the interests of the trust itself, the safer rule will be to leave the power of appointment in Courts and not to vest them in the founder's family. Both reason and convenience are in favour of this position. But having regard to the recent decision already referred to, we think it desirable to refer the following question for the decision of a Full Bench:

"Whether it is competent to an heir of the founder, in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees?"

These second appeals coming on for hearing in pursuance of the above order of reference to the Full Bench on the 28th and 29th of November 1916, upon perusing the above order of reference and upon hearing the arguments of Mr. *A. Krishnaswami Aiyar*, for the Appellant, and of Mr. *V. Ramesam*, for the Respondent, in both the second appeals and these second appeals having stood over for consideration till this day, the Court expressed the following

OPINION.

WALLIS, C. J.—The institution of the hereditary office of trustee of religious and charitable endowments is in accordance with the custom of the country recognized in Madras Regulation VII of 1817 and Act XX of 1863 and is too firmly established to be altered without legislation. It affords, how-

(7) 3 Ind. Cas. 408; 11 C. L. J. 2.
(8) 18 Ind. Cas. 961; 40 C. 251 at p. 257; 17 C. L. J. 189.
(9) 14 M. 1; 5 Ind. Dec. (N. S.) 1.
(10) 10 M. 375; 3 Ind. Dec. (N. S.) 1015.
(11) 27 M. 435 at p. 457; 14 M. L. J. 105.
(12) 4 Ind. Cas. 76; 34 M. 470; 6 M. L. T. 319; 20 M. L. J. 108.

ever, no guarantee of fitness for the exercise of the office and may be held largely responsible for the numerous cases of waste and misappropriation of these endowments which come before the Court, and, it is to be feared, for a still larger number which are never brought before it. The exercise and enjoyment of the office in the event of the successive partitions to which families in India are liable also present difficulties which are illustrated by *Ramanathan Chetty* v. *Murugappa Chetty* (13), which was affirmed by the Privy Council in *Ramanathan Chetti* v. *Murugappa Chetti* (14). In these circumstances it would perhaps be better if it had never been held that on failure of the line of devolution prescribed by the founder the trusteeship reverted as an hereditary office to the heirs of the founder. But, as observed in the order of reference, this view has been regarded as unassailable by a long course of decisions, and I do not feel at liberty to differ from them. This being so, there is, I think, much to be said for the view of the Allahabad and Calcutta Courts recognizing the right of the founder's heirs to make fresh arrangements for the devolution of the trust, instead of leaving it to devolve, as otherwise it must, in the family of the founder, subject to the difficulties as to its exercise and enjoyment to which I have already alluded. The institution of hereditary trusteeship is held to rest on the intention of the donor either expressed in the instrument of trust or to be presumed from usage, and the doctrine of reverter to the heirs of the donor on failure of the line of devolution prescribed by him must also, it seems to me, rest on his presumed intention. This being so, I do not see much difficulty in presuming an intention that the heirs should be at liberty to make fresh arrangements for the devolution of the trust instead of leaving it to devolve in the family, a result which the founder had shown himself anxious to avoid. In *Ramanathan Chetty* v. *Murugappa Chetty* (13), Benson and Bhashyam Ayyangar, JJ., were of opinion that, when the office of trustee devolved upon the members of a Hindu family, it was open to them to settle a scheme for the enjoyment and exercise of the office in rotation, and their decision was upheld in *Ramanathan Chetti* v. *Murugappa Chetti* (14) by their Lordships of the Judicial Committee, who held that the arrangement was one which the parties interested were competent to make without applying to the Court. That, no doubt, was not a case in which the trusteeship had reverted to the heirs of the founder on failure of the line prescribed by him. But in such an event also it seems to me more convenient and more in accordance with the presumed intention of the founder to allow fresh arrangements to be made instead of leaving the office to devolve on the heirs. It might, I agree, be still better if it were open to us in such a case to exclude the heirs of the founder altogether and leave a scheme to be settled by the Court. The right of nomination in such circumstances appears to have been recognised by the Court of Sudder Adallat, Madras Sudder Dewany Adallat No. 52 of 1857. The decision of Muttusami Ayyar, J., in *Sathappayyar* v. *Periasami* (9) does not in my opinion help either side. What the learned Judge did was to recognize a right of appointment, not in the plaintiff as heir of the founder or in the Court, but in the plaintiff and his family as the beneficiaries under the trust. At page 13 the proper decree is said to be to declare the respondent's right to appoint a person qualified to discharge the peculiar trusts as new trustee with the concurrence of the members of the family. The statement as to the decree in the order of reference was made under a misapprehension, as what the decree does is to declare the right of the plaintiff to nominate with the concurrence of his family and to direct the properties to be handed over to the person so nominated, and in default of nomination to dismiss the suit, and this appears to me to have given effect to the intention of the learned Judge. The other cases are sufficiently dealt with in the order of reference and the opinions of my learned brothers and it is unnecessary to refer to them. I would answer the question in the affirmative.

ABDUR RAHIM, J.—To my mind the question whether the right of nominating a trustee to a Hindu religious endowment vests in the heirs of the founder, in the absence or failure of a specific provision in the deed of endow-

(13) 27 M. 192.

(14) 29 M. 283; 10 C. W. N. 825; 33 I. A. 139; 1 M. L. T. 327; 3 A. L. J. 707; 4 C. L. J. 189; 16 M. L. J. 265; 8 Bom. L. R. 498 (P. C.).

ment or where there are no special usages or circumstances indicating a different mode of devolution, is concluded by authority and must be answered in the affirmative. It is not suggested that there is any text of Hindu Law bearing on the point, but the question has been the subject of unanimous rulings of this Court as well as the Allahabad and Calcutta High Courts, the later decisions being mainly founded on the pronouncement of the Judicial Committee in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (2).

To begin with the earlier cases. Of the two Madras Sudder Dewany decisions cited by Mr. Mayne in his Hindu Law (paragraph 440) as negativing the right of nomination by the heirs of the founder, all that was decided in Case No. 50 of 1851, page 57, was that the heirs of a founder were not entitled to recover possession of the endowed properties from a trustee who had been properly appointed or to demand accounts from him. The statement that "it is obvious that in the management of charitable institutions, the heirs of the founder can have no legal right to interfere unless under some special powers given to them by the founder," should not be given a wider application. Case No. 52 of 1857 (at page 152) clearly ruled that on the death of the first *dharmakartha* appointed by the founder the latter's heir had the right to appoint a fresh trustee. In 1870 a Division Bench of the Calcutta High Court, of which Dwarkanath Mitter, J., an eminent authority on Hindu law, was a member, held in *Peet Kownwar* v. *Chuttur Dharee Singh* (1), same case—*Musammat Jai Bansi Kunwar* v. *Chattar Dhari Singh* (1), that where the *mutawalli* of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property. The endowment in question in that case, it may be mentioned, was made by a Hindu for an idol though the words *mutawalli* and *waqf* (Muhammadan Law terms for trustee and deed of endowment respectively) were used in connection with the dedication.

The principle of the decision in *Musammat Jai Bansi Kunmar* v. *Chattar Dhari Singh* (1) was affirmed by the Judicial Committee in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (2), where they lay down: "According to Hindu Law, when the worship of a Thakur has been founded, the *shebaitship* is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution." It was so held also in *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (15), and the rule was reaffirmed in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (3), their Lordships saying that in the absence of evidence as to the terms or conditions of the foundation the legal inference is that the title to the property or to the management and control of the property, as the case may be, follows the line of inheritance from the founder. In *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4), they made it clear that the rule enunciated in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (2) was subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship.

It is contended that the right of the heirs of the founder is limited to their holding the office themselves and does not include the power to nominate or appoint a trustee. No such limitation has, however, been recognised by the Courts and I am not persuaded that it was ever within the contemplation of the Judicial Committee. Soon after the judgment of the Privy Council in the case of *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (2), Muttuswami Ayyar, J., had to consider in *Sathappayyar* v. *Periasami* (9), the precise question now raised before us with reference to a *mutt*. He laid down at page 13: "In the absence of a qualified disciple in whom the right of succession has already vested, the beneficiaries, who are the members of the *zemindar's* family, are the only persons interested in the appointment and entitled as such to express an opinion regarding the fitness of the proposed new trustee for the office. The case is then analogous to that of a vacaney arising from the death of a *paradesi* without appointing his successor. The

(15) 19 C. 513 at p. 532; 19 I. A. 108; 6 Sar. P. C. J. 150; 9 Ind. Dec. (N. S.) 786

proper decree is to declare the respondent's right to appoint a person qualified to discharge the peculiar trusts as new trustee with the concurrence of the rest of his family, to direct him to do so within a given time, and, upon his doing so, to confirm such appointment after notice to the other members of the respondent's family, and to direct that upon such confirmation the properties in dispute be made over to the person newly appointed to be administered so as to carry out the trusts of the institution in accordance with its usage." On referring to the decree passed in accordance with the above direction, it is evident that the suggestion made in the order of reference that the decree drawn up by the High Court only declared the right of the heir of the founder "to offer advice" was based on a clear misapprehension. In fact that was the important point on which the decree of the lower Court was modified by the High Court, the modification consisting in declaring the right of the Rajah to appoint or nominate the *paradesi* subject to confirmation by the Court.

Then, I am unable to draw from the passage in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (11), alluded to in the order of reference, any conclusion that Mr. Justice Bhashyam Ayyangar intended to negative the right of the heirs of the founder to make nomination in the case of a vacancy. If he intended to lay that down, one would have expected him to do so in express terms, especially as he was one of the Vakils who argued the case before Muttuswami Ayyar, J. The learned Chief Justice and Coutts Trotter, J., in *Doraisawmy Pillai* v. *Sandanathamal* (16), on the other hand, held that on failure of the provision originally made by the founder for management of a charitable trust, the right to provide for succession to the trust reverted to him.

In *Sheoratan Kunwari* v. *Ram Pargash* (5) the law is taken to be well-settled that in the absence of provision for the nomination of a trustee, the right to nominate vests in the founder of the endowment and continues to his heirs, and the ruling of the Privy Council in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (2) is referred to as having accepted the principle. The rule is followed in *Chandranath Chakrabarti* v. *Jadabendra Chakrabarti* (17), *Sheo Prasad* v. *Aya Ram* (6), *Gobind Prasad* v. *Gomti* (18) and *Sukhbir Singh* v. *Nihal Singh* (19).

That has also been the course of decisions in Calcutta. In *Ranjit Singh* v. *Jagannath Prosad Gupta* (20) it was held by Norris and Ghose, JJ., following *Musammat Jai Bansi Kunwar* v. *Ch ttar Dhari Singh* (1), that on failure of the provision for the appointment of a *shebait* or manager, the office reverted to the heirs of the fcunder. Banerji, J., a very learned Hindu lawyer, stated in *Jagannath Prasad Gupta* v. *Runjit Singh* (21) the rule as enunciated in *Musammat Jai Bansi Kunwar* v. *Chattar Dhari Singh* (1) and *Gossami Sri Gridharji* v. *Romanlalji Gossami* (2) in general terms, to the effect that when there is no other provision for the appointment of *shebait* the management of the endowment must revert to the heirs of the founder. The same view of the law is upheld by Mookerji, J., in *Sital Das Babaji* v. *Pertap Chunder Sarma* (7) and *Raj Krishna Dey* v. *Bipin Bihari Dey* (8).

In the face of these authorities I feel myself bound to hold that the question referred to us is no longer an open one. Up to now there has been no expression of judicial dissent from the view of the law expressed in the above decisions.

I may mention that Mr. A. Krishnaswami Aiyar referred us to *Narayanan Chettiar* v. *Lakshmanan Chettiar* (22), where it was held that an alienation of the office of trustee by the hereditary trustee of a temple is absolutely void. But it does not seem to me that nomination of a trustee by the heirs of the founder, who on the failure of the line of trustees indicated by the deed of endowment would themselves be entitled to act as trustees, is *ipso facto* the same thing as alienation of the office

(16) 30 Ind. Cas. 225; (1915) M. W. N. 478; 2 L. W. 577.

(17) 28 A. 689; A. W. N. (1906) 173.
(18) 30 A. 288; 5 A. L. J. 256; A. W. N. (1908) 132.
(19) 18 Ind. Cas. 232.
(20) 12 C. 375 at p. 380; 6 Ind. Dec. (N. S.) 255.
(21) 25 C. 354; 13 Ind. Dec. (N. S.) 237.
(22) 29 Ind. Cas. 1; 28 M. L. J. 571.

of a trustee by the hereditary trustee. It is no more an alienation of the office, properly speaking, than the provision for appointment of a trustee when made by the founder himself.

Nor can it be said that the nomination of a trustee by the heirs of the founder would not be in accordance with the genesis of the Hindu Law relating to trusts. That system recognises the hereditary principle with reference to trusteeships, such office is liable to partition like ordinary joint family property and it has been held to be capable of being acquired by prescription. It would doubtless be more in accordance with modern legal notions to release the office of trustee from the domination of the joint family and hereditary principles relating to tenure of property and the arguments of convenience probably preponderate in the same direction. At the same time I am not convinced that there are really insuperable difficulties in working out the view which upholds the right of the heirs of the founder to nominate and appoint trustees. Such of them as arose in actual cases have apparently been solved.

SRINIVASA AIYANGAR, J.—The argument before the Full Bench in which, however, nothing new was said and the further consideration which I have given to this matter have in no way changed the opinion which Mr. Justice Seshagiri Aiyar and myself expressed in the referring order. It is remarkable that in support of the doctrine of reversion of the management of trusteeship to the founder or his heirs, which is applicable only to charities founded by Hindus, no Hindu Law text or commentary was cited; and in *Musammat Jai Bansi Kunwar* v. *Chattar Dhari Singh* (1), in which the doctrine was first formulated, the learned Judges do not treat it as one based on Hindu Law or usage. They say that as one of the provisions of the trust, that which related to the management failed, and as the idol cannot manage the property, the managership must revert to the heirs of the person who endowed the property. I am unable to see why it *must*; in the absence of any person nominated for the purpose of appointing new trustees by the deed of endowment and in the absence of a statutory power, the Court will appoint a person to carry out the trusts. (Perry on Trusts, section 294).

A Hindu who makes a gift to an idol or founds a charity does not resort to the machinery of trusts, but makes a direct gift to the charitable object which is conceived of as a juridical person; and there is no need of incorporation either. In such a case where he does not appoint another person to manage the properties so given, or settle a scheme for such management, as he is entitled to do at the time of the endowment and as a part of the same transaction, the natural presumption or the legal inference is, that he intends to manage the property himself on behalf of the charity or reserves the management to himself. Such management may pass to his heirs by inheritance, just as a legal estate of heritance may pass in England. That is the utmost extent to which the decisions of the Privy Council take us, though no doubt in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (2), *Musammat Jai Bansi Kunwar* v. *Chattar Dhari Singh* (1) was approved. It is to be observed, however, that the principle of Hindu Law—it is here for the first time it is said to be a principle of Hindu Law—which their Lordships lay down is, "that when the worship of a Thakoor has been founded, the *shebaitship* is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to shew a different mode of devolution." In a very recent case, *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (4), their Lordships explained that the vesting of the management, in accordance with the rules of inheritance applicable to private property, "must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship." It seems to me fairly clear from the above observations that whatever other rights the founder's heirs may have, they had no right of nomination; for even if they were incompetent to perform the *sheba* or worship, they were not incompetent to nominate persons qualified to perform the worship; and their Lordships do not appear to con-

template the existence of a power of nomination at all, which power is certainly not necessarily appendant to the trusteeship or *shebaitship* as is assumed in the Allahabad cases.

The only case in which the foundation of this doctrine of reversion of management or the power of nomination is examined is *Sital Das Babaji* v. *Pertap Chunder Sarma* (7). There Mookerjee, J, after stating the two propositions, both of them well established, namely, (1) that the devolution of the management of the trust depends upon the terms of its original constitution, whether they are proved by direct evidence as, for example, the production of a deed of endowment, or by proof of usage, (2) that the office of *shebait* is held to be vested in the founder's heirs in default of evidence that he has disposed of it otherwise, proceeded to lay down a 3rd proposition and said that "from these propositions it necessarily follows that when a *shebait* appointed by a founder fails to nominate a successor in accordance with the condition or usage of the endowment, the management reverts to the representative of the founder." As I have said already I am unable to see the necessity. Where a founder commits the management of the charity to a trustee, the presumption raised or the legal inference drawn in cases where he makes no arrangement for the management, does not arise; and there is no presumption under the Hindu Law, any more than under the English Law, that he reserves any right of interference or reversion of management, after he has once definitely placed the properties given by him in the possession and management of third parties. In a later case, *Raj Krishna Dey* v. *Bipin Bihari Dey* (8), that same learned Judge, after stating the above three propositions, held that on the failure of the scheme of management originally provided by the founder at the time of the foundation, it became incumbent on the representatives of the founder to make an appointment of a *shebait*. Why the *shebaitship* did not vest in all the representatives of the founder according to his third proposition is not clear. If it did, the decree should be for settlement of a scheme providing for the actual exercise of the functions of the *shebait*, by the numerous persons in whom that office vested, as suggested in *Ramanathan Chetti* v. *Murugappa Chetti* (14), and not for the appointment of a trustee. It appears to me that these cases treat the trusteeship or *shebaitship* as a species of private property which is vested as an absolute estate of inheritance in the founder, an estate in fee simple, if I may borrow an expression from the English Law of Real Property, from out of which the founder is entitled to carve out a particular estate retaining the reversion, which again becomes an estate in possession vesting in him or his heirs, as the case may be, on the determination of the particular estate, the founder or his heirs being entitled either to enjoy it themselves or again to carve out a particular estate therefrom. This is to some extent natural if we remember that in Northern India private religious endowments, as for instance to family idols, are very common. That certain kinds of 'shebaitship' are treated as private property capable of being transferred by act of parties, and of being actually divided into shares, is clear from *Tripurari Pal* v. *Jagat Tarini Dasi* (23), where a devise of *shebaitship* was without question assumed to be valid, and from *Kunjamani Dasi* v. *Nikunja Behary Das* (24), where its partibility was assumed. It need scarcely be pointed out that the office of trustee, as we have in this case is inalienable and cannot be delegated, and any notion of their alienability is contrary to the express decisions of the Privy Council as regards the trusteeship of Hindu religious endowments and religious offices. In several cases in this Court alienations of the trustee's office, which could have been supported as an exercise of the power of nomination, if any such existed, were held to be wholly void.

The assumption made in the Allahabad cases that a power of nominating new trustees is a right appendant to trusteeship, appears to me, with all respect, to be equally contrary to settled principles. An appointment of new trustees by the existing trustee or trustees is in effect nothing less than the transfer of the trusteeship, and a power to

(23) 17 Ind. Cas. 696; 40 I. A. 37; 17 C. W. N. 145 13 M. L. T. 1; (1913) M. W. N. 34; 17 C. L. J. 159; 15 Bom. L. R. 72; 40 C. 274 (P. C.).

(24) 32 Ind. Cas. 823; 22 C. L. J. 404; 20 C. W. N. 314.

appoint new trustees cannot exist unless given by the founder at the time of foundation. (See Perry on Trusts, section 287).

Mookerjee, J., also compared the rights of the Hindu charitable donor or his heirs to the rights of the founder of eleemosynary corporations. In the first place the establishment of an idol, the building of a temple, *mutt* or *chattram* or the endowment of property for their upkeep and maintenance may not be a 'foundation' at all and the principle of Hindu Law laid down by the Privy Council does not appear to be confined to charity corporations. Further, though I have no precise notion of the nature of the rights of patronage and visitation vested in the private founder and his heirs, so far as I understand it, such rights cannot, from the nature of the case, include a right of nomination of trustees. [See Lord Holt's opinion in *Phillips* v. *Bury* (25).]

It remains now to consider the decisions of this Court. In Appeal No. 50 of 1850 the Sudder Court held in general terms with reference to a *katlai* in the famous temple at Madura that the founders' representatives—I am using the term 'founder' in this judgment generally in the sense of donor of property to charity– had no right to interfere in any way in the management, unless a power was reserved at the time of the gift. In Appeal No. 52 of 1857 a right to appoint was upheld, as such a power was found on the evidence to have been given by the founder.

The most important case in this Court, however, is *Sathappayyar* v. *Periasami* (9). That was a case of a private religious endowment called the Sattappayyar Mutt, which was first established by one of the *zemindars* of Sivaganga. The position of the head of the *mutt* towards the endowment was not merely that of a secular trustee; he was himself a beneficiary under the endowment, he being entitled to the income of the properties subject to certain disbursements. The Sivaganga *Zemindars* and the members of their family were beneficiaries only in a spiritual sense. The mode of succession prescribed by the original endowment was, for each head of the *mutt* called Sathappayyar, to appoint his successor. The last Suthappayyar who so succeeded was found guilty of breach of trust and was removed, and there was a vacancy which could not be filled in accordance with the prescribed mode. The *zemindar* of Sivaganga, the sole heir of the founder,—Sivaganga is an impartible *zemindari*– prayed for possession of the endowed properties in order that they may be delivered over to another *guru* to be appointed by him. It is not clear from the plaint whether he claimed the reversion of management or a right of appointment. The right of the plaintiff *zemindar* is discussed in several places in the judgment. At page 7 of the report Muttusami Ayyar, J., than whom no one knew more of the religious and charitable institutions of this part of the country, said that "Exhibit I," the deed of endowment, "shows that the land in dispute was given for a specific religious purpose in order that that purpose might be carried out in perpetuity for the benefit of the grantor's family, and the respondent, as the representative of that family for the time being, is entitled to step forth when that purpose is neglected and the produce of the land is misapplied, and to ask *the Court* to prevent the misappropriation, and to see that the income of the endowment is applied to its legitimate purposes." This passage does not necessarily mean that as representative of the founder the plaintiff was only entitled to invoke the power of the Court, but that that evidently was his opinion will be clear from other portions of his judgment. At page 12 he expressly negatived the right of reversion of management and the reason which he gives, *viz.*, that on the construction of the deed of endowment no such right can be deduced, conclusively shews that that very learned Judge never imagined that under the Hindu Law there was any such reversion on the failure of the original line of trustees. The next paragraph is equally important. The first Court's decree, which is set out at page 3 of the report, declared that a trustee would be appointed by the Court *after consulting the wishes of the plaintiff*, the *zemindar*, and the defendant, the dismissed trustee. The *zemindar*, the respondent, insisted that the dismissed trustee should have no voice

(25) (1788) 2 Term. Rep. 346; 100 E. R. 186.

in the appointment, and that was allowed. He further claimed that the power of appointment vested in the *zemindar for the time being*, that is, the heir of the founder. This again was negatived, for the right of nomination allowed to him was in his capacity of one (though the most important) of the beneficiaries, and the concurrence of *all* the other beneficiaries was required. Even this right of nomination conceded to the beneficiaries, not be it noted to the heirs of the founder, appears to be nothing more than a consultation of their wishes, though the decree is in a more positive form; in fact the learned Judge at page 12 states in terms that the only right which the plaintiff had was the right of a beneficiary under a private trust which is declared in section 60 of the Indian Trusts Act. That that was the opinion of Best, J., is clear; for he agreed in dismissing the memorandum of objections of the plaintiff *zemindar*, except in so far as it related to the dismissed trustee having a voice in the appointment of a new trustee. The reference to the decree in the order of reference was, however, made under a misapprehension.

I have dealt with this case at some length, as I consider that this decision is authority against the propositions laid down by Mookerjee, J , though it is cited by him as supporting those propositions. For the same reasons I am unable to agree in the judgment in *Poraisawmy Pillai* v. *Sandanathammal* (16) on this point, where moreover the right of nomination of fresh trustees was conceded to a Christian settlor. I would, therefore, answer the question in the negative.

Reference answered affirmatively.

V. R. P.

CALCUTTA HIGH COURT.

FULL BENCH.

APPEAL FROM ORIGINAL DECREE No. 27 OF 1916.

May 11, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir John Woodroffe, KT., Justice Sir Asutosh Mookerjee, KT., Justice Sir Charles Chitty, KT., and Mr. Justice Teunon.

ABDUL KARIM ABU AHMED KHAN GHAZNAVI—DEFENDANT—APPELLANT

versus

THE ALLAHABAD BANK, LTD.—PLAINTIFF —RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 107, 151, O. XLI, r. 23—Remand, power to order—Inherent jurisdiction of Court, when to be invoked—Rules of Code, whether govern sections.

The powers of an Appellate Court as regards remand are not limited to the specific case mentioned in Order XLI, rule 23, Civil Procedure Code. But a Court, in the exercise of its inherent jurisdiction to do what is right and necessary, may order a remand in cases other than those covered by Order XLI, if justice so requires it. [p. 600, col. 1; p. 601, col. 1; p. 602, col. 1; p. 604, col. 1; p. 605, col. 1.]

Whether justice does require a Court to invoke its inherent jurisdiction for the purpose of ordering a remand must be determined by that Court with reference to the particular facts of the case and the rule of law that the Court cannot invoke its inherent jurisdiction where there is a provision in the Code, whether by way of remand or otherwise, which, if applied, will meet the justice of the case. [p. 601, col. 1.]

Per *Woodroffe, J.*—The body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. The body of the Code must, therefore, be read in conjunction with the rules, either as existing at the date of publication of the Code or as altered or added to subsequently. Therefore, the power of remand under section 107 is limited to the case described in Order XLI, rule 23. [p. 600, col. 1.]

Per *Mookerjee, J.*—Order XLI, rule 23, cannot be regarded as a limitation on the power of remand recognised in section 107 in the sense that the power to remand can be exercised only in the contingency mentioned in Order XLI, rule 23. [p. 602, col. 1.]

Nothing in section 107, Civil Procedure Code, restricts in any manner the application of the principle of inherent power recognised by section 151. [p. 602, col. 1.]

Tohra Bibi v. *Zabeda Khatoon*, 7 Ind. Cas. 75; 12 C. L. J. 368; *Gora Chand* v. *Basanta Kumar*, 12 Ind. Cas. 684; 15 C. L. J. 258; *Meah Uzir Ali Sardar* v. *Savai Behara*, 32 Ind. Cas. 791; 43 C. 938; 20 C. W. N. 547, *Mani Mohan Mandal* v. *Ramtaran Mandal*, 33 Ind. Cas. 329; 43 C. 148, approved.

Nabin Chandra Tripati v. *Pran Krishna Dey*, 20 Ind. Cas. 39; 41 C. 108; 18 C. L. J. 613, dissented from.

The exercise of inherent power can only be invoked where the Court is satisfied that the specific provisions of the Code are not sufficient to meet the necessities of the case. [p. 603, col. 1.]

Per *Teunon, J.*—Where there has been in the first Court a fair and honestly conducted trial, a case should under section 107, Civil Procedure Code, be remanded, in other words, a *de novo* trial should be directed, only where Order XLI, rule 23, is applicable, that is to say, where the Trial Court has disposed of the suit upon a preliminary point. But in exceptional cases where it may be said that in effect there has been no proper trial at the first Court, it is open to the Appellate Court in the exercise of its inherent jurisdiction, for which section 151 of the Code now makes express provision, to direct a remand or a re-trial. [p 604, col. 2.]

Full Bench reference by Sanderson, C. J., and Mookerjee, J., in application for review of judgment, in appeal against the decision of Mr. Justice Fletcher, dated the 1st February 1916, sitting on the Original Side.

ORDER OF REFERENCE TO FULL BENCH.

"In view of the conflicting decisions of this Court [in the cases of *Tohra (Zohra) Bibi* v. *Zabeda Khatoon* (1), *Gora Chand* v. *Basanta Kumar* (2), *Meah Uzir Ali Sardar* v. *Savai Behara*(3), *Upendra Chandra* v. *Shaikh Sabhan* (4), on the one side, and the cases of *Nabin Chandra Tripati* v. *Pran Krishna Dey* (5), *Mani Mohan Mandal* v. *Ramtaran Mandal* (6), on the other side], we refer the following question for decision by a Full Bench, namely, whether the power of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in Order XLI, rule 23 of the same Code, or whether it is competent to the Appellate Court to remand a case in which in the opinion of that Court there has been no proper trial."

Mr. *B. C. Mitter*, Officiating Advocate-General (with him Mr. *C. C. Ghose*), for the Appellant.

Mr. *Buckland*, for the Respondent.

OPINION.

SANDERSON, C. J. - I think the reference may conveniently be considered in two parts.

First—whether the powers of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure of 1908 is restricted to the case specified in Order XLI, rule 23, and *2nd*—whether it is competent to the Appellate Court to remand a case in which in the opinion of the Court there has been no proper trial.

As regards the first part:

In order to ascertain the intention of the Legislature on this point, I think it is useful to examine the state of the law at the time the 1908 Code was passed.

Under the Civil Procedure Code of 1882 the section which corresponded in effect to Order XLI, rule 23, was 562. That section, however, was followed by 564 which provided that "The Appellate Court shall not remand a case for a second decision except as provided in section 562."

Section 566 of the 1882 Code corresponded to Order XLI, rule 25, of the present Code.

It had been held that though the Code of Civil Procedure of 1882 bound all Courts as far as it went, it was not exhaustive and did not affect previously existing powers, and that in matters with which it did not deal, the Court would exercise inherent jurisdiction to do that justice between the parties which was warranted by the circumstances and which the necessities of the case required and that in spite of the express provision of section 564 the Appellate Court was not precluded from remanding a suit in a case to which neither section 562 nor section 566 applied. See *Habib Bakhsh* v. *Baldeo Prasad* (7) and *Hukum Chand Boid* v. *KamalanandSingh* (8).

The law being as stated above with regard to the power of remand, the 1908 Civil Procedure Code was passed.

The scheme of this Code is different from that of 1882. A general power is given by section 107, which is made by its terms subject "to such conditions and limitations as may be prescribed" (which means prescribed by rules) and the provisions of sections 562 and 566 of the

(1) 7 Ind. Cas. 75; 12 C. L. J. 368.
(2) 12 Ind. Cas. 684; 15 C. L. J. 258.
(3) 32 Ind. Cas. 791; 43 C. 938; 20 C. W. N. 547.
(4) 11 Ind. Cas. 183; 15 C. L. J. 6.
(5) 20 Ind. Cas. 39, 41 C. 108; 18 C. L. J. 613.
(6) 33 Ind. Cas. 329; 43 C. 148.
(7) 23 A. 167; A. W. N. (1901) 39.
(8) 33 C. 927; 3 C. L. J. 67.

old Code are in effect reproduced in Order XLI, rule 23 and rule 25, and section 564 has not been re-enacted either in the Code itself or in the rules.

Further a new section applicable to this matter, *viz.*, section 151, was introduced. This section is as follows:—"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

In my judgment it was not the intention of the Legislature in the Code of 1908 to limit the powers of remand to the case specified in Order XLI, rule 23, but that it intended to and did recognise and preserve such powers as had been exercised theretofore.

I think it may fairly be argued that under section 107 read by itself, and having regard to the words "subject to such conditions and limitations as may be prescribed", the power of remand is limited to the case described in Order XLI, rule 23: but that does not dispose of the matter, for that section must be read together with section 151, which not only recognises but expressly preserves the inherent powers of the Court to make such orders as may be necessary for the ends of justice.

The question whether it is necessary for the ends of justice to exercise such powers of remand must depend upon the circumstances of each particular case, and in exercising such jurisdiction the Court must no doubt be careful to see that its decision is based on general legal principles and subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked.

In my judgment, therefore, the powers of the Appellate Court as regards remand are not restricted to the case specified in Order XLI, rule 23, but the Court, by reason of its inherent jurisdiction, recognised and preserved in the Code as above mentioned, may order a remand in cases other than the case specified in Order XLI, rule 23, if it be necessary for the ends of justice.

As regards the *second* part of the reference I think on further consideration that it is couched in too general terms, and that an answer to such a general question might lead to difficulty and misapprehension and inasmuch as the answer to the first part of the reference is really sufficient to dispose of the matter, I do not think it is necessary to give a specific answer to the second part of the reference.

WOODROFFE, J.—The reference raises two questions, *firstly*, whether the Court's power of remand under section 107 is restricted to the case specified in Order XLI, rule 23, of the Code, and *secondly*, (if the answer be in the negative) whether it is competent to the Appellate Court to remand a case in which, in the opinion of that Court, there has been no proper trial. These two matters should, I think, be kept distinct. As regards the *first* part of the reference, the power to remand is sought to be based both on section 107 of the Code and on the *inherent* jurisdiction. In my opinion, section 107 cannot be relied upon as giving further powers than those which are specifically mentioned in the rules. This question of the relation between the body of the Code and the rules has been discussed in *Mani Mohan Mandal* v. *Ramtaran Mandal* (6) by Sir Lawrence Jenkins, C. J., who took part in the framing of the new Code. I agree with what is there said and I need not repeat the whole of it. The body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. The body of the Code must, therefore, be read in conjunction with the rules either as existing at the date of publication of the Code, or as altered or added to subsequently. A contrary view might lead to difficulties, for (to take an example) it might be urged that section 114 of the Code gave the Court power to entertain a review in cases not covered by Order XLVII, rule 1. I think, therefore, that the power of remand under section 107 is limited to the case described in rule 23, Order XLI If this were not so, the rules would be unnecessary, for the general power of remand would cover not only Order XLI, rule 23, but every other conceivable case. But Sir Lawrence Jenkins went on to say: "And this is the general

rule, except under special conditions which have no application in the circumstances of the case." What is it which authorises the Court to act in such cases? In my opinion, we must invoke in such a case the inherent powers of the Court which are both recognised and saved by section 151 of the Code. I have dealt with this question, whether the Code is exhaustive or not and whether the Court has inherent jurisdiction to pass such orders as justice requires, in my judgment in *Hukum Chand Boid* v. *Kamalanand Singh* (8) and I, therefore, do not repeat what I have said there. Doubtless this exercise of inherent jurisdiction must be exercised with care, subject to the general legal principles and to the condition that the matter is not one with which the Legislature has so specifically dealt as to preclude the exercise of inherent power. But it is argued here that the Code has dealt with the subject of remand and has, therefore, indicated that it is not to be ordered except in the one specific instance mentioned in Order XLI, rule 23. I am not prepared to hold this,—the more so that section 564 of the previous Code has not been re-enacted. The mere fact that section 107 deals with remand does not exclude the Court's inherent jurisdiction to make orders of remand in cases other than those covered by Order XLI, rule 23. I am of opinion, therefore, that the powers of the Appellate Court as regards remand are not limited to the specific case mentioned in Order XLI, rule 23, and that the Court, under its inherent jurisdiction to do what is right and necessary, may order a remand in cases other than those covered by that order if justice so requires it. Whether justice does require a Court to invoke its inherent jurisdiction, must be determined by that Court with reference to the particular facts of the case and the rule of law that a Court cannot invoke an inherent jurisdiction where there is a provision in the Code, whether by way of remand or otherwise, which, if applied, will meet the justice of the case. The merits of the particular application out of which this reference arose are not before us.

The *second* part of the reference is in such wide terms that I feel a difficulty in answering it in a manner which will not lead to misapprehension. Thus the words a "proper trial" might include cases within Order XLI, and an answer in the affirmative might enable the Courts to order wrongly a new trial, although the particular case ought to be dealt with under the provisions of Order XLI. It is the less necessary to do so as the Advocate-General has stated that he will be satisfied with a decision given on the first part of the reference.

MOOKERJEE, J.—The question referred for decision has been framed in the following terms: "Whether the power of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in Order XLI, rule 23, of the same Code, or, whether it is competent to the Appellate Court to remand a case in which, in the opinion of that Court, there has been no proper trial."

I shall confine myself to an examination of the *first* branch alone of the question formulated; for, if it is answered in the negative, the second does not arise, while if it is answered in the affirmative, the second need not be considered, as it is not necessary for our present purpose to specify the limits of the power of remand, if such power is capable of exercise in cases other than those contemplated by Order XLI, rule 23.

Section 107 recognises the power of an Appellate Court to remand a case, but such power is expressly made subject to such conditions and limitations as may be prescribed, that is, prescribed by rules and forms contained in the First Schedule or made under section 122 or section 125 [section 2, clauses 16 and 18]. This, in my opinion, does not necessarily imply that wherever there is a provision in the rules relating to the matters mentioned in the section, the provision is by way of condition or limitation; whether a particular rule has or has not this effect must clearly depend on its terms. This is not inconsistent with the view indicated by Jenkins, C. J., in *Mani Mohan Mandal* v. *Ramtaran Mandal* (6), that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised, which, it is important to observe, is essentially different from the view adopted by Stephen, J., in *Nalin Chandra Tripati* v,

Pran Krishna Dey (5), that the sections lay down general principles while the rules provide the means by which they can be applied and they cannot be otherwise applied as the rules restrict the provisions contained in the sections. I do not read Order XLI, rule 23, as a limitation on the power of remand recognised in section 107, in the sense that the power to remand can be exercised only in the contingency mentioned in Order XLI, rule 23. Apart from this, it seems to me to be incontestable that section 151, which embodies a statutory recognition of the inherent power of a Court to make such orders as may be necessary for the ends of justice, gives ample authority to the Court to make an order of remand in cases not comprised within Order XLI, rule 23, where the Court is satisfied that such order is necessary for the ends of justice. Section 151 does not recognise a new principle; it embodies a doctrine which had been enunciated by Sir Barnes Peacock in *Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Debia* (9), and was re-stated and re-affirmed by Woodroffe, J., and myself, in *Panchanan Singha Roy* v. *Dwarka Nath Roy* (10) and *Hukum Chand Boid* v. *Kamalanand Singh* (8). I feel no doubt whatever that nothing in section 107 restricts in any manner the application of the principle of inherent power recognised by section 151. This was the view adopted by me, after careful consideration and in concurrence with Carnduff, J., in *Tohra (Zohra) Bibi* v. *Zabeda Khatoon* (1) and *Gora Chand* v. *Basanta Kumar* (2). I see no reason to depart from that view, which has been subsequently followed in *Upendra Chandra* v. *Shaikh Sabhan* (4) and *Meah Uzir Ali Sardar* v. *Savai Behara* (3). The decision of Jenkins, C. J., and N. R. Chatterjea, J., in *Mani Mohan Mandal* v. *Ramtaran Mandal* (6), also recognises the power of a Court of Appeal to order a remand under special conditions not included in Order XLI, rule 23. I respectfully dissent from the contrary view expressed by Stephen and Mullick, JJ., in *Nabin Chandra Tripati* v. *Pran Krishna Dey* (5). That the Code itself recognises the power of a Court to direct a remand in circumstances other than those specified in Order XLI, rule 23, is clear from the terms of section 99. I am fortified in my conclusion by an examination of the condition of the law as it stood under the Code of 1882. Section 564 explicitly provided that the Appellate Court shall not remand a case for a second decision except as provided in section 562; yet, the Courts had repeatedly claimed a power to direct a remand in circumstances not included in section 562. The Court sometimes traced the source of this authority to its inherent power to make such orders as might be needed for the ends of justice, as in *Perumbra Nayar* v. *Subrahmanian Pattar* (11), but on other occasions the Court, apprehensive as it were to invoke its inherent power, treated the authority as involved by implication in one or other of the provisions of the Code, for instance, in *Habib Rakhsh* v. *Baldeo Prasad* (7). See also *Jadab Gobinda Singh* v. *Anath Bandhu Saha* (12). While the law was in this condition, the Legislature took two significant steps, namely, *first*, they refrained to reproduce in the Code of 1908 the restrictive provision contained in section 564, and, *secondly*, they introduced in the Code of 1908 section 151, which recognises in explicit terms the inherent power of a Court to make such orders as may be necessary for the ends of justice. The only inference legitimately deducible from this history of the legislation on the subject is that the Legislature intended to place beyond all doubt and dispute the authority of an Appellate Court to direct a remand and re-trial in cases other than those comprised in Order XLI, rule 23, where the Court is satisfied that such order is necessary in the ends of justice. There is, on the other hand, the significant fact that sections 584 and 585 of the Code of 1882, which enumerated the grounds for a second appeal and prescribed a restriction that a second appeal did not lie on any other ground, re-appear as sections 100 and 101 of the Code of 1908. The view that a Court of Appeal is competent to direct a remand and re-trial in a case not covered by Order XLI, rule 23, if the Court is satisfied that such an order is necessary in the ends of justice, has been adopted in other High Courts under the Code of 1908: *Narottam Rajaram* v. *Mohanlal*

(9) 9 W. R. 402 at p. 406; B. L. R. Sup. Vol. 985.
(10) 3 C. L. J. 29.
(11) 23 M. 445; 10 M. L. J. 61; 8 Ind. Dec. (N. S.) 712.
(12) 5 Ind. Cas. 998; 37 C. 171.

Kahandas (13), *Kuppelan* v. *Kunjuvalli* (14), *Vemula Jambalaya* v. *Iskala Rajamma* (15). It is undeniable that exceptional cases, not capable of exhaustive enumeration or classification, do sometimes occur in which defects of trial are so radical as to be incurable otherwise than by a re-trial *de novo*. In a case of this decription, it is incumbent on the Court of Appeal to exercise its inherent power to make such orders as, in its opinion, are required in the ends of justice. The exercise of such inherent powers can only be invoked where the Court is satisfied that the specific provisions of the Code are not sufficient to meet the necessities of the case. The Court of Appeal is invested with plenary powers to correct errors of procedure committed by the Trial Court, as is clear from an examination of rules 24—29 contained in Order XLI of the Code. These provisions cannot be arbitrarily disregarded on well-established principles, which regulate the exercise of inherent power by a Court of Justice, as explained in the judgments in *Hukum Chand Boid* v. *Kamalanand Singh* (8) and *Panchanan Singha Roy* v. *Dwarka Nath Roy* (10); but where the Court of Appeal is satisfied that the correction of the omissions or defects in the trial is not reasonably practicable by recourse to one or other of the provisions mentioned, that is, where it is clearly apparent that the Appellate Court cannot itself satisfactorily dispose of the suit on the merits by the adoption of the specific procedure mentioned in rules 24—29, a remand for re-trial is not only permissible but obviously incumbent on the Court. This view has been followed in practice in this Court for a long series of years, and this is obviously a case for the application of the maxim *cursus curiæ est lex curiæ*. In my opinion the reference should be answered in the terms mentioned in the judgment of the learned Chief Justice.

CHITTY, J.—The following question has been referred for decision by the Full Bench:—"Whether the power of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in Order XLI, rule 23, of the same Code, or whether it is competent to the Appellate Court to remand a case in which in the opinion of that Court there has been no proper trial." These are really two separate questions, to which it would be inconvenient if not impossible to give a single answer.

Dealing with the *first* part of the question I confess that I was at first sight inclined to think that Order XLI, rule 23, while prescribing a condition to a remand under section 107 (1) (*b*), did not impose any limitation on the power of an Appellate Court under that section. There are no words of limitation to be found in rule 23. As was said by the Court in *Tohra* (*Zohra*) *Bibi* v. *Zabeda Khatoon* (1), "Rule 23 makes provision for a particular contingency, but clearly its scope is neither exclusive nor all-embracing." Section 99, also, which precedes section 107 and which forbids a remand under certain circumstances, seemed to me to imply that there may be cases of remand not covered by Order XLI, rule 23. On the other hand, however, it may be reasonably urged that if Order XLI, rule 23, merely prescribes one contingency, in which a remand may be made, and leaves the general provisions of section 107 otherwise unfettered in this respect, then rule 23 is wholly unnecessary and superfluous, and the same might also be said of the other rules which regulate the powers of an Appellate Court conferred by section 107, *viz*, rules 25 to 29 inclusive. It is obvious that this cannot have been the intention of the Legislature, which framed the present Code and rules together. It may be noted that by Order XLIII, rule 1 (*u*), the right of appeal is given only against an order under Order XLI, rule 23, remanding a case. This indicates that the only order of remand under section 107 (1) (*b*), contemplated by the Code and rules as framed, is one made under Order XLI, rule 23. I had the advantage of reading the judgment of Woodroffe, J, and I agree with what he has said in this connection. This was also the view expressed by the late Chief Justice Sir Lawrence Jenkins in the case of *Mani Mohan Mandal* v. *Ramtaran Mandal* (6), and his opinion is entitled to all the more weight as he was in a great measure responsible

(13) 17 Ind. Cas. 891; 37 B. 289; 14 Bom. L. R. 1154.

(14) 9 Ind. Cas. 790; 9 M. L. T. 373; (1911) 1 M. W. N. 199.

(15) 15 Ind. Cas. 859; 36 M. 492; (1912) M. W. N. 1000; 24 M. L. J. 512.

for the Code of Civil Procedure and the rules as they now stand.

It follows that the first part of the question must be answered in the affirmative, but the matter does not end there. I entirely agree that while the power of remand given to an Appellate Court by section 107 (1) (*b*) is restricted by Order XLI, rule 23, the inherent power of the Court, which is expressly reserved to it by section 151, may be invoked to enable it to make an order of remand in circumstances which are not provided for by the Code or the rules. This power must be exercised with the greatest caution. It must not be exercised to enable the Court to pass an order contrary to the provisions of the Code or the rules. Nor can it properly be exercised in circumstances where the Code or rules provide an adequate remedy, as for example in the case of *Mani Mohan Mandal* v. *Ramtaran Mandal* (6) above cited, which was a case of adducing additional evidence. A good example of a case to meet which there is no provision in the Code or rules is *Tohra (Zohra) Bibi* v. *Zabeda Khatoon* (1), also above cited, which is the earliest of the cases now under review. Sir Lawrence Jenkins no doubt had this in mind when he said: "These rules provide that in the case of a lower Appellate Court the power of reversal and remand is limited to the position described in rule 23, Order XLI. And this is the general rule except under special conditions which have no application in the circumstances of this case." In this view of the matter the prohibition on remands contained in section 99 also becomes intelligible.

I do not think that the *second* part of the question can be properly answered by this Full Bench. The expression "case in which in the opinion of the Appellate Court there has been no proper trial" opens up questions of fact, into which this Bench cannot go. It is, however, unnecessary to discuss the matter further, as the learned Advocate-General stated that he would be content with an answer to the first question.

TEUNON, J.—This reference arises out of an application for review of the judgment delivered in Appeal No. 27 of 1916, and the question referred to the Full Bench has been stated in the following terms: namely, whether the power of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in Order XLI, rule 23, of the same Code or whether it is competent to the Appellate Court to remand a case in which, in the opinion of that Court, there has been no proper trial.

Section 107, sub-section (1), of the Code provides that subject to such limitations and conditions as may be prescribed an Appellate Court shall have power —

(*a*) to determine a case finally,
(*b*) to remand a case,
(*c*) to frame issues and refer them for trial,
(*d*) to take additional evidence or to require such evidence to be taken.

For the purposes of this reference sub-section (2) may be disregarded.

The limitations and conditions prescribed are to be found in the rules contained in the First Schedule to the Code, that is, in the rules contained in Order XLI.

It is now well settled that as regards matters specifically dealt with by the Code, the provisions of the Code are exhaustive. It would seem to follow that when an Appellate Court finds itself unable to arrive at a final determination, it should deal with the case under one or other of the sub-clauses (*b*), (*c*) and (*d*) in accordance with the circumstances set out in the appropriate rule. A case should, therefore, be remanded, in other words, a *de novo* trial should be directed, only where Order XLI, rule 23, is applicable, that is to say, where the Trial Court "has disposed of the suit upon a preliminary point."

In the course of the argument before us some stress was laid upon the omission from the present Code of the express prohibition of a *de novo* trial in other cases which was to be found in section 564 of the Code of 1882. To this omission I am unable to attach any great importance, as in the view I take the provisions of section 564 of the last Code have been in effect incorporated in the wider language used in the opening clause of section 107 (1), that is to say, in the words "subject to such limitations and conditions as may be prescribed,"

I have set out above my view as to the general rule.

But section 107 contemplates and proceeds on the assumption that there has been in the first Court a fair and honestly conducted trial. But other exceptional cases may be conceived. It may be found that the Trial Judge was disqualified by personal interest, or that owing to the attitude assumed by the Judge, either party has been precluded from putting forward his case. In such cases and in other cases, where for instance a minor has been improperly treated as a major, in all such cases (and I attempt no exhaustive enumeration of such special conditions) where it may be said that in effect there has been no trial, it is necessarily open to the Appellate Court, in the exercise of the inherent jurisdiction, for which section 151 of the Code now makes express provision, to direct a remand or a re-trial.

Of the six cases decided by this Court that have been cited in the order of reference or discussed in the argument before us, three, namely, *Tohra (Zohra) Bibi* v. *Zabeda Khatoon* (1), *Upendra Chandra* v. *Shaikh Sabhan* (4), *Meah Uzir Ali Sardar* v. *Savai Behara* (3), it may be observed, are cases where after adding parties the Appellate Court directed a *de novo* trial. A remand in such cases may perhaps be supported under the provisions of Order XLI, rule 23, the trial having been vitiated by the first Court's erroneous decision on the preliminary question of non-joinder and by the absence of the assistance which the added party was in a position to give. Otherwise the decision is justified under section 151 of the Code. These three cases, the case of *Gora Chand* v. *Basanta Kumar* (2) and the observations of Jenkins, C. J., in *Mani Mohan Mandal* v. *Ramtaran Mandal* (6) support in my opinion the view I take. The remaining case, *Nabin Chandra Tripati* v. *Pran Krishna Dey* (5), may possibly be said to be against it, but it is doubtful whether in that case the learned Judge had in view the exceptional circumstances which may make recourse to section 151 necessary.

For the above reasons and subject to the foregoing observations, my answer to both branches of the question referred to us is in the affirmative.

First part of reference answered affirmatively.

MADRAS HIGH COURT.

APPEAL No. 194 OF 1915.

January 31, 1917.

Present:- Justice Sir William Ayling, KT. and Mr. Justice Srinivasa Aiyangar.

CHUNDURU CHINA LAKSHMINARAYANA AND OTHERS—DEFENDANTS NOS. 1 TO 6—APPELLANTS

versus

NERALLA VENKATA SUBBA RAO, MINOR, BY NEXT FRIEND MAMIDI PICHAMMA AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 7 & 8—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 4—Will—Executors, rights and duties of—Executor indebted to estate, position of—Trusts Act (II of 1882), s. 87—Legatee, suit by, against executor-debtor, nature of—Limitation Act (IX of 1908), Sch. I, Art. 123—Suit not framed as one for administration—Plaint, amendment of—Civil Procedure Code, O.VI, r. 17—Decree, form of—Interest, liability for, by executor-debtor, after testator's death.

A legatee is not entitled to sue a debtor of the estate for the debt. The only persons who can sue are the executors appointed under the Will. [p. 607, col. 2.]

If, however, the executors fail to do their duty and refuse or neglect to sue, a legatee may sue the executors for his legacy in due course of administration and may join the debtor or his representatives as parties and claim payment of the debt to the estate [p 607, col. 2.]

Where the claim is against a stranger indebted to the estate, the suit should be filed within three years from the date when the debt becomes payable. [p. 607, col 2]

If, however, the debtor himself is one of the executors in whom the estate vests, in legal theory the debt payable by him is assumed to have been paid by him to himself and becomes part of the assets of the deceased testator in his hands. [p. 607, col. 2.]

This is the case whether the executor proves the Will or not, provided he acts as executor. [p. 608, col. 2.]

If, however, a person appointed an executor renounces the office or dies without having acted or obtaining probate, he will be in the position of a stranger debtor, and an action to recover the debt will be barred unless brought within the time limited for an action to recover a debt. [p. 608, col. 2.]

One of two executors cannot sue his co-executor for payment of the assets in the latter's possession, but on his death the surviving executor can sue

the legal representatives of the deceased executor for recovery of such assets. [p. 608, col. 1.]

A creditor or a general legatee may for the purpose of recovering his debt or his legacy bring a suit for administration and in that suit claim an account from the representatives of the deceased executor and payment of whatever is found due. [p. 608, col. 1.]

In such an action, it may not be necessary to join as parties persons beneficially interested in the estate; but the decree in such a suit would not be for payment of the debt as a debt, but would be for an account of the moneys belonging to the testator's estate in the hands of the executor. [p. 608, col. 1.]

Such a suit when brought by a legatee is one to recover a legacy, and is governed by Article 123 of the Limitation Act. [p. 608, col. 2.]

Where the plaint does not expressly contain a prayer for administration, either general or limited, and the claim is not made for the recovery of a legacy, but it contains all the necessary allegations to give the plaintiff the relief to which he is entitled, it may be allowed to be amended and the necessary parties may be ordered to be added. [p. 609, col. 2.]

Where the plaintiff legatee is not entitled, at the date of the decree, to payment of his legacy under the terms of the Will, the proper order is to direct the executors and debtors to the estate to pay the amounts due into Court and direct their investment. [p. 609, col. 2.]

Where an executor who is indebted to the estate retains the amount of the debts as assets of the estate, he is liable to interest on it at 6 per cent. per annum if he does not invest the same. [p. 610, col. 1.]

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Original Suit No. 30 of 1913.

Messrs. *T. R. Ramachandra Aiyar* and *T. Ramachandra Rao*, for the Appellants.

Messrs. *V. Ramesam* and *P. Narayana Moorthy*, for the Respondents.

JUDGMENT.—Several questions were raised at the hearing of the appeal, but at the close of the arguments, there finally emerged for decision two substantial questions:—

(1) Whether the suit was barred by the Statute of Limitations, and

(2) whether the suit as brought was maintainable.

The appellants challenged the findings of fact of the lower Court, but as we agree with those findings, it is scarcely necessary to deal with the evidence in detail. The facts which are either admitted or proved may be shortly stated. One Mangayya and Chunduri Subbarayudu, the father of defendants Nos. 1 and 2 and the grandfather of defendants Nos. 3 to 6, had dealings with each other, which resulted in mutual accounts. There were three accounts, one for cash dealings, another for purchase and sale of goods on each other's account, and a third called the Rice Mills Factory Account. The last account requires some explanation. Subbarayudu and others were working some rice mills in Bezwada in partnership, and Mangayya was a sub-partner with Subbarayudu in that concern. Moneys advanced by Mangayya to Subbarayudu for the working of the rice mills were entered in the third account. In December 1900, a sum of over Rs. 10,000 was owing to Mangayya from Subbarayudu on No. 1 account, and it appears that he was pressing Subbarayudu for payment of the sums due to him, but Subbarayudu instead of paying him appears to have asked Mangayya for money for the working expenses of the rice mills and proposed that Rs. 5,000, out of the amount which was owing to Mangayya on No. 1 account, should be transferred and debited to the rice mills account; the result of such transfer would be that the sum of Rs. 5,000, instead of being a personal debt of Subbarayudu, would become an item of account in the partnership between the two. Mangayya agreed to this and the necessary adjustments were made on January 11, 1901; but a year later, either because Mangayya was not bound to contribute any such sum of Rs. 5,000 for the working expenses of the rice mills or for other reasons, the debit of Rs. 5,000 to the rice mills account was cancelled, and that sum was carried to a separate account to the debit of the first defendant, Lakshminarayana. That was on January 25, 1902. On the same day the credits and debits in No. 2 account were taken over to No. 1 account and thereafter No. 2 account ceased to exist. That these adjustments were made with the consent of Subbarayudu is established by the evidence. Though the sum of Rs. 5,000 was debited in the name of Lakshminarayana, it was a debt owing by Subbarayudu and the joint family consisting of himself and his sons. Lakshminarayana does not say that it was a personal debt of his own. He had nothing to do with this adjustment and in fact he disclaims all knowledge of it. Mangayya died on November 24, 1903, and before his death on November 6, 1903, made his Will by which he appointed Subbarayudu, his debtor Krish-

nayya, his son-in-law, and another Sambayya executors. He gave authority to his widow Sitamma to adopt and bequeathed $\frac{2}{3}$rds of the residue of his property to the boy to be adopted and the remaining $\frac{1}{3}$rd to Sitamma. The legacies were payable, on the boy to be adopted attaining the age of majority. Sambayya, one of the executors, declined to act and Subbarayudu and Krishnayya entered on their duties, though probate was not taken out (no probate was necessary as the Hindu Wills Act does not apply), and Subbarayudu took a leading part in the administration of the estate. It appears, however, that the widow Sitamma was in actual custody of the moneys belonging to Mangayya's estate though Subbarayudu was in the direction of affairs. Krishnayya, the other executor, was receiving salary from the estate and was looked upon as practically a servant. Sitamma was pressing Subbarayudu to repay the sum of Rs. 5,000 and interest, but Subbarayudu declined to pay on the ground that the money was in his hands and he, as executor, was entitled to keep it. He also claimed to retain what may be found due to him on taking the accounts of the rice factory. There was practically no balance due either way on No. 1 account. Sitamma, finding that Subbarayudu was not paying the debt due to her husband's estate in spite of repeated demands, applied for a succession certificate jointly with Krishnayya to collect this debt and certain small debts due to her husband's estate from others, and in spite of opposition from Subbarayudu she and Krishnayya obtained a succession certificate on the 19th October 1905. The plaintiff was adopted by Sitamma on the 5th June 1905, and Subbarayudu died in June 1906. The present suit was instituted on August 21, 1911, by the adopted son who is still an infant against the defendants, the sons and grandsons of Subbarayudu, to recover the said sum of Rs. 5,000 and interest. Neither Sitamma, nor Krishnayya the surviving executor is a party to the suit, though both of them are named as the next friends of the minor plaintiff.

In this state of things the first question for determination is as to the nature of the right of the plaintiff in the estate of Mangayya and against the defendants, for on that would depend the Article of the Limitation Act applicable to the suit. The estate of Mangayya on his death vested in his executors Krishnayya and Subbarayudu under section 4 of the Probate and Administration Act. As the plaintiff does not repudiate the Will and claim the estate as the surviving member of a joint Hindu family – according to the decisions of this Court, he could not have done so—he is not entitled to sue a debtor of the estate for the debt and the only persons who could sue are the executors. If, however, the executors fail to do their duty and refuse or neglect to sue, a legatee may sue the executors for his legacy in due course of administration and may join the debtor or his representatives as parties and claim payment of the debt to the estate [see *Consett* v. *Bell* (1) and *Morley* v. *White* (2)], but whatever be the form of action the same Article of Limitation would apply, and if the cause of action had accrued, and time commenced to run during the lifetime of the testator, it would continue to run, except in the case specially provided for by section 9 of the Limitation Act. [See *Soni Ram* v. *Kanhaiya Lal* (3).] If, therefore, Subbarayudu had been a stranger debtor, the claim to recover the debt would certainly be barred by limitation as the debt became due in January 1902 during the lifetime of Mangayya, and the period of limitation for a suit to recover the debt is three years. The acknowledgments of liability referred to by the lower Court, even if they satisfy the conditions of section 19 of the Act, would be of no use as there is none within three years of the date of the suit. If, however, the debtor himself is one of the executors, in whom the estate vests, in legal theory, the debt payable by him is assumed to have been paid by him to himself and becomes part of the assets of the deceased testator in his hands. *Bourne, In re*; *Davey* v. *Bourne* (4), section 87, Indian

(1) (1842) 1 Y & C. C. C. 569 at p. 579; 11 L. J. Ch. 401; 6 Jur. 869; 62 E. R. 1020; 57 R. R. 451.

(2) (1873) 8 Ch. App. 731; 42 L. J. Ch. 880; 29 L. T. 822; 21 W. R. 828.

(3) 19 Ind. Cas. 291; 40 I. A. 74; 17 C. W. N. 605; 11 A. L. J. 389; 13 M. L. T. 437; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 35 A. 227 (P. C.).

(4) (1906) 1 Ch. 697; 75 L. J. Ch. 474; 94 L. T. 750 22 T. L. R. 417.

Trusts Act. This seems to be the case whether the executor proved the Will or not, provided he acted as executor, *Wankford* v. *Wankford* (5) and *Applebee, In re*; *Leveson* v. *Beales* (6). If, however, a person appointed an executor renounces the office or dies without having acted or obtaining probate, he will be in the position of a stranger debtor and an action to recover the debt will be barred unless brought within the time limited for an action to recover a debt [*Ingle* v. *Richards* (7)]. As one executor is as much entitled to be in possession of the assets of the testator and expend it in due course of administration as his co-executor, there can ordinarily be no suit against him by the co-executor to pay over the assets to him [*Beall* v *Hilliary* (8)]; but on the death of one of two executors, the powers of the office are vested in the survivor, and he then may have a right to claim the assets from the representatives of the deceased executor. Also a creditor or a general legatee may for the purpose of recovering his debt or his legacy bring a suit for administration and in that suit claim an account from the representatives of the deceased executor and payment of whatever is found due. Now that Subbarayudu himself was an executor, the co-executor Krishnayya could not bring an action at law to recover the debt due from Subbarayudu but can, if at all, only sue for administration to secure the payment of the debt due to the estate. In such an action, it may not be necessary to join as parties persons beneficially interested in the estate: but the decree in such a suit would not be for payment of the debt as a debt but would be for an account of the moneys belonging to the testator's estate in the hands of an executor. See *Peake* v. *Ledger* (9), for form of decree the same case reported in 4 De G. & Smole page 137. But Krishnayya was not bound to bring such a suit so long at any rate as Subbarayudu was alive and the plaintiff cannot be prejudiced by any inaction on the part of Krishnayya [See *Pardoe, In re*; *McLaughlin* v. *Penny* (10)].

The plaintiff in this case is only a legatee and does not represent the estate and has no direct claim against any debtor to the estate His only right under the Will is to recover as legatee his share of the residue which was bequeathed to him from the executors and if the executors had died possessed of property belonging to the testator, to recover the same from their representatives; for there can carcely be any doubt that the defendants, as representatives of their father Subbarayudu, would be bound to pay to the estate of Mangayya any assets which remained in the hands of Subbarayudu. As the debt due to Mangayya by Subbarayudu became assets in his hands on his appointment as executor, the plaintiff is entitled to two-thirds of the money which remained in the hands of Subbarayudu at the time of his death and the defendants are liable to pay that sum to the plaintiffs. It is not said that any debts or other legacies remain to be paid and any further administration of the estate, except dividing the residue between the plaintiff and Sitamma, is not necessary. The plaintiff's right then is to recover a legacy, and even if he were an adult, his suit would not be barred, as he has under Article 123 12 years from the time when he becomes entitled to receive it. *Rajamannar* v. *Venkatakrishnayya* (11), *Johnson, In re*; *Sly* v. *Blake* (12) and *Davis, In re*; *Evans* v. *Moore* (13). But whatever Article of Limitation applies, as the cause of action accrued to the plaintiff for the first time after the death of Mangayya, and as he is still an infant, his right of action could not be barred.

The next question is whether the plaint is so framed as to give the plaintiff the relief he is entitled to. The claim made in the plaint as it now stands is undoubtedly a legal claim to recover a debt due to the estate

(5) 1 Salk. 299; 91 E. R. 265.
(6) (1891) 3 Ch. 422; 60 L. J. Ch. 793; 65 L. T. 406; 40 W. R. 90.
(7) (1860) 28 Beav. 366 at p. 368; 6 Jur. (N. S.) 1178; 8 W. R. 697; 54 E. R. 406, 3 L. T. 46; 126 R. R. 172.
(8) 54 Am. Dec. 649; 1 Maryland 186.
(9) (1850) 8 Hare 313; 4 De G. & Sm. 137; 64 E. R. 769; 68 E. R. 380.
(10) (1906) 1 Ch. 265; 75 L. J. Ch. 161; 94 L. T. 88; 54 W. R. 210.
(11) 25 M. 361; 12 M. L. J. 183.
(12) (1885) 29 Ch. D. 964; 52 L. T. 682; 33 W. R. 502.
(13) (1891) 3 Ch. 119; 61 L. J. Ch. 85; 65 L. T. 128; 39 W. R. 627.

as if the plaintiff is the present owner and representative of the estate, and the lower Court has given a decree to the plaintiff for the whole amount sued for on that basis. That, as has already been stated, is not his right. There can scarcely be any doubt that the plaintiff and his advisers have managed to go wrong as often as they can, and although the plaint was allowed to be amended in the lower Court, it is obviously still defective. At the close of the arguments in the appeal, the plaintiff applied for permission to further amend the plaint in accordance with his actual rights in the estate of his adoptive father and subsequently filed a petition for that purpose. This application is opposed by the appellants and the question is whether we should allow it now. The plaint contains all the necessary allegations to give the plaintiff the relief to which he is entitled, though there is no specific prayer for administration, either general or limited, and the claim is not made as for the recovery of a legacy. It is to make the plaint regular, by claiming proper reliefs, and to cure the defect as regards parties that the application to amend the plaint has been made in this Court. Inasmuch as the plaintiff is still an infant, and as his claim is certainly not barred, to avoid futher litigation and expense, we think we should allow the amendment now asked for, if we can do so without prejudice to any vested rights of the defendants. Inasmuch as the rest of the properties belonging to Mangayya's estate except the sum due from Chunduru Subbarayudu is said to be now in the possession of Sitamma as guardian of the minor plaintiff and inasmuch as both Sitamma and Krishnayya agree to account to the minor for his share of the residue of the testators's estate and to be bound by all the proceedings which had hitherto been taken in this suit, there is no need to pass a decree for general administration or to send the case back for taking general accounts. In the view we have taken, namely, that the claim of the plaintiff is not a legal claim to recover a debt, but only a right to recover his share of the residue, Subarrayudu and his representatives would be entitled to claim, if they so desired, an enquiry as to whether Subbarayudu during his lifetime made any payments or was entitled to retain any sum as executor out of the funds which were in his hands. No suggestion was made in the course of the trial in the lower Court that any disbursements were made or expenses incurred by Subbarayudu as executor of the estate of Mangayya, but it was said that if the account of the rice factory partnership is adjusted, it will be found that Mangayya's estate was indebted to Subbarayudu. If the defendants insist on an equiry they are entitled to it. As we can direct this enquiry in this suit, the amendment should, we think, be allowed and to obviate any possible objection as to want of parties, we also order Krishnayya the surviving executor and Sitamma, the other residuary legatee, to be added as defendants, reserving, however, the right of the plaintiff to an account of and payment of his share of the residue in their hands.

As the plaintiff is only entitled to $\frac{2}{3}$rds of the amount, the decree of the lower Court directing the payment of the whole sum to the plaintiff cannot stand. Further the residue is not payable till the infant plaintiff attains the age of majority. As the legacy is payable according to the terms of the Will on the plaintiff attaining majority, it is clear that Sitamma's claim to her legacy is also not barred. In these circumstances it is unnecessary to drive Sitamma to a separate suit to recover her share of the legacy. The proper order then to make in view of the rights of the parties is an order directing defendants Nos. 1 to 6 to pay into Court, out of the joint family property in their hands, the sum for which on taking accounts they are found liable and directing its investment when paid under the directions of the Court. For out of the invested funds the plaintiff should be paid his share, namely $\frac{2}{3}$rds, and Sitamma the remaining $\frac{1}{3}$rd, when plaintiff attains the age of majority, liberty to be reserved to apply for this purpose.

There is one other question in the case, *viz.*, as the debt due to Mangayya from Chunduri Subbarayudu became assets in the hands of Subbarayudu on the death of Mangayya, whether he was bound to pay interest thereon according to the rate stipulated in the contract between the parties or whether after that date he was to be treated as executor with the money of his testator in his hands for which he has not accounted

and whether he was chargeable with any interest. It is clear that the moneys of Mangayya which were in the hands of executors could have been invested and lent out for interest, and as it is not proved that they could have been lent out at any particular rate, we think 6 per cent. interest from the date of the death of the testator on the sum then due till date of payment should be charged. There will be no costs in this Court. The costs of the lower Court will be provided for in the final decree to be passed on taking accounts.

There will be a preliminary decree for accounts and inquiries in this Court.

Appeal allowed; Decree modified.

V.R.P.

CALCUTTA HIGH COURT.

RULE *Nisi* NO. 471 OF 1917.

July 4, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

BALAKESHWARI DABI—PETITIONER

versus

JANANANDA BANERJEE—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 132, sub-s. 1—Pardanashin lady, appearing in Court to institute criminal complaint, whether loses exemption from personal appearance in Civil Court.

A *pardanashin* lady, who according to the customs and manners of the country ought not to be compelled to appear in public, does not cease to be exempt from personal appearance in Court under sub-section (1) of section 132, Civil Procedure Code, in consequence of her appearing on a previous occasion in a Criminal Court for the purpose of instituting a complaint. [p. 611, col. 1.]

Rule against the order of the Sub-Judge, second Court, Burdwan, in Miscellaneous Case No. 25 of 1917.

FACTS appear from the judgment

Babu *Biraj Mohan Mozumdar* (with him Babu *Ajendra Nath Dutt*), for the Petitioner.—The refusal by the learned Subordinate Judge to order the issue of a commission for the examination of the lady is clearly erroneous. She is a *pardanashin* lady and as such she is entitled to be examined on commission. Under section 132, sub-section (1), Civil Procedure Code, she ought not to be compelled to appear in public and is exempt from personal appearance in Court. The mere fact that on a certain occasion in a criminal case she appeared before the Criminal Court cannot forfeit her right under section 132, sub-section (1), of the Civil Procedure Code. The section is clear and unmistakeable. The opposite party does not dispute the fact that the petitioner is really a *pardanashin* lady. She cannot have forfeited her right to claim exemption by reason of her appearance in the Criminal Court. The principles to be observed in cases like this were clearly laid down in *Chamatkar Mohiney Dabee* v. *Mohesh Chunder Bose* (1) and *Mohesh Chunder Addy* v. *Manick Lall Addy* (2). In the Criminal Court the lady appeared voluntarily, and that is no reason why in the present case she should be compelled by the learned Subordinate Judge to appear in person. A *pardanashin* lady is entitled to be examined on commission. Refers to *In the matter of Hurro Soondery Chowdhrain* (3), *Hem Coomaree Dassee* v. *Queen-Empress* (4).

Dr. *Jadunath Kanjilal*, for the Opposite Party, opposed and contended that a *pardanashin* lady was not entitled as of right to be exempt from personal attendance in Court.

JUDGMENT.—We are invited in this Rule to set aside an order, whereby the Subordinate Judge has refused an application for the issue of a commission for the examination of the petitioner, who is a *pardanashin* lady. The petitioner moved the Court below to institute proceedings under the Legal Practitioners Act against the opposite party, who is alleged to have acted as her Pleader. On the 6th June last, she applied to be examined on commission in support of her allegations. The application was opposed on the ground that as the applicant had appeared before the Criminal Court on the 2nd June to institute a complaint against one Bhakta Das, she should appear before the Subordinate Judge and be examined in Court. The Subordinate Judge thereupon refused the application. In our opinion the order cannot possibly be supported.

(1) 26 C. 651*n*; 3 C. W. N. 750; 13 Ind. Dec. (N. S.) 1018.
(2) 26 C. 650; 3 C. W. N. 751; 13 Ind. Dec. (N. S.) 1017.
(3) 4 C. 20; 3 C. L. R. 93; 2 Ind. Dec. (N. S.) 14.
(4) 24 C. 551; 1 C. W. N. 333; 12 Ind. Dec. (N. S.) 1036.

BALAKESHWARI DABI *v.* JANANANDA BANERJEE.

Section 132, sub-section (1), of the Civil Procedure Code, 1908, provides that women, who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court. It is not disputed that the petitioner is a *pardanashin* Hindu lady, and, according to the customs and manners of the country, ought not to be compelled to appear in public. The question consequently arises, whether she has forfeited the exemption she enjoys under sub-section (1) of section 132, by reason of the fact that she has appeared in a Criminal Court to institute a complaint; on that occasion, the Court-room was cleared and she was examined in *camera*. In our opinion, the question should be answered in the negative, in accordance with the principles explained by this Court in the cases of *Chamatkar Mohiney Dabee* v. *Mohesh Chunder Bose* (1) and *Mohesh Chunder Addy* v. *Manick Lall Addy* (2). In the earlier of the two cases, Mr. Justice Trevelyan observed that he should be exceedingly careful before he forced into the public gaze a woman, even though she might have gone outside the *parda* once, either by way of experiment or otherwise. In the second case, Mr. Justice Stanley ordered a commission to issue, although it was established that the lady had on a previous occasion appeared in Court and was examined seated inside a palanquin. The Subordinate Judge has overlooked the obvious distinction between the voluntary and the compulsory appearance of a *pardanashin* lady in Court to be examined as a witness. No doubt, a *pardanashin* lady may completely alter her mode of life, and cease to be included in the statutory description of a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public. When this transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in section 132. But if she is, in fact, a *pardanashin* lady she is not deprived of the statutory protection, merely because she may have previously appeared in public. It is not necessary for our present purpose to investigate exhaustively the law applicable in this respect to criminal cases; but, as the Subordinate Judge has relied upon the fact of the voluntary appearance of the petitioner in a Criminal Court, to her detriment, we may point out that, as regards criminal cases, there has perhaps been a slight divergence of judicial opinion on the question of the examination of *pardanashin* ladies on commission. In this Court, it has been sometimes maintained [*In the matter of Harro Soondery Chowdhrain* (3), *In re Din Tarini Debi* (5), *Abhoyeswari* v. *Kishori Mohan Banerjee* (6), *Hem Coomaree Dassee* v. *Queen-Empress* (4)] that she is entitled to be examined on commission. In Allahabad, on the other hand [*In the matter of the petition of Farid-un-nissa* (7), *In the matter of the petition of Basant Bibi* (8)], it has been said that a *pardanashin* lady is not entitled as of right to be exempt from personal attendance in Court, although, as a matter of prudence, she should not be compelled to appear. But, whatever may be the exact rule of procedure applicable to criminal cases, the true scope of section 132 of the Civil Procedure Code is not open to serious discussion. We are, consequently, of opinion that in the present case the application by the lady to be examined on commission should not have been opposed in the Court below or in this Court, and we cannot but express our surprise that a person in the position of the opposite party should have thought it proper to take up and maintain such an attitude.

The result is that this Rule is made absolute. We direct that a commission do issue for the examination of the petitioner in accordance with law. As the Rule has been opposed, the petitioner will have her costs in this Court. We assess the hearing fee at two gold *mohurs*.

Rule made absolute.

(5) 15 C. 775; 7 Ind. Dec. (N. S.) 1100.

(6) 23 Ind. Cas. 700; 42 C. 19; 18 C. W. N. 1020; 15 Cr. L. J. 348.

(7) 5 A. 92; A. W. N. (1882) 184; 3 Ind. Dec. (N. S.) 109.

(8) 12 A. 69; A. W. N. (1889) 202; 6 Ind. Dec. (N. S.) 794.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 78 OF 1916.

May 2, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

A. K. T. K M. NARAYANAN NAMBUDRIPAD—PETITIONER—APPELLANT

versus

TAWKER J. MEGAJI SEIT AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 63—Attachment of property by superior Court—Subsequent attachment and sale by inferior Court—Sale, whether invalid.

A subsequent attachment and sale by an inferior Court of immoveable property already attached in execution of a decree of a superior Court is not necessarily illegal and made without jurisdiction. [p. 613, col. 1.]

Gopi Chand Bothra v. *Kasimunnessa Khatun*, 34 C. 836; 6 C. L. J. 130, dissented from.

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Srinivasa Aiyangar, dated the 11th January 1916, reported as 32 Ind. Cas. 927, in Civil Revision Petition No. 64 of 1914, praying the High Court to revise the order of the District Court, South Malabar, dated the 9th September 1913, in Civil Miscellaneous Appeal No. 17 of 1913 (preferred against the order of the Court of the District Munsif of Manjeri, in Civil Miscellaneous Petition No. 2293 of 1912).

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *K. P. M. Menon*, for the Respondents.

This Letters Patent Appeal coming on for hearing on the 30th November and the 1st December 1916, the Court delivered following

JUDGMENT.—The observations of the learned Judge that the purchaser in this case (3rd respondent) had no notice of the attachment by the Court of the Subordinate Judge appears to have been made inadvertently and is not based on any finding that we can discover in the judgments of either of the lower Courts.

We must call for finding on this issue,

Was 3rd respondent at the time of his purchase at Court auction aware of the existence of an attachment of the Court of the Subordinate Judge on the property sold?

The District Judge will take evidence on this point and return a finding in two months. Seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of South Malabar submitted the following

FINDING.—The High Court has called for a finding on the issue "was the 3rd respondent (3rd counter-petitioner) at the time of his purchase at Court auction aware of the existence of an attachment of the Court of the Subordinate Judge of Calicut on the property sold?"

2. The 1st witness for the petitioner proves Exhibit F, the affidavit sworn to by Valiyapeediyakkal Ahammad, in which he admits that he bought the property at Court sale *benami* for Ahammadkutti. The 2nd witness for the petitioner swears that Naliya Peediyakkal Ahammad (3rd counter petitioner) is the agent of Ahammadkutti. The 3rd counter-petitioner goes into the box on his side and says that the shares of Kalluvettikuzhiyil Ahammadkutti were bought with his money, but he did not attend the sale, and the money was paid back to him the next day. Apparently he made in the defence statement in connexion with Miscellaneous Petition No. 2293 of 19.2 (Exhibit G) an entirely contradictory statement, wherein he says that he bought the property with his own money and for himself. Valiyapeediyakkal Ahammad is, therefore, a man on whose word no reliance can be placed, and if I were not merely recording a finding to the superior Court, I should have to consider the advisability of ordering his prosecution under section 476, Code of Civil Procedure, for his contradictory written statement and affidavit I accept the evidence of the petitioner's 2nd witness that Ahammad is the agent of Ahammadkutti and I think that it is probable that the affidavit contains a correct account that Ahammad bought the property *benami* for his principal.

3. In these circumstances I think that it is safe to presume that the 3rd respondent at the time of his purchase at Court auction was aware of the existence of the attachment of the Court of the Subordinate Judge on the property sold. He was no stranger to Ahammadkutti and I have no doub

PUTTU MAL *v.* BHARAT INDU.

that they have discussed the matter between themselves.

4. Accordingly I find in the affirmative on the issue.

This Letters Patent Appeal coming on for final hearing on the 30th April 1917 and this day, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—The property in dispute was attached by the Court of the Subordinate Judge of Calicut. While the attachment was subsisting, the District Munsif of Manjeri in execution of a decree of the Court of the Principal District Munsif attached the same property and brought it to sale. The respondent was the purchaser. An application was made by the Subordinate Judge's Court decree-holder to set aside the sale. The Courts below upheld the sale. In this Court, Mr. Justice Srinivasa Aiyangar took the same view. Hence the Letters Patent Appeal.

We think that the language of the second clause of section 63 of the Code of Civil Procedure, 1908, leaves no room for doubt that the Legislature intended to hold that the sale is valid.

Before the Act of 1908 the decisions were to this effect. It was held in Calcutta [*Gopi Chand Bothra* v. *Kasimunnessa Khatun* (1)] that the sale held in contravention of the provisions of section 285 of Act XIV of 1882 was not a nullity. *Har Prasad* v. *Jagan Lal* (2) took the opposite view. In *Kunhayan* v. *Ithukutti* (3) and in *Abdul Karim* v. *Thakordas Tribhovandas* (4) an intermediate view was taken to the effect that if the purchaser took the property with knowledge that an attachment by a superior Court was subsisting, his sale should be set aside. In this state of the authorities the Legislature has said, "nothing in this section shall invalidate any proceeding taken by a Court executing one of such decrees." In our opinion, this language is intended to give legislative sanction to the view taken in Calcutta. Of course, if any question of fraud arises, the protection would be of no avail. In the absence of fraud each decree-holder is entitled to proceed with the execution of his decree. The Legislature has enacted for the convenience of the various decree-holders that the Court which shall deal with the assets shall be the superior Court. It is clear that the other Court has also jurisdiction to carry into effect proceedings in execution of its own decrees. Consequently, the direction for investing the superior Court with power to distribute the assets seems to be directory and not mandatory. In this view, the proceedings of the inferior Court should not be regarded as illegal and without jurisdiction.

We must, therefore, hold, that the sale to the respondent was not invalid and that the Courts below were right. We affirm the decision of the learned Judge and dismiss the appeal with costs.

Appeal dismissed.

V. R. P.

(1) 34 C. 836; 6 C. L. J. 130.
(2) 27 A. 56; A. W. N. (1904) 161.
(3) 22 M. 295; 9 M. L. J. 1; 8 Ind. Dec. (N. S.) 210.
(4) 22 B. 88; 11 Ind. Dec. (N. S.) 640.

F. N. Das
Advocate High Court
Jammu & Kashmir

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 66 OF 1916.

July 15, 1916

Present:—Mr. Justice Walsh and Mr. Justice Sunder Lal.

PUTTU MAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BHARAT INDU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Village sites, ownership of—Zemindars, *rights of*—*Tenants allowed to use land, effect of*—*Temporary user*—*Adverse possession.*

In ordinary agricultural villages *zemindars* are owners of the entire village land, but as the village develops and becomes bigger it is possible that the holders of land in the village may obtain proprietary rights either by grant from the *zemindars* or by adverse possession. The mere fact that a village has become big enough to be called a town does not by itself affect or alter the *zemindars'* rights, but it is by the process of transfer, grant or adverse possession that the various owners acquire their rights. [p. 614, cols. 1 & 2.]

A *zemindar* very often does allow tenants to use the land in his village in many ways beneficial to the tenants but which are not injurious to him. They are mere acts of grace and favour, and cannot by themselves be regarded as acts indicating adverse possession. [p. 614, col. 2.]

Where a *zemindar* allows the occupants of shops in the village to use the land in front of the shops, the user does not confer any rights on the owners

of the shops, nor does it constitute a case of adverse possession. [p. 614, col. 2.]

Framji Cursetji v. *Goculdas Madhowji*, 16 B. 338; 8 Ind. Dec. (N. S.) 703, relied upon.

Second appeal from a decree of the Additional Judge, Farrukhabad at Fatehgarh, dated the 30th of November 1915, reversing that of the Munsif, Fatehgarh, dated the 28th February 1914.

The Hon'ble Mr. *B. E. O'Conor* and Mr. *Nehal Chand*, for the Appellants.

The Hon'ble Dr. *Surendro Nath Sen*, for the Respondents.

JUDGMENT.—This suit relates to certain land in Kamalganj. The plaintiffs are the *zemindars* of the village. Nanhe and Balli *bhatiaras* or inn-keepers are residents of the village, who are occupants or owners of certain shops or buildings in the *sarai*. The dispute does not relate to the shops or buildings but to plots of open land and land covered by a *chabutara*, which have been recently sold and which the other defendants now intend to build upon. The plaintiffs' case is that they are the *zemindars* of the village, that as such they are the owners of the land, that the defendants do not own the land in dispute, that they have no right to sell and that the transferees have no right to build upon the land without the plaintiffs' consent. The Court of first instance dismissed the suit. The learned Judge in appeal has decreed it. The question is whether the findings at which that Court has arrived can be disturbed by us.

There was previously a suit about lands in this very village which is reported as *Incha Ram* v. *Bande Ali Khan* (1). That case did not decide that Kamalganj was an agricultural village. But at one time or other there can be no doubt that it was an agricultural village. What in that case was held to be the result of the finding was that "Kamalganj was once an agricultural village and is still inhabited by a number of agriculturists." The Court below after a consideration of the whole evidence has arrived at the conclusion that the *zemindars* are in possession of the site in dispute and the defendants have failed to prove their adverse possession for more than twenty years. In ordinary agricultural villages *zemindars* are owners of the entire village land, but as the village develops and becomes bigger, it is possible that the holders of land in the village may obtain proprietary rights either by grant from the *zemindars* or by adverse possession. The mere fact that a village has become big enough to be called a town does not by itself affect or alter the *zemindars'* rights, but it is by the process of transfer, grant or adverse possession that the various owners acquire their rights. The question in this case is whether, so far as the land in dispute is concerned, the defendants have acquired any rights. They may be owners of the land covered by their shops or houses. That is not a point of controversy before us. The question is whether they are owners of the lands adjacent to and near their houses which are now in suit. No grant or transfer by the *zemindars* is proved in this case and the only way in which the defendants can acquire ownership is by adverse possession. The Court below after a careful consideration of the entire evidence has held that no adverse possession has been proved. A *zemindar* very often does allow tenants to use the land in his village in many ways beneficial to the tenants but which are not injurious to him. They are mere acts of grace and favour. And if these acts by themselves are to be regarded as acts indicating adverse possession, there can be no doubt that the *zemindars* will soon think of putting an end to all such acts of grace and favour. As has been said by Lord Justice Bowen in *Blount* v. *Layard* (2), "Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many persons besides the owners, under the fear that their good nature may be misunderstood". It may be that in this case the *zemindars* allowed the occupants of shops and the *sarai* to use the land in front, but that alone cannot confer any rights on the owners of the shops nor constitute a case of adverse possession, as held by the Bombay High Court in *Framji Cursetji* v. *Goculdas Madhowji* (3) The finding of the lower Court, therefore, seems to be conclusive in the case. Dr. Surendro Nath

(1) 11 Ind. Cas. 52; 8 A. L. J. 877; 33 A. 757.

(2) (1891) 2 Ch. 681*n* at p. 691 *n*.

(3) 16 B. 338; 8 Ind. Dec. (N. S.) 703.

however, has urged that his client produced a number of sale-deeds and other documents of transfer, which the Court below has held to be not legally proved and which according to the view taken by that Court did not affect the question in the case. Many of these deeds of transfer are more than thirty years old and if produced from proper custody might be admitted without proof under section 90 of the Evidence Act. From some of the documents laid before us it would appear that they deal only with the land covered by the house or shop and do not deal with the land near or adjacent to it as in this case. They would, therefore, not affect the question in issue in this case. We think that the appeal is concluded by the findings of fact of the Court below, which we in second appeal have no power to set aside. The appeal is dismissed with costs, which in this Court will include Counsel's fee on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 516 OF 1915.

May 30, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Smither.

Kumar NRIPENDRANATH ROY, MINOR, BY HIS NEXT FRIEND SARADA CHARAN MOZUMDAR—PLAINTIFF—APPELLANT

versus

Kumar BIRENDRANATH ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 9, O. II, r. 5, O. VI, r. 17—Suit against executors as such and personally, whether maintainable—Non-joinder or misjoinder of parties, dismissal of suit for—Amendment of plaint—'Estate,' meaning of.

A suit for recovery of an estate, on declaration of plaintiff's title thereto as a *shebait* or in the alternative (if the property is found not to be *debutter*) as owner by right of inheritance to his deceased adoptive father, against the defendants in their personal capacity, was dismissed on the ground that as the defendants were in possession in their capacity as executors under the Will of a testator, they could not be sued in their personal capacity:

Held, (1) that inasmuch as the testator obtained possession of the estate and held it until his death and under his Will it vested on his death, in his executors, and inasmuch as the plaintiff averred that the executorship of the defendants ceased after his adoption, the Trial Court ought to have allowed the plaintiff an opportunity to amend the plaint by suing the defendants both as executors and in their personal capacity, instead of dismissing the suit on the ground of misjoinder or non-joinder of parties; [p. 624, col. 1.]

(2) that as the alternative claims of the plaintiff arose out of the same transaction, the plaintiff could maintain the suit as a *shebait* or in the alternative in his own right as owner. [p. 625, col. 2; p. 526, col. 1.]

The word "estate" in Order II, rule 5, means not only the "estate" rightly and properly held by executors, but also the "estate" in its physical sense, so that a claim against the executor as such can be joined with a claim against him personally, when both the claims arise in reference to the same estate. [p. 624, col. 2.]

Appeal against the decree of the Subordinate Judge, Rajshahi, dated the 8th September 1915.

FACTS appear from the judgment and following extract from the lower Court:—

It is asserted that all the properties in suit are strictly *debutter*, but at the same time it is prayed that if according to evidence and the finding of the Court the whole or any part of the properties are held to be secular, the plaintiff be still held entitled to get the $\frac{1}{4}$th share in them as an heir by virtue of his personal right as opposed to his *shebait* right. The principal defendants prevented the plaintiff from possessing the properties of schedule I other than those described in schedule II of the plaint and hence a cause of action arose on the day of adoption, *viz.*, the 23rd *Aghrayan* 1316 B. S.

All the defendants have raised the same principal pleas so far as issues Nos. 1 and 3 are concerned. They are these: The defendants Nos. 2 to 6 are the executors to the Will left by Raja Jogendra Nath Roy. They have no personal concern with the disputed properties. The defendants Nos. 2 to 5 alone have been managing and have been in possession of the properties in their character as executors.

The suit is defective for misjoinder of causes of action. The plaintiff should have alleged in the plaint which properties belonged to which of the family idols and separate suits should have been brought on behalf of such individual idols. The suit is defective in form in that the plaintiff

has not described himself as a *shebait* in the cause title. In one and the same suit the plaintiff should not have prayed for the declaration of his personal *maliki* right and his right as a *shebait* of idols.

Raja Jogendra was in exclusive possession of the disputed properties from *Aghrayan* 1282 as an absolute owner against the defendant No. 8 Rani Basanta Kumari, and for the matter of that against the whole world and was in such possession up to the date of his death, *viz.*, 1st *Bhadra* 1308. He left a Will dated the 29th *Baisak* 1307 and left behind him his grandson, defendant No. 1, as the only heir of his moveable and immoveable properties. The allegations of paragraph 9 of the plaint are not true. It is not a fact that the defendants Nos. 2 to 6 possessed the disputed properties in their individual capacity on behalf of, or jointly with the defendant No. 1. The executors of the estate of late Raja Jogendra have alone been in possession of the disputed properties as such since the death of the testator, and so the suit is defective for non-joinder of parties as they have not been brought in on the record as party defendants and persons other than the said executors have been added as principal defendants.

FINDINGS.

Issues Nos. 1 *and* 3.—The plaintiff claims to have his *shebait* right established in the disputed properties. It is alleged that the properties are absolutely *debutter* and belong to the idols of the Natore Raj family of the younger branch commonly called the Chhoto Taraf. According to the defendants the plaintiff should have described himself as such a *shebait* but he has not actually done so in the cause title. The learned Pleader of the defendants referred me to some English text books and cases in support of his contention on the point. Odgers on Procedure, Pleading and Practice, page 1, provides: "that if the plaintiff is suing, or if any of the defendants is sued in a representative character (*e. g.*, as trustee in a bankruptcy, or as an executor of a Will), the fact must be stated in the title or heading of the statement of claim, as well as in the writ."

Law Reports, Chancery Division, Vol. I, 1896, page 628, refers to a case which holds that "if a writ in a creditor's action for the administration of real and personal estate does not show that the plaintiff is suing on behalf of all the other creditors of the deceased, this fact ought to appear in the title of the statement of claim, and not merely in the body thereof". North Justice says in that case: "I give leave to amend the statement by adding to the title a statement that the plaintiff is suing on behalf of all the other creditors."

The cases reported as *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1), *Babajirao* v. *Laxmandas* (2) and *Kartick Chandra* v. *Ashutosh Dhara* (3) have also been cited to show that in a suit like the present one the plaintiff prosecutes not in his personal character but in his capacity as *shebait*. That being the case, the defendants argue that all the other *shebaits* who are joint tenants should have been added as parties to represent the idols, who are judicial persons and on whose behalf and to protect whose properties the present suit has been brought. To support the above proposition the defendants cited the cases reported as *Rajendronath Dutt* v. *Shaikh Mahomed Lal* (4), *Kokilasari Dasi* v. *Mohunt Rudranand Goswami* (5), *Bechu Lal* v. *Oliul ah* (6), *Elder widow of Raja Chutter Sein* v. *Younger widow of Raja Chutter Sein* (7) (the Treatise containing Select Cases from 1791 to 1811, Court of Saddar Dewany Adawlat, by W. H. Macnaghten, Volume I) and *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj* (8).

In the present case, however, all the other *shebaits* are parties. Raja Ananda Nath left four sons as his heirs and they got the disputed properties and were in joint possession as *shebaits* according to the plaintiff. Of these Raja Chandra Nath Roy died childless and his widow Khetramoni is also

(1) 32 C. 129; 31 I. A. 203; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).
(2) 28 B. 215; 5 Bom. L. R. 932.
(3) 12 Ind. Cas. 163; 39 C. 298; 16 C. W. N. 23; 14 C. L. J. 425.
(4) 8 C. 42; 8 I. A. 135; 4 Sar. P. C. J. 254; 5 Ind. Jur. 548; 4 Ind. Dec. (N. S.) 27 (P. C.).
(5) 5 C. L. J. 527.
(6) 11 C. 338; 5 Ind. Dec. (N. S.) 985.
(7) 1 Select Reports 239; 6 Ind. Dec. (O. S.) 176.
(8) 19 A. 428; A. W. N. (1897) 103; 9 Ind. Dec. (N. S.) 276.

dead. The second son Kumar Kumud Nath's only heir, the defendant No. 7 Narendra Nath Roy, who is said to have been adopted by Kumud Nath's widow Rani Saramoye, since deceased, has been added as a party. The third son Kumar Nogendra Nath's widow Rani Basanta Kumari and the alleged adopted son the plaintiff are also parties. So also the fourth son Kumar Jogendra Nath Roy's heir and grandson Kumar Birendra Nath Roy is one of the principal defendants. The objection that all the *shebaits* should be made parties, therefore, no longer stands.

Now the formalities of English Courts cannot and ought not to be strictly enforced here. Rules 4, 5 and 9 (clause 2), Order VII, of the present Civil Procedure Code deal with pleadings in cases where the plaintiffs sue in their representative characters but they do not provide that the cause title should show that they are suing in that character. It is simply enjoined that the "statements shall show in what capacity the plaintiff or defendant sues or is sued." I also refer in this connection to the case reported as *Kuarmani Singha* v. *Wasif Ali Murza* (9). It has, however, been held in that case that it would be better and most convenient to describe in the cause title of the plaint the parties in their representative characters when they sued or were sued in such characters.

Nextly the plaintiff urges that he has not brought this suit to vindicate the rights or protect the properties of the idols. In connection with the properties of idols there may be two distinct classes of suit; those in which the *shebait* seeks to enforce his private and personal rights, and those in which he seeks to vindicate the rights of the idol. These two classes of suits are illustrated by *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (10), on the one hand, and *Dattagiri* v. *Dattatraya* (11), on the other. The present suit does not allege that the idols have been dispossessed by the defendants, but it is averred that the plaintiff's private and personal right as a *shebait* to manage and possess the *debutter* properties has been interfered with by a co-*shebait* and so he has come to Court to have that right of his established and to recover possession of the disputed *debutter* properties. The case reported as *Babajirao* v. *Laxmandas* (2) and Trevelyan's Hindu Law, page 543, have been cited in support of the plaintiff's contention.

The defects pointed out by the defendants as noticed above appear to be thus of a trivial character and are not fatal to the suit.

There is another objection raised by the defendants which appears to me more serious. The plaintiff has not only prayed for a declaration of this *shebait* right, but has added an inconsistent alternative relief that if the disputed property or any part of it are held on evidence to be secular, then the plaintiff's right to the same by right of inheritance in his personal as opposed to *shebait* character may be declared and he may be allowed joint possession with the defendants. This latter right certainly can be asserted only in opposition to the interest of the family idols as whose *shebait* the plaintiff poses himself in the present case. The plaintiff thus assumes two inconsistent characters in one and the same suit. Gordon Langhy on "Law of Pleadings and Claim for Alternative Relief." At page 21 of the book it is said "All persons may be joined as defendants against whom any right to relief is alleged to exist whether jointly, severally, or in the alternative, but not in an inconsistent alternative." Again at page 49: "The plaintiff may not hover between two inconsistent alternatives, not distinctly avering either. But he might always state the actual facts and ask the Court to draw one conclusion of law from them, or another, even though the conclusion might be inconsistent." "No man could file a bill for alternative reliefs founded on inconsistent allegations." Another very important case also has been referred to. It is reported in the "Jurist New Series, Volume VIII, 1862, page 125, Court of Chancery, *Thomas* v. *Hobler*" (12). The case begins thus:—"Mining Company—cost-book—pre-

(9) 28 Ind. Cas. 818; 19 C. W. N. 1193.

(10) 27 I A 69; 23 M. 271; 2 Bom. L. R. 597; 4 C. W. N. 329; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591.

(11) 27 B. 363; 4 Bom. L. R. 743.

(12) (1862) 4 De G F. & J. 199; 45 E. R. 1160; 135 R. R. 91; 8 Jur. N. S.) 125; 5 L. T. 564.

liminary contract—bill seeking alternative relief—pleading." Further on it is remarked "Although alternative cases may be embodied in one bill, and alternative relief prayed by it, it is necessary that the plaintiff should have one and the same character. Therefore in a case of a bill filed by a share-holder, suing on behalf of himself and other share-holders of a mining company, and praying alternative relief, one branch of which was antagonistic to the interest of the share-holders whom the plaintiff in part professed to represent, it was held that the bill was not maintainable." The Lord Chancellor in the course of his judgment remarked: "The claims which are made by the plaintiff in this suit are divisible into two classes, those which he makes in respect of his own personal and individual right and those which are common to himself and all the other share-holders in the company." After giving a short description of the two separate claims it is further remarked: "Now it is perfectly manifest, from this description of the bill, that the two portions of the case are, in the nature of things, entirely inconsistent and contradictory. The plaintiff is at one and the same time plaintiff and defendant. The plaintiff claims a right to put on in succession two distinct characters. It is perfectly true that alternative cases may be presented by the same bill where they are not inconsistent with each other; but in order to maintain that position it is necessary that the plaintiff should have one and the same character, *i.e*, so long as the plaintiff retains the same individual character.'

The principle of this last mentioned case exactly applies to the present case. Here also the plaintiff assumes at first the character of a *shebait* of the family idols and then in the same suit wants to put on a different and an antagonistic character claiming the properties as secular by virtue of his right of inheritance as the adopted son of deceased Kumar Nagendra Nath Roy. The plaintiff must elect one of these two positions in the present suit and amend the plaint accordingly.

On the plaintiff's side his learned Pleader referred me to several cases on the point, but they do not cover all the objections raised on defendants' side. In none of those cases the plaintiff was allowed to assume two different and contradictory characters such that the plaintiff was at one and the same time plaintiff and defendant as in the present case. In *Ningappa* v. *Shivappa* (13) referred to by the plaintiff it was held that the plaintiff's allegation of partition did not preclude him from seeking the alternative relief on the strength of his general title. The second case referred to is reported as *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (14). It has been therein held that a suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of ground rights of ownership and easement. In this case the Judges referred to the Privy Council case reported as *Mahomed Buksh Khan* v. *Hosseini Bibi* (15). In the Privy Council the plaintiff alleged forgery and forgery alone. The issue raised not only covered that plea of forgery but also a new and inconsistent plea not in the plaint, namely, "Or whether it was executed by undue influence." The Privy Council, after deciding that the document had been executed by Shahazadi, went on to try the question whether it had been obtained by undue influence and coercion. From these cases it is argued by the learned Pleader of the plaintiff that Courts of India and for the matter of that even the highest Court of Appeal, the Privy Council, allowed two inconsistent reliefs of an alternative nature to be combined in one and the same suit. I have already remarked that the cases do not meet the objections raised by the defendants and noticed above at length.

Now let us consider the question as regards the misjoinder and non-joinder of parties. The defendants' case is that neither defendant No. 1 nor the defendants Nos. 2 to 6 as described in the plaint, *i.e.*, in their individual right, have ever been in possession of the disputed properties, but that the defendants Nos. 2 to 5 alone, as executors to the estate of late Raja Jogendra Roy, were in actual possession. The defendant

(13) 19 B. 323; 10 Ind. Dec. (N. S.) 219.
(14) 11 C. W. N. 20; 4 C. L. J. 437; 1 M. L. T. 364; 34 C. 51.
(15) 15 C. 684; 15 I. A. 81; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175; 7 Ind. Dec. (N. S.) 1040.

No. 6 Ananda Mohan Roy, although one of the executors and joined the others in taking out the Probate of the Will, never managed the disputed properties or others devised by the Will. The defendant No. 3 Bhuban Mohan Moitra died after the institution of this suit. The plaintiff's suit can thus lie only against the executors as such who are alive and have been possessing the disputed properties not in their individual and private capacity but in their character as executors. They and they alone are necessary parties to this suit and none of the defendants Nos. 1 to 6 can be sued against on the allegations made in the plaint. The defendants referred me to sections 4, 89 and others of the Probate and Administration Act in support of their contention.

Section 4 provides that the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such.

On plaintiff's side it is urged that the provision of that section has absolutely no application to a case like this, where the plaintiff does not claim the properties of the testator but adversely to him. It is no part of the plaintiff's case that the disputed properties belonged to Raja Jogendra, the testator. On the contrary his case is that they did not belong to him; that they belonged to plaintiff's adoptive father late Kumar Nogendra Nath Roy; and that Raja Jogendra by coercion and threat illegally deprived Kumar Nogendra's widow the defendant No. 8 of the possession of those properties. Plaintiff asserts that the properties vested in him after his adoption as a son by Rani Basanta Kumari. There is much force in this argument and taking the allegations of the plaint as regards ownership to be true, the properties in suit did not belong to the testator and so cannot be said to have vested in the executors to his Will. But still there remains the other branch of the provision of section 4. It is provided "that the executor of a deceased person is his legal representative for all purposes." I do not understand how the plaintiff can override this express provision of the law. If Raja Jogendra dispossessed Rani Basanta Kumari and took illegal and forcible possession of the disputed properties and died while in such possession and on his death his executors came to possess such properties, whom would the plaintiff the alleged rightful owner sue in ejectment, but the legal representatives of the testator, *i. e.*, the executors who are described in the section as his legal representatives for all purposes?

The learned Pleader of the plaintiff advances the following argument against the above proposition of law.

He says the plaintiff has not made out any case in the plaint against Raja Jogendra or his estate. When he was adopted in *Aghrayan* 1316, the principal defendants did not allow him to possess the disputed properties and so a cause of action arose against them only on the date of adoption, *i. e.*, the 23rd day of the said month of *Aghrayan*. He refers me to the two cases reported as *Nundo Kumar Nasker* v. *Banomali Gayan* (16) and *Bandhu Acharja* v. *Nathni Bahar Singh* (17). In those cases the question raised was whether the suit was defective on the ground of multifariousness. In the second case it was contended for the defendants that the plaintiff was not entitled to join all the defendants in one action, inasmuch as they were in occupation of different parcels of land. The Judges held, "In our opinion there is no force whatever in this contention. In support of our view it is sufficient to refer to the decision of this Court in the case of *Nundo Kumar Nasker* v. *Banomali Gayan* (16)....It was pointed out by the learned Judges who decided that case, that the cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the defendants profess to hold possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him and that fact gives him his cause of action, etc." I need not discuss the other cases as the second supports the principle laid down in the first. The present case has no analogy to the two cases cited above, save and except that in all of them the plaintiff sued in ejectment. In considering

(16) 29 C. 871.
(17) 7 C. L. J. 460

the preliminary issues in the present case we are not discussing under what title the principal defendants are in possession. The question that arises here is whether the defendants have at all been in possession. Such a question did not arise in the two cases noticed above. In those two cases the defendants were in juridical possession on their own account. In this case the defendants contend that the defendant No. 1 is not in possession and that the other principal defendants Nos. 2 to 6 as described in the plaint have never been in possession in their individual capacity. The contending defendants Nos. 2 to 5 asserted that they were in possession as executors to the estate of late Raja Jogendra Nath. It is an elementary principle of law that defendants Nos. 2 to 6 in their individual and private capacity are in the eye of law one set of persons and as executors they are another set of persons. Because the defendants Nos. 2 to 5 have been in possession as executors the plaintiff is not, in my opinion, entitled to sue them in their personal capacity for recovery of possession of the disputed lands. The Treatise on the Rules for the Selection of the Parties to an Action by A. V. Dicey at page 494 very aptly gives us a description of the necessary parties who should be added as defendants in an action for ejectment. "The persons to be named in the writ are, therefore, all the tenants in possession, *i. e*, every person who occupies, as tenant or as owner, any part of the property. Even a lodger who has exclusive use of a certain room may, though it is not necessary or usual to do so, be joined as a defendant. On the other hand, mere friends or visitors of the tenant in possession, his wife, children, or servants do not occupy as tenants, and, therefore, should not be included in the writ as defendants, *i e*, they are not in possession; for the occupation, *e. g*, of a servant is, in contemplation of law, the possession of his master, etc." That the principal defendant No. 1 has not been in possession of the properties in suit and that as contended for by the other principal defendants Nos. 2 to 5 they have been in possession as executors and not in their personal capacity, have been amply and satisfactorily proved in this case by oral and documentary evidence of a reliable character. The evidence is one-sided, as the plaintiff did not choose to examine a single witness or produce a single scrap of paper to contradict it. The allegations of the plaint also lend support to the defendants' case that Raja Jogendra was in absolute possession of 16-annas share of the properties during his lifetime, and up to the time of his death, and since his death the executors of his Will have been in such exclusive possession. In paragraph 9 of the plaint it is averred that the defendants Nos. 2 to 6 have been in possession on behalf of and jointly with, Raja Jogendra's grandson and only heir, the defendant No. 1. The plaint is studiously silent in what capacity the defendants Nos. 2 to 6 have been in possession. These persons are the five executors to the Will of Raja Jogendra and it is in evidence that defendant No. 6 was never in possession and never managed the properties as executor. He has all the same been added as a principal defendant apparently because he is one of the executors. It is not, therefore, quite true, as urged by the learned Pleader of the plaintiff, that the defendants Nos. 1 to 6 have been sued as principal defendant simply because they were in actual possession of the disputed one-fourth share of the properties at the date of adoption and stood in the way of plaintiff's taking possession of it The plaintiff knew the real facts as to who have been in possession since the death of the testator and he should have made them, *i.e*, the executors and them only as the principal defendants. For some ulterior object not very far to seek, the plaintiff has persistently and studiously made a futile attempt not to disclose the real facts in his pleading and has omitted to bring in upon the record the necessary parties even at the risk of sericus legal consequences.

Let us now take into consideration the provisions of section 89 of the Probate and Administration Act. It runs thus: "All demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, survive to, and against his executors or administrators, etc." In this case the deceased Raja Jogendra left a Will and Probate was taken out by

the executors. The right to defend a suit like this existed in favour of Raja Jogendra, as he it was who is alleged to have originally dispossessed the then legal heir of Kumar Nagendra Nath. On his death it survives to his executors and to them alone according to law. It is truly remarked by Majumdar in his Treatise on Hindu Wills Act, page 606*, in the notes under section 89 of the Probate and Administration Act, "As regards actions on tort, it seems, subject only to the exceptions herein named there is no demand or cause of action, for or against, whether in relation to personalty or realty, that does not survive the deceased; so that whatever injury or wrong is actionable by or against a person during his lifetime is also actionable after his death by or against his representatives, *i.e.*, executors or administrators."

It is urged by the plaintiff that those (English and Indian) cases in which it has been held that executors borrow money as such, even though it be for the benefit of the testator's estate at their own personal responsibility. I have been referred to page 237 of Walker's Compendium of the Law of Executors, 3rd Edition, by E. J. Elgood. It is remarked therein: "Executors who carry on the testator's trade, though in pursuance of directions contained in his Will, render themselves personally liable to the creditors of the partnership, etc." The case of the executor is very hard, said Lord Eldon; he becomes liable, as personally responsible, to the extent of his own property; but he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation and contract that sort of responsibility. Mayne on Damages, 8th Edition, by Lunly Smith also cites cases in pages 622 to 626 where the executor is liable personally. The most obvious of these cases is where he is charged upon a contract made with himself, or an obligation thrown upon himself, subsequently to the death of the testator. The cases reported as *Romanath Paul* v. *Kanai Lal Dey* (18) and *Debendra Nath Biswas* v. *Hem Chandra Roy* (19) have also been referred to in that connection. From these it is argued that the executors to the Will of Raja Jogendra may also in the same way be held personally liable for the mesne profits claimed in this suit. Those cases do not help us in the present suit as here the principal relief claimed is ejectment for and recovery of possession of immoveable property. The relief for mesne profits is only ancilliary to the principal claim. So that the persons in juridical possession of the immoveable property are the only necessary parties in a suit like this.

It is then urged on plaintiff's behalf that the present executors who are now alive, *i.e.*, defendants Nos. 2, 4, 5 and 6 are not competent to act as legal representatives of the testator, as according to paragraph 6 of the Will (Exhibit A) the irreducible minimum who are entitled to act as executors is six. At the time of the institution of the suit, however, only five were alive and since then one of them defendant No. 3 has died. Section 12, illustration (*f*), is referred to for showing that less than six executors as directed in the Will cannot do any act. This objection cannot prevail so long as the Probate has not been re-called or revoked by the District Judge. When such case is made out and the Judge revoked the Probate it would still be necessary to issue a Letter of Administration with the Will annexed limited to suit (*vide* section 88 of the Probate and Administration Act). That fact cannot, in my opinion, entitle the plaintiff to bring a suit like this against the executors in their personal capacity.

The next plea raised on plaintiff's behalf is that the properties being *debutter*, Raja Jogendra had no right to devise them by Will and so the executors appointed by it are not competent to act as such. I have been referred to the cases reported as *Chaitanya Gobinda Puari Adhikari* v. *Dayal Gobinda Adhikari* (20), *Jib Lal Gir* v. *Jaga Mohan Gir* (21) and *Mohunt Madhusudan Das* v. *Maharaja Jagadindra Nath Roy* (22). The first case held that "Where the *shebait* of an endowed property executed a document appointing another person as a *shebait* for the purpose of carrying out the *sheba* and other rites after the death of the

(18) 7 C. W. N. 104.
(19) 8 C. W. N. 135; 31 C. 253.
(20) 9 C. W. N. 1021; 32 C. 1082.
(21) 16 Ind. Cas. 453; 16 C. W. N. 798.
(22) 16 C. W. N. 292 (ccxcii).

*See 2nd Edition p. 807—*Ed.*

former, it was not a Will and Probate of such document could not be applied for."

In this case, however, it is yet to be inquired into and decided whether the properties in suit are strictly *debutter*. Then again the executors named in the Will must have, according to the said ruling, to be looked upon as *shebaits* of the idols and should have been represented in the pleading as such. Under no circumstances as shown above can the plaintiff sue in ejectment against the defendants Nos. 2 to 6 personally.

The result is that the first issue is decided in the negative and the third issue in the affirmative.

As regards the misjoinder of causes of action, I would have allowed the plaintiff to elect one of two positions, *i.e.*, either to allege the properties in suit as *debutter* and to claim them as *shebait* or to allege them as secular and claim them in his individual and personal capacity. I would have also permitted him to amend the plaint accordingly. But the other question raised in issue No. 3 and all the questions of issue No. 1 have been decided against the plaintiff and so it would no longer be necessary to take that course, as in the result the suit will have to be dismissed.

Mr. *C. R. Dass*, (with him Babus *Broja Lal Chuckerbutty*, *Jatindranath Lahiri*, *Biraj Mohan Mazumdar* and *Nayendranath Ghose*), for the Appellant.

Dr. *Rash Behari Ghose* (with him Babus *Dwarkanath Chuckerbutty*, *Priya Sankar Mazumdar* and *Sarat Chandra Khan*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of possession of the properties in dispute on a declaration of the plaintiff's right thereto, and for other reliefs. The plaintiff's case shortly stated is that there were certain *debutter* properties of the Nattore Raj family deities, that Raja Shibnath belonging to the younger branch (*chota taraf*) of the family inherited the same as *shebait*, and after his death his widow adopted Raja Ananda Nath, who accordingly obtained the said *debutter* properties by inheritance as *shebait* together with certain other properties acquired with the income of the *debutter* properties. Ananda Nath left four sons, Raja Chander Nath, Kumud Nath, Nagendra Nath and Jogendra Nath, who remained in possession of the properties in *shebaiti* right. The first three sons died leaving their widows but without any issue, and it is alleged that Jogendra Nath committed oppression upon his brothers' widows who were helpless and obtained from them an *ekrar* by which the bulk of the properties was given up to him. The defendant No. 8, the widow of Nagendra Nath, under the authority given by her husband adopted the plaintiff on the 23rd *Aghyan* 1316, and the plaintiff thereupon as the heir of Nagendra Nath became entitled to $\frac{1}{4}$th share of the estate as *shebait*, and to joint possession accordingly. The defendant No. 1 is the grandson and heir of Jogendra Nath and the plaintiff alleged that the defendants Nos. 2 to 6 on behalf of the defendant No. 1 and jointly with him are in possession of the estate and prevented the plaintiff from taking possession of the properties. The plaintiff further states that so far as he has come to know on enquiry Raja Shibnath and his descendants had a *shebaiti* right only in the properties, but that if the properties were found not to be *debutter*, then the plaintiff's title to $\frac{1}{4}$th share by right of inheritance might be declared and a decree for joint possession in respect of the same might be passed. The plaintiff also claimed mesne profits and costs and further reliefs.

The defence denied that there was any authority given by Nagendra Nath to the defendant No. 8 to adopt or that the plaintiff was adopted by her, and it was alleged that the properties were not wholly *debutter* but were personal properties, some of which were charged with the *sheba* and worship of family deities, and that Jogendra Nath and his executors having been in adverse possession thereof for over twelve years the defendant No. 1 had acquired an indefeasible title thereto. Various other pleas were raised. The main pleas, so far as they are material for the purposes of the present appeal, were that the defendants Nos. 2 to 6 were in possession of the Estate as executors under the Will of

Jogendra Nath, and could not be sued in their personal capacity, and that the plaintiff could not maintain the suit as a *shebait* and in his own right as owner.

Various issues were raised in the case, the first and third issues being as follows :— (1) Is defendant No. 1 and are defendants Nos. 2 to 6, as described in the plaint, in possession of the properties in dispute as alleged ? Has the plaintiff any cause of action against them ?

(2) Is the suit bad for misjoinder of causes of action ? Are the executors to the Will of Kumar Jogendra Nath Roy necessary parties to the suit ? If so, is the suit bad for non-joinder of parties.

The suit was dismissed by the Court below on a decision of the first and third issues only without trying the suit on the merits. The plaintiff has appealed to this Court.

The first question for consideration, therefore, is whether the suit can be maintained against the defendants Nos. 2 to 6, unless they are sued as executors. That they are executors under the Will of Jogendra Nath is not disputed, and it is found by the Court below that the defendants Nos. 2 to 5 are in possession of the share claimed as executors. Now Jogendra Nath in his lifetime obtained possession of the share claimed and held it until his death, and under his Will it vested on his death in his executors (section 4 of the Probate Act) and any right of suit against Jogendra Nath survived against the executors (section 89 of the Probate Act). It is contended, however, on behalf of the appellant that although they might have held the share as part of Jogendra Nath's estate as executors prior to the adoption of the plaintiff, they could not after the said adoption hold it as part of that estate, because on the adoption of the plaintiff, the arrangement under which Jogendra Nath and, after his death, his executors held possession of Nagendra Nath's share came to an end, and, therefore, it ceased to be part of Jogendra Nath's estate, and the executors as such could not hold the share as part of that estate.

It is further contended that the plaintiff claims the share as the adopted son of Jogendra Nath, and he has sued the defendants Nos. 2 to 5 as the persons who are in possession of it and who prevented him from taking possession to which he was legally entitled. If the plaintiff does not succeed in establishing his title, the suit will fail on the merits, and on the other hand if he has a title to the share it does not form part of Jogendra Nath's estate, in which case the defendants Nos. 2 to 6 are not holding it as executors but only as trespassers, and that, therefore, in either case, it is not necessary to sue them as executors.

But in the first place, if, as contended on behalf of the appellant, only the persons in possession should be sued, the defendant No. 1 should be dismissed from the suit. It is true the plaintiff says that the "defendants" (which would include the defendant No. 1 also) prevented him from taking possession, but the defendant No. 1 at the date of the suit was a minor, and it is found by the Court below that he is not in possession, the possession being still with the executors. In the next place, the defendants Nos. 2 to 5 assert that the share claimed by the plaintiff is part of Jogendra Nath's estate, they profess to hold it as part of that estate, and they did not at any time assert any right of their own. Whether the share claimed by the plaintiff could be rightfully withheld from him by the executors as being part of Jogendra Nath's estate after the alleged adoption of the plaintiff is a matter to be decided in the suit, but it is as executors of Jogendra Nath's estate that they prevented him from taking possession. If they are trespassers, they acted as trespassers on behalf of the estate as executors, and the question whether or not the share is part of that estate should be determined in the presence of the executors who represent the estate. The appellant seems to be apprehensive that by suing the defendants Nos. 2 to 5 as executors he would be taken to have admitted that the properties are part of Jogendra Nath's estate, but as contended on behalf of the respondents no such inference can possibly arise from suing the defendants as executors.

Order I, rule 9, lays down that no suit shall be defeated by reason of the mis-

joinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The suit could not, therefore, be dismissed on the ground that the defendants No. 2 to 6 were not sued as executors. The suit could have proceeded against them as trespassers, but any decree passed in the case would not have bound the estate of Jogendra Nath. Every suit should as far as practicable, be so framed as to prevent further litigation concerning the subject in dispute. We are of opinion that although the suit should not have been dismissed on the ground that the defendants Nos. 2 to 6 were not sued as executors they are proper parties to the suit, and the plaintiff ought to have been called upon to amend the plaint for the purpose.

It is pointed out on behalf of the appellant that under the Will of Jogendra Nath the powers of the executors to manage the estate are limited to the minority of the defendant No. 1. It is also pointed out that there were six executors under the Will, one of them did not accept the office of executor, and another has died since the institution of the suit and according to the Will the minimum number of executors at any time must be six, and, therefore, a less number of executors cannot properly represent the estate. It is further contended that if the properties are *debutter*, the *shebaiti* right cannot be legally dealt with by a Will. These questions have not been gone into, and we do not express any opinion on these points. If, however, it be held that the defendants Nos. 2 and 4 to 6 do not represent the estate, the suit cannot proceed against them as executors, and so far as Jogendra Nath's estate is concerned the defendant No. 1 as heir would represent the estate. Order I, rule 7, lays down that where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

We think that under these circumstances, and in order to effectually and completely adjudicate all the questions involved in the case, the defendants Nos. 2 and 4 to 6 should be sued personally as well as executors, and the defendant No. 1 sued as the residuary legatee and heir of Jogendra Nath.

It is contended on behalf of the respondents that a claim against the executor cannot be joined with a claim against him personally, and we are referred to the provisions of Order II, rule 5. That rule prohibits such a joinder, unless the claim against the executor personally is alleged to arise with reference to the estate in respect of which the defendant is sued as executor.

In the present case, the executors might have fairly believed that the share claimed by the plaintiff forms part of Jogendra Nath's estate, and might have prevented him from taking possession thereof in their character as executors as they profess to have done, although the Court may eventually decide that the plaintiff had title to the share, and that, therefore, the executors had no right to prevent him from taking possession. It is said that the word "estate" means the estate rightly and properly held as executors, and not the "estate" in its physical sense. We are of opinion, however, that the word is used in both senses, and the joinder is permissible when both the claims arise in reference to the estate. Here the defendants Nos. 2 and 4 to 6 claimed to be in possession of the property as part of Jogendra Nath's estate at the date of the plaintiff's adoption and prevented the plaintiff from taking possession professedly in their character as executors. The plaintiff has claimed mesne profits and costs, and if the plaintiff succeeds, the Court will have to decide whether the defendants Nos. 2 to 6 are liable (if at all) personally or as executors. We think in the circumstances the case comes within the exception mentioned in Order II, rule 5.

The next question is whether the claims as *shebait* and as owner can be joined in the same suit. It is not disputed that claims in the alternative can be joined in the same suit. It is contended, however, on behalf of the respondent that such joinder is permissible only where the alternative claims are put forward in the same character although they may be inconsistent, and that if the plaintiff claims to fill two

inconsistent characters he will have to elect at the hearing which claim he will rely on. We are referred to the cases of *Rawlings* v. *Lambert* (23) and *Thomas* v. *Hobler* (12). But these cases were decided before the Judicature Act was amended. The English rule (Order XVI, rule 1) was altered in 1896, and the first part of that rule corresponds to Order I, rule 1, of our Code which runs as follows:—

"All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of fact or law would arise," and alternative claims since the amendment of the rule have always been allowed to be joined in the same suit, provided they have arisen out of the same transaction.

We were also referred to the case of *Stroud* v. *Lawson* (24). In that case the plaintiff in his statement of claim, on his own behalf, claimed damages from the defendants, who were Directors of a Company, for inducing him by fraud to purchase shares in the Company and he also claimed in the same action on behalf of himself and all the other share-holders of the Company a declaration that the payment of dividend (on the shares of the Company when there were no profits) was *ultra vires* and illegal, and it was held that the plaintiff was not entitled under Order XVI, rule 1, to join both the causes of action in one suit. But as was pointed out by A. L. Smith, L. J., the first claim was a Common Law action of deceit personal to the plaintiff and in the second part of the statement of claim, the plaintiff sued the same defendants and the Company limited, not in his personal capacity, but in a wholly different capacity, and that they were wholly separate and distinct causes of action which did not arise out of the same transaction or series of transactions.

"According to the terms of the rule the plaintiff in this case cannot join the two causes of action which he is putting forward in different capacities, unless he can show that they both arise out of the same transaction."

Now, do the alternative claims in suit arise out of different transactions? Looking at the substance of the plaint, the plaintiff's case appears to be that as the adopted son of Nagendra Nath, he is entitled to the same interest in the properties as Nagendra Nath had. He alleged that Nagendra held the properties as *shebait* but that if the Court finds that they are not *debutter*, and were held by Nagendra Nath as his personal properties, the plaintiff would still be entitled to his share. If the plaintiff succeeds in establishing that he is the adopted son of Nagendra Nath, that the arrangement entered into by the defendant No. 8 terminated on his adoption, and there is no other bar to his right, he would be entitled to succeed whether the properties were held by Nagendra Nath as *shebait* or in his own right. It is to be observed that although the defendants pleaded that the properties were not absolutely *debutter*, they stated that some of the properties were charged with the expenses of *sheba* of the family deities. If there is no deed of dedication, and specially in cases where the *debutter* is claimed to be the *debutter* of family deities from ancient times, the determination of the question whether the properties are absolutely *debutter* or personal properties merely charged with the expenses of the *sheba*, depends upon the conclusion to be drawn from the facts which may be proved.

The principle as to alternative relief is thus stated by Sir W. Page Wood, V. C., in *Rowlings* v. *Lambert* (23) referred to above: "You have no right to allege two inconsistent states of facts and ask relief in the alternative, for the two cannot be true; but you have always a right to state the facts of the case, the documents and deeds, and ask the conclusion of the Court on those facts and documents, and say the Court may come to one conclusion of law or it may come to another; and you may ask the Court to come to a conclusion on the facts which you have disclosed, having stated everything that will enable the Court to form a proper judgment. You may ask the judgment of the Court on the two alternatives. That may be done on any

(23) (1860) 1 J. & H. 458 at p. 466; 70 E. R. 826; 128 R. R. 468.

(24) (1898) 2 Q. B. 44; 67 L. J. Q. B. 718; 78 L. T. 729; 46 W. R. 626; 14 T. L. R. 421.

bill without objection." See also *Evans* v. *Davis* (25) where (at page 754). Fry, J., observed, "a plaintiff may draw two inconsistent inferences from the same state of facts."

It is contended on behalf of the respondents that the plaintiff's duty as trustee is in conflict with his interest as owner, but the second alternative would arise out of the same facts and would have to be considered only if the first alternative fails and in fact would follow from it. If the respondents' contentions were allowed the plaintiff must first sue as *shebait* and then when he fails, he will have to bring a fresh suit in his right as owner, though upon the same state of facts and transactions. But every suit should be so framed as to prevent further litigation concerning the subject in dispute, and Order I, rule 2, provides that where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may order separate trials.

In the case of *Radha Mohun Mundul* v. *Jadoomonee Dosee* (26) the plaintiff sued to recover certain properties as heiress of her husband as if they were personal properties; it was found that they were *debutter* properties, and the Court of first instance held that she could not succeed as she had not sued as *shebait*. The High Court treated the objection as one of form and gave her relief; the Judicial Committee were of opinion that the High Court were right in treating the objection which had been made to the reception of the claim by the Subordinate Judge as an objection rather of form than of substance.

In the present case the plaintiff in effect asks for a declaration that he as the adopted son of Nagendra Nath has in the properties in suit the same interest, *shebait* or otherwise, which Nagendra Nath had, and he asks for possession accordingly. That being so, the plaint is not open to any serious objection on this point.

The last question is the question of costs. No doubt the general rule is that the party applying for amendment must pay costs up to the stage when amendment is applied for. But the Court below does not appear to have allowed the plaintiff any opportunity to apply for amendment.

(25) (1879) 10 Ch. D. 747; 48 L. J. Ch. 223; 39 L. T. 391; 27 W. R. 285.

(26) 23 W. R. 369; 3 Sar. P. C. J. 482.

The suit should not have been dismissed for misjoinder or non-joinder of parties, and under the circumstances we think that the plaintiff should be directed to pay the costs up to the stage when the preliminary issues (Nos. 1 and 3) were decided, because that was the stage when the Court ought to have given the plaintiff an opportunity to apply for amendment. We assess the costs up to that stage at Rs. 1,500.

A question has been raised on behalf of the respondents whether the order for costs should be made against the plaintiff or against his next friend. It is unnecessary to consider the question, as the learned Counsel for the appellant does not object to the decree for costs being passed against the next friend, if only the costs up to the stage when the first and third issues were decided, are ordered to be paid. We accordingly direct that the next friend of the plaintiff do pay to the defendants Rs. 1,500 as costs within two months from this date, the money to be paid to Babu Priya Sankar Mozumdar, Vakil, for defendants Nos. 1, 2, 4 and 5, and on payment of which the plaintiff will be allowed to apply for amendment within one month from the date of such payment. The payment will be notified to this Court by the Pleaders on both sides, and the Court below will be informed of the payment by this Court.

We make no order as to costs of this appeal.

N. R CHATTERJEA AND RICHARDSON, JJ.—(*July* 18, 1917.)—The appellant having paid Rs. 1,500 on account of costs to Babu Priya Sankar Mozumdar, Vakil, for defendants Nos. 1, 2, 4 and 5 as ordered by the judgment of this Court dated 30th May 1917 and the said Vakil having admitted the payment thereof, the Court below will be informed of the said payment.

The Court below will now proceed with the suit in accordance with the directions given in the judgment of this Court dated the 30th May 1917.

Let the record be sent down without delay.

N. R. CHATTERJEA AND SMITHER, JJ.—(*June* 1, 1917.)—Under section 13 of the Court Fees Act, a certificate will be granted to the appellant authorising him to receive back from the Collector the *full amount* of fee paid on the memorandum of appeal.

Appeal allowed; Case remanded.

NOGENDRA NATH ROY *v.* ASHUTOSH ROY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2207 OF 1913.

July 23, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

NOGENDRA NATH ROY CHOWDHURY AND OTHERS—PLAINTIFFS NOS. 1 TO 3—APPELLANTS

versus

ASHUTOSH ROY CHOWDHURY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 102—Appeal, second, right of—Suit cognizable by Small Cause Court—Declaration, prayer for, addition of, whether alters nature of suit.

The mere addition of a prayer for a relief by way of declaration does not alter the character of a suit which is of a nature cognizable by a Small Cause Court, so as to give a party a right of second appeal which is prohibited by the terms of section 102, Civil Procedure Code. [p. 628, col. 1.]

Where all the reliefs which the plaintiff claims in a suit can be obtained without asking for a declaration, the mere addition of a prayer for a declaration does not prevent the suit from being a suit cognizable by a Small Cause Court. [p. 628, col. 1.]

Appeal against the decree of the District Judge, 24-Pergannahs, dated the 2nd April 1913, modifying that of the Munsif, 1st Court, Baruipore, dated the 30th April 1912.

FACTS of the case appear from the judgment.

Babu *Baranashibashi Mukherjee* (with him Babus *Khitish Chunder Chuckerbutty* and *Satish Chunder Lahiri*), for the Respondents, raised a preliminary objection that no appeal lay under section 102, Civil Procedure Code. The case is barred by section 102, because the suit as framed was only a suit for recovery of damages or money compensation. The main relief asked for in the plaint was only damages and the suit was not one for declaration of plaintiffs' title.

Babu *Amarendra Nath Bose*, for the Appellants.—The second appeal is competent, because there is a prayer for declaration of plaintiffs' title in the suit and because the Small Cause Court Judge has refused to decide the question of title. See *Rash Behari Pal Chowdhry* v. *Sridhar Belal* (1). If your Lordships consider that the second appeal is not maintainable, then the memorandum of appeal may be treated as an application for revision under section 115, Civil Procedure Code.

The main question is one of limitation. Article 36 of the Limitation Act does apply to this case. See *Ramachandraiyar* v. *Noorulla Sahib* (2). Article 48 or 49 or 120 is the Article applicable to this case.

Babu *Baranashibashi Mukherjee*, for the Respondent.—The suit was a Small Cause Court suit and the prayer for declaration in the plaint does not make any difference in the matter. See *Ramachandraiyar* v. *Noorulla Sahib* (2). The second appeal is not competent and there is no special reason or extraordinary circumstance in this case which would justify your Lordships to treat the memorandum of appeal as an application for revision.

As regards the question of limitation, Article 36 has been rightly applied to this case. If, however, the preliminary objection as regards the competency of the second appeal be given effect to then, I need not argue on the question of limitation.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs against a decision of the learned District Judge of the 24-Pergannahs, dated the 2nd April 1913, modifying the decision of the Munsif at Baruipore. The action was an action instituted, at first, in a Court of Small Causes to recover damages by the plaintiffs for certain wrongful acts said to have been done by the defendants with reference to a property to which they were both jointly entitled. The learned Judge in the Small Cause Court, in the exercise of his discretion under section 23 of the Provincial Small Cause Courts Act, thought fit to return the plaint to the plaintiffs for presentation to the regular Civil Court. The only question now for our decision is, "does a second appeal lie or is a second appeal barred under section 102, Civil Procedure Code." It has been decided quite clearly that the mere fact that the Judge exercised his discretion under section 23 of the Provincial Small Cause Courts Act does not give the parties a right of second appeal. The suit, notwithstanding the fact that the plaint has been returned, remains one which is cognizable by a Small Cause Court. The

(1) 6 C. W. N. 687.

(2) 30 M. 101; 1 M. L. T. 314; 16 M.L.J. 477.

only difference that is said to have occurred in this case is that the plaintiffs, when the plaint was retured to them, added in it a prayer for a relief that they asked for by way of declaration. In the original plaint, there was no prayer for such a relief; but, in the amended plaint, this relief was asked for in the form of a declaration; and the only question is whether the mere fact of adding a prayer for a declaration to the plaint gives the plaintiffs a right of second appeal. The case relied on by the plaintiffs, namely, the case of *Rash Echari Pal Chowdhry* v. *Sridhar Belal* (1), does not establish the point that the plaintiffs wish to establish by that case. That case does not establish that the mere addition of a prayer for a declaratory relief gives the plaintiff a right of second appeal. It says that where the suit is, as it was in the Small Cause Court, for damages and remains such in the Civil Court, then the plaintiff has got no right of second appeal. The learned Judges in that case did not consider, nor had they before them the case, that the mere addition of a relief asking for a declaration would alter the character of the suit. On the other hand, there is the decision of a Full Bench of the Madras High Court that had the very point for consideration. That is the decision in *Ramachandraiyar* v. *Nurulla Sahib* (2), and there it was held that where all the reliefs which the plaintiffs claimed in a suit could have been obtained without asking for a declaration, the mere addition of a prayer for a declaration did not prevent the suit from being a suit cognizable by the Small Cause Court. I think that that decision is clearly correct and, in that view, the mere addition of such a prayer does not alter the character of the suit so as to give a party a right of second appeal which is prohibited by the terms of section 102, Code of Civil Procedure. In that view, it is quite clear that a second appeal does not lie in the present case. The appeal, therefore, fails and must be dismissed.

The cross-objection is not pressed and is accordingly dismissed.

We make no order as to costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 109 OF 1916.

June 5, 1917.

Present:—Mr. Justice Maung Kin.

MAUNG KYI NYO—APPELLANT

versus

MAUNG AUNG THA AND ANOTHER—RESPONDENTS.

Sale—Property in possession of third person—Purchaser, duty of—Constructive notice.

Where a person purchases immoveable property which is in the possession of a person other than the seller he must be held to have had constructive notice of the right of the possessor, for if he had enquired he would have found out the true state of affairs. [p. 629, col. 1.]

Mr. *Po Han*, for the Appellant.

Mr. *Ba Dun*, for Respondent No. 1.

JUDGMENT.—Maung Kyi Nyo obtained a money decree against defendant Ma Wun and in execution thereof attached the land in suit and brought it to sale. Plaintiff himself, with leave of the Court to bid, bought the land at the sale. The purchase was in due course confirmed.

Aung Tha filed a suit against Kyi Nyo and Ma Wun for the cancellation of the sale and for declaration of his title to the land, alleging that some six years before he had bought the land from Ma Wun for Rs. 300 and that he was in possession. Kyi Nyo and Ma Wun denied the alleged sale to Aung Tha. Ma Wun in particular said that she let the land to Aung Tha for one year and that after the expiry of the tenancy he refused to return it to her.

Aung Tha produced a deed of sale which was neither registered nor stamped.

The Trial Court held that the document not being admissible Aung Tha was not entitled to prove the alleged sale to him in any other way and passed a decree for Rs. 300 against Ma Wun. It may be here stated that in the alternative he had asked for a decree against her for the return of the purchase-money.

Aung Tha appealed and raised two points, namely, (1) that the decree obtained by Kyi Nyo against Ma Wun was obtained fraudulently, and (2) that he had a charge on the land to the extent of Rs. 300.

The first point was held to have been waived in the first Court. On the 2nd point the lower Appellate Court passed a decree giving a charge on the land against both defendants to the extent of Rs. 300.

Kyi Nyo appeals and contends that there can be no charge as against him, as it has not been proved that he had notice of the alleged transaction between Aung Tha and Ma Wun. This contention cannot prevail. Aung Tha was in possession at the time of Kyi Nyo's purchase and the latter must be held to have had constructive notice of Aung Tha's rights, for if he had enquired of Aung Tha, he would have found out the real state of affairs.

Another point argued was that as at the utmost Aung Tha has proved a usufructuary mortgage for Rs. 300 in his favour, the section of the law, namely 55 (6) (*b*), under which the charge is claimed does not apply. I do not see what difference this makes, the result would practically be the same, for the meaning of there being a mortgage is that Kyi Nyo's purchase will be subject to Aung Tha's mortgage and Kyi Nyo must pay off the mortgage.

The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 460, 461 AND 922 OF 1917.

April 12, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

IN C. M. P. NOS. 460 AND 461 OF 1917

JANAKI AMMAL—PETITIONER

versus

NARAYANASWAMI AIYER—RESPONDENT.

IN C. M. P. NO. 922 OF 1917

NARAYANASWAMI AIYAR—PETITIONER

versus

JANAKI AMMAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLV, r. 15—"Certified copy of the decree," interpretation of—Plain print copy with affidavit, whether sufficient.

Rule 15 of Order XLV of the Code of Civil Procedure should not be construed as restricting the only possible evidence of an Order in Council to the certified copy, but as directory words with the object of ensuring that proper information on the subject of an Order in Council should be supplied to the Courts in India. [p. 630, col. 1.]

Hurrish Chunder Chowdhry v. *Kali Sunderi Debi*, 9 C. 482; 10 I. A. 4; 12 C. L. R 511; 7 Ind. Jur. 161; 4 Sar. P. C. J. 403; 4 Ind. Dec. (N. S.) 970, followed.

Where, therefore, along with an application for execution of the decree of the Privy Council a plain print copy of the decree was filed and in support thereof an affidavit was filed, to show that it was the decree passed by the Privy Council:

Held, that it must be deemed to be the true copy of His Majesty's Order in Council within the meaning of rule 15 of Order XLV of the Code of Civil Procedure. [p. 630, col. 2.]

Damodar Das v. *Birj Lal*, 30 Ind. Cas. 77; 37 A. 567; 13 A. L. J. 769, distinguished.

IN No. 460

Civil Miscellaneous Petition, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to transmit for execution to the Court of the Subordinate Judge, Mayavaram, the plain printed copy of the decree of His Majesty in Council, in Privy Council Appeal No. 105 of 1914*, preferred against the decree of the High Court, in Appeal Suit No. 22 of 1908† (Original Suit No. 30 of 1907) on the file of the Court of the Subordinate Judge Mayavaram.

Mr. *C. A. Seshagiri Sastri*, for the Petitioner.

Messrs. *T. R. Ramachandra Aiyar* and *G. S. Ramchandra Aiyar*, for the Respondent.

IN No. 461

Civil Miscellaneous Petition, praying that in the circumstances stated in the affidavit filed with the above Civil Miscellaneous Petition No. 460 of 1917, the High Court will be pleased to order the return of the securities deposited by the petitioner for the costs of the respondent in the appeal to His Majesty in Council in the said Privy Council Appeal No. 105 of 1914 and also of the interest that may have accrued thereon, and to order the refund of the balance of amount lying to the credit of the petitioner after defraying the expense for the printing and transmission of the printed record in the said Privy Council No. 105 of 1914 to His Majesty in Council.

IN No. 922

Civil Miscellaneous Petition, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to set aside the order of the Registrar of the High Court, dated 28th February 1917, in Civil Miscellaneous Petition No.

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*See 37 Ind. Cas. 161—*Ed.*

†*See* 17 Ind. Cas. 261—*Ed.*

642 of 1917, for furnishing Janaki Ammal, the appellant in Privy Council Appeal No. 105 of 1914, with a certificate of the costs incurred by her in the High Court in Appeal Suit No. 22 of 1908, and in the Court of the Subordinate Judge of Mayavaram in Original Suit No. 30 of 1907, and to direct a re-settlement of the taxation of costs after hearing the petitioner herein.

Messrs. *T. R. Ramachandra Aiyar* and *G. S. Ramachandra Aiyar*, for the Petitioner.

Mr. *C. A. Seshagiri Sastri*, for the Respondent.

JUDGMENT.—The first objection taken to the transmission of the decree of the Privy Council for execution is that the Original Order in Council has not been filed in this Court and, therefore, there is no certified copy' which should accompany the application for execution as required by Order XLV, rule 15 of the Code of Civil Procedure, 1908. The facts set out in Civil Miscellaneous Petition No. 460 of 1917 and the affidavit of the petitioner explain how the original order has miscarried and has not yet reached the petitioner. The order was passed about the end of July 1916 and since the successful appellant before the Privy Council has not yet received the original order, he has put in a plain print copy of the Order in Council along with his petition and asks us to transmit the decree for execution to the lower Court.

We think the principle of the decision of the Privy Council reported as *Hurrish Chunder Chowdhry* v *Kali Sunderi Debi* (1) applies to a case like this. As pointed out there, the provisions of section 610 of the old Code of Civil Procedure, which correspond to rule 15 of Order XLV of the present Code, should not be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that proper information upon the subject of any Order in Council should be supplied to the Courts in India. No doubt the Order in Council in that case was in possession of the opposite party and he neglected to file it. But the principle applies to the present case and we are satisfied upon the affidavit and other materials placed before us that the plain print copy filed along with the petition is a true copy of His Majesty's Order in Council. In fact this is not denied. The case of *Janaki Ammal* v. *Narayanasami Aiyar* (2) has also been reported in the authorised Law Reports, 39 Madras 634, where the decree is given in the same terms as in the plain copy. We have been referred to a case in the Allahabad High Court, *Damodar Das* v. *Birj Lal* (3). But there it appears that there was no copy of the 'Order in Council' at all before the executing Court, but only the judgment or recommendation of their Lordships of the Privy Council. That is not the case here.

Another objection has been urged by the learned Pleader for the respondent that the Registrar did not give notice to him at the time of taxing the costs. We have, however, heard what objections he has to urge as regards the costs as taxed, and his principal objection is that no Pleader's fee should have been allowed in this Court because no certificate of fees was filed within seven days as required by the rules. But then the order of this Court as regards costs was that each party was to bear his own costs and, therefore, it was not expected that the Pleader would file any certificate of fees. That order has, however, been reversed by their Lordships of the Privy Council. We think in the circumstances the Registrar was right in accepting the certificate of fees.

Civil Miscellaneous Petitions Nos. 460 and 461 of 1917 are, therefore, allowed. Civil Miscellaneous Petition No. 922 of 1917 is dismissed with costs.

C. M. P. Nos. 460 *and* 461 *of* 1917 *allowed*; *C. M. P. No.* 922 *of* 1917 *dismissed.*

V. R. P.

(1) 9 C. 482; 10 I. A. 4; 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar P. C. J. 406; 4 Ind. Dec. (N. S.) 970.

(2) 37 Ind. Cas. 161; 39 M. 634; 31 M. L. J. 225; 20 M. L. T. 168; 14 A. L. J. 997; (1916) 2 M.W.N. 188; 20 C. W. N. 1323; 18 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530 (P. C.)

(3) 30 Ind. Cas. 77; 37 A. 567; 13 A. L. J. 769.

PATNA HIGH COURT.

FIRST CIVL APPEAL No. 46 OF 1914.

May 8, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

Musammat DILTOR KOER—PLAINTIFF—APPELLANT

versus

Babu HARKU SINGH—DEFENDANT—RESPONDENT.

Hindu Law—Widow—Acceleration—Maintenance—Reversioner, whether can deal with contingent interest.

A reversionary Hindu heir has no right to deal with his expectant interest. [p. 634, col. 1.]

Khunni Lal v. *Gobind Krishna Narain*, 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.); *Rup Narain* v. *Gopal Devi*, 3 Ind. Cas. 382; 36 C. 780; 6 A. L. J. 567; 10 C. L. J. 58; 13 C. W. N. 920; 5 M. L T. 423; 11 Bom. L R. 833; 93 P. R. 1909; 68 P. L. R. 1910; 146 P. W. R. 1909; 36 I A. 103; 19 M. L. J. 548 (P. C.); *Sham Sundar Lal* v. *Achhan Kunwar*, 21 A. 71; 2 C. W. N. 729; 25 I. A. 183; 7 Sar. P. C. J. 417; 9 Ind. Dec. (N. S.) 755; *Nund Kishore Lal* v. *Kanee Ram Tewary*, 29 C. 355; 6 C. W. N. 295; *Sumsuddin* v. *Abdul Husein*, 31 B. 165; 8 Bom. L. R. 781, distinguished.

A Hindu widow must surrender her entire interest in her husband's property in order to effect a valid acceleration of the estate in favour of the next reversioner. [p. 634, col. 2.]

Debi Prasad Chowdhry v. *Golap Bhagat*, 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499;; *Rangappa Naik* v. *Kamti Naik*, 31 M. 366; 3 M. L. T. 355; 18 M. L. J. 309, relied upon.

One *T.* died leaving two widows *P.* and *K.* *P.* and *K.* divided the property between themselves. *K.* during her lifetime surrendered her entire interest in the property in favour of her daughter's son to which the daughter consented. The daughter's son, on the other hand, agreed to give *K.* Rs. 1,200 per year for her maintenance and it was agreed that in lieu of her maintenance she should remain in possession of four villages belonging to her husband:

Held, that the surrender effected a valid acceleration. [p. 635, col. 1.]

Appeal from a decision of the third Subordinate Judge, Patna, dated the 23rd September 1913.

FACTS of the case and the arguments are fully set out in the judgment. The material portion of the document, dated the 19th March 1891, executed by *Musammat* Khatan Kuar is as follows:—

"8. Now *Musammats* Diltor Kuar and Mantor Kuar, the daughters, and Babu Harnandan Prasad Narain Singh, father and guardian of Babu Sheonandan Prasad Narayan Singh minor, my daughter's son, who are now present and residing with me, the executant, at my house in *Mauza* Garh Nehusa, *Pargana* Ghyaspur, used to make this request that with the exception of the properties given below the income of which would be sufficient to meet the expenses of me the executant and should be retained in my possession, I should deliver complete possession of the remaining properties moveable and immoveable to the extent of one-third share in equal proportion under the term of the *taksimnama*. As I the executant heartily desire that during the lifetime of me the executant the *taksimnama*, dated the 28th February 1886, and the *ijabnamas*, dated the 11th July 1886, 15th September 1886 and 20th September 1886, should come into force and that in future the daughters and the daughters' sons may have no occasion for dispute among themselves and their sons and representatives nor should any one be in want of possession after my death, therefore, I, the executant, out of my own free-will.....recognised each of the three heirs set forth above to have and hold possession in equal proportion of the entire properties in the deed of *taksimnama* mentioned above as well as mentioned below, with the exception of the properties relating to the *Thakurbari* in respect of which some one else is the *mutawalli*, *viz.*, one-third share to *Musammat* Diltor Kuar.....and one-third share to *Musammat* Mantor Kuer.....and one-third to Babu Sheonandan Prasad....., and waived all claims to possession in respect of the same and withdrew altogether. And now I, the executant, have not and shall not have any sort of claim to title, etc., with each of the said three heirs. And each of the three heirs mentioned above too have had and held complete possession out of their free will and accord in confirmation of the previous deed, *taksimnama*, executed by me the executant and the *ijabnama* executed by themselves in their own capacity and by his guardian. Each of the three heirs should have their respective names registered in the Government Registers in the column of *milkiat* and *malikdari* on expunction of the name of me, the executant. In respect thereto none of the heirs shall have any connection or contention or demand with the other or with any of their heirs and representatives.

9. Each of the three heirs agreed to pay

Rs. 1,200 annually for the purpose of meeting the expenses and necessity of me, the executant, during my lifetime and I, the executant, accepted to take Rs. 1,200 annually, but with mutual consent and with a view to better security and to avoid demands, in lieu of Rs. 1,200 the said amount of maintenance, *Mauza* Nehusa and *Mauza* Ukhra.....and *Mauza* Chak..... the *jamabandi* of which.....comes up to the amount of maintenance should remain in the possession of me the executant with only the right of appropriation of the produce in lieu of maintenance, support and necessities of every description till my lifetime. And the payment of the Revenue and Road and Public Works cesses and other Government dues will rest with each of the said three heirs, their heirs and representatives. And after the death of me, the executant, the same will come into the possession of each of the three heirs, their heirs and representatives in proportion to a third share to each; no one has and shall have any claim and contention with any other and each of the three heirs in equal proportion should get their respective names registered in the columns of *maliks* and *malikdari* in the Government Registers in respect of the said villages."

Dr. *D. N. Mitra*, Messrs. *Rajendra Prasad Goyan*, *R. Chatterji*, *Nirsu Narayan Sinha*, *Ram Persad* and *Purendra Narain Sinha*, for the Appellant.

Messrs. *Rai Guru Saran Prasad*, *Tribhuan Nath Sahay*, *Gangadhar Das*, *Kulwant Sahai* and *Hari Bhusan Mukerjee*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This was a suit by the appellant for recovery of possession of shares in several villages which came into the possession of the respondent under a mortgage in the form of an *ijara* executed in his favour on September 14th, 1897, by *Musammat* Mantor Koer, a sister (now deceased) of the appellant. The appellant claims a declaration that the *ijara* is not binding on her, a decree for mesne profits, and other reliefs.

The following pedigree has been admitted:—

Musammat Poona Koer, 1st wife, who died in 1899.	= Tundan Singh, died February 2nd, 1875.	= *Musammat* Khatan Koer, 2nd wife, who died in 1902.
	Musammat Dhanjot Koer, alive	
	Several daughters.	

Musummat Ganeswar Koer, died without issue before 1886.	*Musammat* Sheomurat Koer, who died in August 1884	*Musammat* Diltor Koer, (plaintiff), had two sons of whom one is now alive.	*Musammat* Mantor Koer, died in December 1906
	Sheonandan Singh.		*Musammat* Jageshwar Koer, alive.

According to the Hindu Law the property of Tundan Singh devolved upon his two widows jointly; on the death of Poona Koer the surviving widow Khatan Koer would have taken the entire property and on her death her surviving daughters Diltor Koer and Mantor Koer would have taken it jointly, and on the death of Mantor Koer her sister Diltor Koer would have taken the whole and the daughters' sons would have taken nothing till the death of the last surviving daughter.

But the property of Tundan Singh has been the subject of many transactions and the decision of this case depends upon the effect to be given to them.

On the death of Tundan Singh Khatan Koer seems to have set up a Will. Poona Koer disputed the Will and set up a gift in respect of some moveable property. The dispute between the widows was settled on October 29th, 1876, on terms stated in two *iqrarnamas* executed by each in favour of the other. These documents recite that Khatan Koer had given up the Will propounded by her and Poona Koer had given up the gift which she had set up, and go on to provide that Khatan Koer who had four daughters should take a 12-annas share in the property and Poona Koer who had only one daughter should take a 4-annas share. Poona Koer was to be entitled to retain her share for life or give it to

her daughter or son-in-law and in case of her death the share was to go to her daughter. There was similar provision regarding the share of Khatan Koer. There was also a provision which was intended to keep the 4-annas share in the line of Poona Koer and her descendants for ever and the 12-annas share in the line of Khatan Koer and her descendants for ever.

It was firstly contended for the respondent that the *iqrarnamas* had the effect of conferring an absolute and heritable estate upon each of the widows as if the rule laid down in the case of *Khunni Lal* v. *Gobind Krishna Narain* (1) and other similar cases applied to the present case. But it is clear that the compromise was not based upon any antecedent title to an absolute estate in the parties. Khatan Koer gave up all claims under the Will. That document has not even been put in evidence and there is nothing to show that it purported to give her an absolute estate. It must, therefore, be held that the widows did not under the compromise acquire absolute estates in the property. At the latest the *iqrarnamas* ceased to have any effect on the death of Khatan Koer in 1902.

On March 14th, 1878, Khatan Koer executed a document whereby she purported to divide the 12-annas share between her four daughters with effect from her death. This document was never acted upon and may be dismissed from further consideration.

On February 28th, 1886, after the death of the eldest daughter, Khatan Koer executed a somewhat similar document whereby she purported to divide the 12 annas share between her daughters Diltor Koer and Mantor Koer and her daughter's son Sheonandan with effect from her death. On July 11th, 1886, September 15th, 1886, and September 20th, 1886, Diltor Koer, Mantor Koer and the father of Sheonandan each executed a document styled an *ijabnama* accepting the terms and conditions of the deed of February 28th, 1886, and the husbands of Diltor Koer and Mantor Koer each executed an *iqrarnama* guaranteeing that his wife would observe the arrangement that had been made. The document executed by Dharamjit husband of Diltor Koer is dated September 24th, 1886, and is on the record. The others have not been printed.

Before going further it is necessary to ascertain what was the legal effect of this set of documents. For the reasons already given it is clear that Khatan Koer had no power to regulate the succession to the property after her death. On behalf of the appellant it is contended that the two daughters and the daughter's son could not enter into agreements which would bind their contingent or prospective interests in the property or change the course of the devolution of the property, and reliance is placed on section 6 of the Transfer of Property Act and on the cases of *Rup Narain* v. *Gopal Devi* (2), *Sham Sundar Lal* v. *Achhan Kunwar* (3), *Nund Kishore Lal* v. *Kanee Ram Tewary* (4) and *Sumsuddin* v. *Abdul Husein* (5). The respondent, on the other hand, relies upon the cases of *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty* (6), *Ramakkal* v. *Ramasami Naickan* (7), *Sudalai Ammal* v. *Gomati Ammal* (8), *Kantee Chandra Mukerji* v. *Ali-Nabi* (9), *Ram Nirunjun Singh* v. *Prayag Singh* (10). The five cases last mentioned may be distinguished from the present case on the ground that the agreements in question in these cases were made by persons in possession of property and the object of the agreements was to define their respective rights in that property, whereas in the present case the two daughters and the daughter's son were not in possession of property

(1) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 4 7; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.)

(2) 3 Ind. Cas. 382; 36 C. 780; 6 A. L. J. 567; 10 C. L. J. 58; 13 C. W. N. 920; 5 M. L. T. 423; 11 Bom. L. R. 853; 93 P. R. 1909; 68 P. L. R. 1910; 146 P. W. R. 1909; 36 I. A. 103; 19 M. L. J. 548 (P. C.).

(3) 21 A. 71; 2 C. W. N. 729; 25 I. A. 183; 7 Sar. P. C. J. 417; 9 Ind. Dec. (N. S.) 755.

(4) 29 C. 355; 6 C. W. N. 395.

(5) 31 B. 165; 8 Bom. L. R. 781.

(6) 24 C. 333; 12 Ind. Dec. (N. S.) 893.

(7) 22 M. 522; 9 M. L. J. 101; 8 Ind. Dec. (N. S.) 373.

(8) 16 Ind Cas. 428; 12 M. L. T. 288; 23 M. L. J. 355; (1912) M. W. N. 908.

(9) 9 Ind. Cas. 935; 33 A. 414; 8 A. L. J. 199.

(10) 8 C. 138; 10 C. L. R. 62; 4 Ind. Dec. (N. S.) 88.

but were attempting to deal with property which might or might not devolve on them on the death of Khatan Koer.

It appears to me, as it appeared to the Calcutta High Court in *Nund Kishore Lal* v. *Kanee Ram Tewary* (4), that the decision of their Lordships of the Privy Council in *Sham Sundar Lal* v. *Achhan Kunwar* (3) has distinctly negatived the right of a reversionary Hindu heir to deal with his or her expectant interest. In *Sumsuddin* v. *Abdul Husein* (5) Sir Lawrence Jenkins held the same with reference to the chance of a person succeeding to an estate under the Muhammadan Law. I am of opinion that there is nothing in the document executed by Khatan Koer, her two daughters, their husbands and the father of Sheonandan in 1886 which would have prevented the daughters from asserting their rights under the Hindu Law on the death of Khatan Koer.

But on March 19th, 1891, Khatan Koer executed a document styled an *iqrarnama la-dawa*, whereby she gave up her widow's estate in the property which had been till then in her possession. Clauses 1—4 of this document recite some of the previous documents and give the history of the family from 1875 up to date. Clauses 5—7 may be disregarded. Clause 8 states that her daughters and the father of Sheonandan had asked her to hand over her property to them, retaining only what would be sufficient for her maintenance, and that she had agreed to do so. Then she goes on to say that she has made each of them full and absolute possessor of one-third of her property and had herself given up possession to them, that she had no longer any claim to the property and that each of the three was to have his or her name entered in the Government records in respect of his or her share. Each of them was to be *malik* of his or her share and none of them was to have any contention, demand or connection with the others or their representatives. Clause 9 recites that the two daughters and the son-in-law had agreed to pay her Rs. 1,200 per annum for her expenses for life and she had agreed to accept that amount, but it had been arranged between them and her that instead of receiving Rs. 1,200 from them she should retain possession of four of the villages and have the right to take the income thereof for her maintenance and needs—the Government revenue and cesses being paid by the daughters and son-in-law and their heirs and representatives.

The appellant contends that this document at the most transferred Khatan Koer's estate to the daughters and Sheonandan, that there was no complete surrender or extinction of the widow's estate and consequently no acceleration of the estates of the daughters. The respondent on the other hand contends that this document evidences a complete surrender and extinction of the widow's estate by Khatan Koer which brought about an acceleration of the estates of the daughters, and that this document read with the documents of 1886 and considered in the light of the conduct of the two daughters and the daughter's son shows that they had all agreed, so far as they were able to do so, that the two daughters and Sheonandan should each take a one-third share. The Subordinate Judge relied upon the case of *Pulin Chandra Mandal* v. *Bolai Mandal* (11) as authority for the proposition that a surrender by a widow of her entire interests in a portion of her husband's estate accelerates the estate of the reversioners in that portion, but that decision was in effect overruled by the Full Bench in *Debi Prosad Chowdhry* v. *Golap Bhagat* (12), where it was held that the surrender must be of the entire estate of the widow in order that the estates of the reversioners may be accelerated, and the same view was taken in *Rangappa Naik* v. *Kamti Naik* (13). It is contended by the appellant that Khatan Koer did not give up her entire estate because she retained possession of four villages and we were referred to the case of *Pilu Appa Nalwade* v. *Babaji Naru Mang* (14), where two widows had made a gift of four-fifths of their husband's estate and had retained one fifth for their maintenance, and it was held that the retention

(11) 35 C. 939: 12 C. W. N. 837; 8 C. L. J. 280.
(12) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701: 17 C. L. J. 499.
(13) 31 M. 366; 3 M. L. T. 355; 18 M. L. J. 309.
(14) 4 Ind. Cas. 584; 34 B. 165; 11 Bom. L. R. 1291.

of the one-fifth took the case out of the rule. The terms of the instrument executed by the widows in that case do not appear from the report. In the case before us Khatan Koer abandoned the whole of her widow's estate as such and in lieu of Rs. 1,200 per annum as maintenance was allowed to take the income of four villages. It is quite clear from the terms of the document that she did not retain a widow's estate in the four villages but was given a bare right to receive the rents and profits from the tenants instead of taking the sum of Rs. 1,200 from the other parties to the document. It was also contended that even if Khatan Koer gave up her widow's estate in all the property then in her possession, there was no acceleration of the estates of the daughters because the 4-annas share in Tundan Singh's property remained in possession of the other widow Poona Koer. As a matter of fact Poona Koer also shortly afterwards, *i. e.*, in 1896 relinquished her 4-annas share in favour of her daughter, but, in my opinion, the retention of her share by Poona Koer did not make the relinquishment by Khatan Koer any less complete. By an arrangement, which was binding upon both the widows for their joint lives and upon the survivor of them, Khatan Koer had no rights whatever in the share allotted to Poona Koer. Khatan Koer abandoned her widow's estate in all the property to which she was entitled and that was, in my opinion, sufficient to satisfy the rule. *Lastly*, it was contended that an abandonment of her estate by a widow must be in favour of the next reversioners only, whereas Khatan Koer abandoned one-third of her estate in favour of her daughter's son who was not one of the next reversioners. In my opinion this contention should be rejected. What is required is that the widow should relinquish her estate. The circumstance that the next reversioners allowed another person to take part of the property does not appear to affect the question. If the relinquishment had been in favour of the next reversioners only and they had the next day made over part of the property to another person, there would have been no room for the contention now advanced. It was with the consent of the two daughters and in pursuance of the family arrangement that one-third of the property was made over to the daughter's son Sheonandan. On the whole I am of opinion that the relinquishment of her widow's estate by Khatan Koer was sufficient to bring this case within the rule and that the estates of the daughters were accelerated. If this view is correct Mantor Koer acquired in 1891 a woman's estate in her father's property which passed into her possession and she had power to mortgage it in 1897 for legal necessity as understood in the Hindu Law. When Mantor Koer died in 1906 Diltor Koer might have challenged the mortgage but she did not do so. On the contrary she accepted three instalments of the *haq-ajiri* (the sum payable by the *ijaradar*) from the respondent namely Rs 347-0-3 on January 9th, 1907, for a period prior to the death of Mantor Koer, Rs. 300 on March 25th, 1907, and Rs. 200 on June 3rd, 1907 (see Exhibits D D 1, 2 3). The finding of the Court below that these sums were received by Diltor Koer has been challenged but, in my opinion, there can be no doubt that the three sums were received by her. I prefer the evidence of Parasidha Narain Singh and the respondent to that given by the appellant and her servant Maneshur Lal, whose story that he told the appellant's husband that the respondent's *ijara* was a "colourable one" is plainly false. The appellant and her husband (Dharamjit) had full knowledge of the *ijara* taken by the respondent, for Dharamjit had advanced money to Mantor Koer on September 18th, 1897, when an arrangement was made that the *haq-ajiri* payable by the respondent should be devoted to keeping down the interest payable to him (Dharamjit). I agree with the Court below that Diltor Koer by accepting rent or *haq-ajiri* from the respondent after the death of Mantor Koer must be taken to have elected to affirm the mortgage and that she cannot now challenge it.

But I am prepared to go further and accept the view taken by the Court below that there was a valid family arrangement whereby Mantor Koer became entitled to deal with her one-third of Khatan Koer's estate as she pleased so far as Diltor Koer was concerned. For the reasons already given I am of opinion that the documents of 1886, executed as they were while the daughters had no more than expectant

interests, did not have the effect which they were intended to have. But when the daughters obtained possession in 1891 they became entitled to make any agreement with each other that they pleased regarding the property in their possession. It is quite clear that all along the daughters were anxious to make an arrangement whereby each should take one-third of her mother's property and have unfettered control over it. Diltor Koer and Mantor Koer did not sign the deed of March 19th, 1891, but they accepted it and applied to the Collector for registration and took possession on the strength of it. That document was the last of a series of documents all executed with the same object. It is quite clear that by taking possession under that document the daughters reaffirmed the arrangement which they had sought to make previously but which they had been unable to make effectively owing to the nature of their interests. The heirs of Diltor Koer may not be bound by the arrangement which she made with her sister and Sheonandan but Diltor Koer herself cannot challenge it. In this view the *ijara* held by the respondent cannot be challenged by the appellant Diltor Koer, whether it is supported by legal necessity or not.

I would dismiss this appeal with costs.

JWALA PRASAD, J.—I agree that the appeal should be dismissed.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 93 OF 19 5.

June 7, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

BHAG MAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHAGWAN DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—Succession—Sister's son and grandson, whether bandhus *- Delay in filing suit —Acquiescence—Limitation Act (IX of* 1908*), Sch. I, Art.* 120 *- Suit for declaration of plaintiff's right to manage* dharamsala.

According to the Mitakshara School of Hindu Law, a sister's son and grandson are *bandhus* and can succeed to the property of the deceased as his heirs. [p. 637, cols. 1 & 2.]

Mangat Ram v. *Devi Chand*, 20 P. R. 1906; 69 P. L. R. 1906; *Bibi Sodhan* v. *Harsa Singh*, 34 Ind. Cas. 585; 51 P. R. 1916; 138 P. W. R. 1916; 155 P. L. R. 1916, distinguished

The mere fact that a suit by the reversioners challenging a gift is not brought till ten or eleven years after the death of the donor does not show that the plaintiffs acquiesced in the gift and the plaintiffs are not thereby estopped from bringing the suit [p. 637, col. 2.]

Plaintiffs sued for possession of certain property and a *dharamsala*, but subsequently amended the plaint and asked for a decree for possession of the property and a declaration to the effect that they were entitled to be managers and supervisors of the *dharamsala*. In the amended plaint it was stated that the person last in possession died in April 1898 and that the cause of action accrued then:

Held, that the suit was governed by Article 120 of the Limitation Act and having been filed more than six years after the last owner's death was barred by time. [p. 639, col. 1.]

First appeal from the decree of the Subordinate Judge, 1st Class, Attock, dated the 31st of October 1914, decreeing the claim in part.

Messrs. *C. H. Oertel* and *Ganpat Rai*, for Bhag Mal, and Mr. *Beechey*, for *Musammat* Bindo, Appellants.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Respondents.

JUDGMENT.—This is an appeal by Bhana defendant from the order of the Subordinate Judge, 1st Class, Campbellpore, giving Bhagwan Das and Gokal Chand a decree for possession of five eighths and one-eighth share respectively of certain property of which *Musammat* Subi, widow of Hira Singh, made a gift in favour of the defendant-appellant Bhana. The claim for a declaration in respect of the management of a *dharamsala* was dismissed and there are cross objections by the plaintiffs in respect of this. At first Bhagwan Das, who is the sister's son of Hira Singh, was the sole plaintiff, but subsequently Mitha Mal, sister's son, and Karm Chand and Gokal Chand, sister's grandsons of Hira Singh, were joined as co-plaintiffs. The lower Court originally dismissed the plaintiff's suit as barred by time, but this Court on appeal held that the suit was barred by time only as regards Bhagwan Das but not as regards the other plaintiffs. It, therefore, set aside the order of the lower Court in regard to them and remanded

the case under Order XLI, rule 23, Civil Procedure Code, for decision on the merits, (see judgment in Civil Appeal No. 895 of 1910,* dated 28th March 1912, printed at pages 1-3 of the paper-book). Subsequently Mitha Mal and Karm Chand assigned their shares in Hira Singh's property to Bhagwan Das and he has now been given a decree for their shares. The facts of the case appear sufficiently from the judgments of the lower Court and of this Court in the previous appeal and need not be recapitulated at length.

The first question for decision is whether a sister's son is an heir under the Hindu Law as followed by the parties. Article 576 of Mayne's Hindu Law, 8th Edition, shows that the sister's son has now been held to be a *bandhu* in those parts of India where the Mitakshara school is in force. Mr. Oertel has referred us to *Mangat Ram* v. *Devi Chand* (1) and *Bibi Sodhan* v. *Harsa Singh* (2), but neither of those rulings is in point for the case of the sister's son was not discussed in them. In *Bibi Sodhan* v. *Harsa Singh* (2) it was, no doubt, stated that according to the Benares School of Hindu Law females do not succeed to males unless their right of inheritance is expressly recognised by some text in their favour. The sister is not one of the females whose right of inheritance is expressly recognised so that the sister would not be an heir, but it does not follow, because a sister is not an heir, that a sister's son is also not an heir. In *Raghunath Kuari* v. *Munnan Misr* (3) the right of the sister's son was recognised. *Bansidhar* v. *Ganeshi* (4), which held that a daughter's daughter was an heir, was expressly dissented from in *Jagan Nath* v. *Champa* (5), but these cases are obviously not in point here where we have to consider the case of a sister's son. The case reported as *Khargai* v. *Debi* (6) was one where a sister's son was preferred to the father's uncle's daughter's son and in *Sundar Singh* v. *Musammat Gurdevi* (7), a Divisional Bench ruling of this Court, it was stated that the right of the sister's son as a *bandhu* had now been settled in his favour. Mr. Oertel has not been able to cite a single recent instance in which it was held that the sister's son is not a *bandhu* according to the Mitakshara School of Law. We, therefore, hold that Mitha Mal and Bhagwan Das being sister's sons of Hira Singh were clearly his heirs. It is, however, urged that even if the sister's sons are heirs, Karm Chand and Gokal Chand who are sister's grandsons are not heirs. As to this *Pandit* Sheo Narain has referred us to Trevelyan's Hindu Law, page 388, where the father's daughter's son's son *i. e.*, sister's son's son is given in the list of *bandhus*. We, therefore, hold that all the original plaintiffs were heirs of Hira Singh. If the pedigree table is as stated by the plaintiffs, then Mitha Mal was clearly entitled to a half share of the estate of Hira Singh and Karm Chand and Gokal Chand were entitled to one-eighth share each. Bhagwan Das is the assignee of Mitha Mal and Karm Chand and would, therefore, be entitled to five-eighths share in the estate.

Mr. Oertel urged in a half-hearted way that the plaintiffs were estopped from suing, having acquiesced in the gift to Bhana Mal. He was, however, unable to point out in what manner their acquiescence was proved. The only point urged by him was that there was a great delay in bringing the suit and that originally Mitha Mal, Karm Chand and Gokal Chand did not join in it. The mere fact that a suit was not brought for some ten or eleven years after the date of *Musammat* Subi's death does not show that the plaintiffs acquiesced in the gift. We, therefore, hold that there is no estoppel by acquiescence made out.

The next point is whether Hira Singh had any other reversioners besides those mentioned in the plaint. It is alleged that he had a sister *Musammat* Bholi of whom Diwan Chand is the great-grand-

(1) 20 P. R. 1906; 69 P. L. R. 1906.
(2) 34 Ind. Cas. 585; 51 P. R. 1916; 138 P. W. R. 1916; 155 P. L. R. 1916.
(3) 20 A. 191; A. W. N. (1898) 13; 9 Ind. Dec. (N. S.) 484.
(4) 22 A. 338; A. W. N. (1900) 107; 9 Ind. Dec. (N. S.) 1258.
(5) 28 A. 307; A. W. N. (1906) 13; 3 A. L. J. 87.
(6) 9 Ind Cas. 339.
(7) 31 Ind. Cas. 27; 163 P. W. R. 1915.

* See *Bhagwan Das* v. *Bhana Mal*, 14 Ind. Cas. 366.—*Ed.*

son and that Mitha Mal had a brother Ghaddu whose grandsons, Sona and Bishna, are alive. It is admitted by the plaintiffs that Mitha had a half brother Ghaddu, but they say that the latter was not the son of a sister of Hira Singh but of another wife of Devi Sahai, Mitha's father. The lower Court has clearly held that it has not been proved that any other heirs of Hira Singh are living who should have been made parties to the suit. The evidence in support of the defendants' contention is meagre and has been sufficiently discussed by the lower Court in its judgment. Its finding is entitled to great weight and should not be set aside by an Appellate Court unless the latter is convinced that it is wrong. We have perused the evidence on the record and are unable to hold that it is proved that any heirs of Hira Singh existed other than those admitted by the plaintiffs. Diwan Chand was himself produced as a witness, and though his evidence is by no means satisfactory, it does not prove anything in favour of the defendant.

The next question is whether Bhana defendant is entitled to recover any sum on account of debts of *Musammat* Subi, widow of Hira Singh, paid off by him or on account of sums expended by him upon the property or upon the funeral ceremonies of *Musammat* Subi. Upon this very little has been urged in argument except in regard to a sum of Rs. 1,000 paid by Bhana to a previous mortgagee, the mortgage in whose favour was effected by *Musammat* Subi on 30th March 1896. The lower Court has disallowed this item on the ground that there was no proof that *Musammat* Subi had any necessity to effect the mortgage. It is pointed out that Bhana was living with *Musammat* Subi when the mortgage was effected and was in a peculiarly favourable position for knowing the necessity for transaction if any such existed. The deed of mortgage is printed on pages 1—3 of the paper-book. It does not allege any necessity at all and shows that Rs. 1,000 was paid to *Musammat* Subi in cash at the time of registration. She was accompanied by Bhana the present appellant and there is, therefore, good ground for supposing that it was Bhana himself who received and spent the money. At all events he must be fixed with the knowledge of the purpose for which Rs. 1,000 was borrowed, and he has made no attempt to show that there was any necessity for it. He does not allege that he paid off this debt out of his own pocket. He paid it off on the 22nd February 1906 and about a month later he made a further mortgage of a part of Hira Singh's property for Rs. 2,800 said to be due on book account. We have no doubt at all that the Rs. 1,000 to pay off the prior mortgagee was advanced by the subsequent mortgagees. Those mortgagees were made defendants in the present suit and have not appealed from the decree of the lower Court. Mr. Oertel suggests that his client will be personally liable to them but we know nothing about this. We hold that there is no proof that *Musammat* Subi effected the original mortgage for necessity, and that if Bhana Mal paid off that debt he did not pay it out of his own pocket, but out of the money raised by him on a subsequent mortgage of Hira Singh's property.

As to the other sums said to have been spent by Bhana Mal, we agree with the lower Court that he is not entitled to any compensation. He admitted that he received jewelry worth Rs. 200 and other household goods belonging to *Musammat* Subi at the time of her death, and it is not at all likely that he spent more on her funeral ceremonies than the value of the properties which he received from her. He has, moreover, been deriving an income of about Rs. 150 a year from the property during all the years that he has been in possession, and the sums thus realised by him may very well be set off against anything spent by him upon the upkeep or improvement of the property.

The lower Court dismissed the claim in respect of the management of the *dharamsala*, holding that sanction of the Collector was necessary under section 92 of the Civil Procedure Code. Mr. Sheo Narain contends that section 92 is not applicable and refers to *Budree Das Mukim* v. *Chooni Lal Johurry* (8) and *Sir Dinshaw* v. *Sir Jamsetji* (9). We do not find it, however, necessary to decide this point definitely because, in our

(8) 33 C. 789; 10 C. W. N. 581.
(9) 2 Ind. Cas. 701; 33 B. 509 at pp. 510, 529; 11 Bom. L. R. 85; 5 M. L. T. 301.

opinion, the plaintiffs' claim for a declaration as to the management of the *dharamsala* is barred by time. In the original plaint possession of the *dharamsala* as well as other property was claimed but upon the advice of *Bhai* Charat Singh, before whom the case was at one time, the plaintiffs amended the plaint and prayed for a decree for possession of the entire property except the *dharamsala* and asked for a declaratory decree to the effect that they were entitled to be managers and supervisors of the *dharamsala* (see the amended plaint at page 24 of the former paper-book which was printed when the case was previously before this Court). In that plaint it was stated that *Musammat* Subi died in April 1898 and that the cause of action accrued then. The suit for a declaration is governed by Article 120 of the Second Schedule of the Limitation Act and having been brought more than six years after the date of *Musammat* Subi's death is barred by time.

The cross-objections accordingly fail, and we hereby dismiss them. The appeal of the defendants is also dismissed but taking all the circumstances of the case into consideration we leave the parties to bear their own costs.

Appeal dismissed,
Cross-objections dismissed.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE NO. 2439 OF 1915.
July 19, 1917.
Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.
ISWAR CHANDRA SARMA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
KAILASH CHANDRA NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Occupancy holding, non-transferable, purchaser of, in execution of money-decree, rights of, against subsequent purchaser in execution of money-decree recognized by landlord—Settlement.

The plaintiff purchased a non-transferable occupancy holding in execution of a money-decree but before he took possession from Court, the defendants purchased the same in execution of another money-decree and obtained delivery of possession, and the rent paid by them was accepted by the landlord. In a suit by the plaintiff to recover possession of the holding from the defendants as its prior purchaser:

Held, that as the landlord, who had a right to re-enter upon the land on its abandonment by the heirs of the original tenant, had accepted rent from the defendants and treated them as tenants, there was practically a settlement with them by the landlord and that, therefore, the plaintiff as the purchaser of the interest of the tenant did not acquire any interest which could be enforced against the landlord or the defendants claiming under the landlord. [p. 639, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, Commilla, dated the 4th June 1915, confirming that of the Munsif, Brahmanberia, dated the 6th June 1914.

Babu *Gopal Chandra Das*, for the Appellants.

Babu *Govinda Chandra De Roy* (with him Babus *Hemendra Kumar Das* and *Khemoda Kinkar Roy*), for the Respondents.

JUDGMENT.—The plaintiff-appellant as the purchaser of a non-transferable occupancy-holding at a sale held in execution of a money-decree brought the suit, out of which this appeal arises, to recover possession of the holding from the defendants. The holding belonged to one Ram Manikya, and, as we have said, it was purchased by the plaintiff in execution of a money-decree on the 21st May 1901; but before the plaintiff took possession from Court, defendant No. 1 purchased the holding at another sale held in execution of a money-decree in September 1902, and obtained delivery of possession in 1903.

It is found that the heirs of the tenant Ram Manikya had at that time left the land and even the homestead without arranging for the payment of rent, and that there was an abandonment of the holding by the heirs of the tenant. That being so, the landlord had a right to enter upon the land. He accepted rent from the defendants and treated them as tenants and there was practically a settlement with them by the landlord. Under these circumstances, the plaintiff as the purchaser of the interest of the tenant did not acquire any interest which could be enforced against the landlord or the tenants claiming under the landlord.

We think, therefore, that the plaintiff was not entitled to recover possession of the land from the defendants and that

the decrees of the Courts below are right. The appeal is accordingly dismissed with costs.

Appeal dismissed

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 355 OF 1916.

March 19, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Srinivasa Aiyangar.

MAJJIGA VENKATASUBBA REDDI—DEFENDANT—APPELLANT

versus

CHUNDI LINGA REDDI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), *Sch. I, Art.* 11*A, applicability of—Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 100—*Application dismissed without investigation—Person dispossessed, whether bound to bring suit within one year—Limitation.*

If an application made under Order XXI, rule 100, of the Code of Civil Procedure is dismissed without investigation, the person dispossessed is not bound to bring a suit to establish his right to possession within one year under Article 11A of the Limitation Act.

Narasimha Chetti v. *Vijiapala Nainar*, 27 Ind. Cas. 944; 2 L. W. 206, *Ponnusami Pillai* v. *Samu Ammal*, 38 Ind. Cas. 937; 31 M.L.J. 247, distinguished.

Appeal against the order of the District Court, Nellore, in Appeal Suit No. 64 of 1915, preferred against the decree of the Court of the Additional District Munsif, Nellore, in Original Suit No. 40 of 1915.

Messrs. *A. Krishnaswami Aiyar* and *B. Somayya*, for the Appellant.

Mr. *Varadachariar*, for the Respondent.

JUDGMENT.—We agree with the District Judge in thinking that if an application made under Order XXI, rule 100, of the Code of Civil Procedure is dismissed without investigation, the person dispossessed is not bound to bring a suit to establish his right to possession within one year under Article 11A of the Limitation Act.

The decisions in *Narasimha Chetti* v. *Vijiapala Nainar* (1) and *Ponnusami Pillai* v. *Samu Ammal* (2) related to orders made upon claims under Order XXI, rule 63. There is no such change of language in the rules that relate to claims made after sales in execution as there is in those portions of the Code which relate to claims against attachment.

Under these circumstances the decisions under the old Code upon this point apply, and the appeal must be dismissed with costs.

The District Court should have given a refund of the value of the stamp on the appeal memo. to the appellant instead of including it among the costs to be paid by respondent in the decree.

Appeal dismissed.

V. R. P.

(1) 27 Ind. Cas. 944; 2 L. W. 206.
(2) 38 Ind. Cas. 937; 31 M. L. J. 247.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 157 OF 1917.

April 2, 1917.

Present:—Mr. Justice Chevis.

JAGRAM DAS—PLAINTIFF—APPELLANT

versus

MANGAL DAS—DEFENDANT—RESPONDENT.

Succession Certificate Act (VII of 1889), *s.* 26 (2) *proviso—Order rejecting application for certificate—Appeal—Court, proper.*

An appeal against an order of a Senior Subordinate Judge rejecting an application for a succession certificate lies to the District Court and not to the High Court.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Delhi, dated the 8th January 1917, rejecting application of the appellant and granting certificate to the respondent.

Mr. *Santanam* and Lala *Balwant Rai*, for the Appellant.

The Hon'ble Pandit *Sheo Narain*, R. B., and Mr. *B. P. Khosla*, for the Respondent.

JUDGMENT.—For respondents it is objected that appeal lies to the District Court, being an appeal from the order of a Court inferior in grade to a District Court. This objection seems perfectly correct, see section 26 (2), proviso, Act VII of 1889.

The appeal is returned for presentation to the District Court.

Appeal returned.

BOMBAY HIGH COURT.
FULL BENCH.
CRIMINAL APPEAL No. 539 OF 1916.
April 3, 1917.
Present:—Sir Basil Scott, KT., Chief Justice, Mr. Justice Beaman, Mr. Justice Heaton and Mr. Justice Macleod.
NAZAR MAHOMED AND OTHERS—ACCUSED —APPELLANTS
versus
EMPEROR—RESPONDENT.

Bombay Act (*XI of* 1846), *s.* 3—*Rule* 44 *of rules made under s.* 3, *whether* ultra vires—*Mewas Agent's Court, conviction by—High Court's power—Jurisdiction—Appeal—Revision.*

Rule 44 of the rules under section 3 of Act XI of 1846 is not *ultra vires* and under it the High Court of Bombay has power—it being immaterial whether the power is called appellate or revisional—to take cognizance of any case on the petition of a convicted party and, if it thinks fit, send for the proceedings and pass a fresh decision. [p. 643, col. 1.]

Therefore, the High Court has jurisdiction to entertain an appeal from a convicted person who has been sentenced by a Court of the Mewas Agent to a term not exceeding five years' imprisonment. [p. 642, col. 2; p. 643, col. 1.]

Criminal appeal from convictions and sentences passed by the Mewas Agent, West Khandesh.

This appeal coming on for hearing before Batchelor and Shah, JJ., their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH.

BATCHELOR, J.—This is an appeal from the judgment of the Mewas Agent, West Khandesh, by whom the appellants have been convicted under sections 326 and 114 of the Indian Penal Code, and have been sentenced to various terms of imprisonment, each term being less than five years.

The appeal gives rise to a preliminary question of some difficulty, that is to say, the question whether this Court has jurisdiction to entertain an appeal from a convicted prisoner who has been sentenced by the Court of the Mewas Agent to a term not exceeding five years' imprisonment. The question was answered in 1890 by a Division Bench of this Court in *Queen-Empress* v. *Sarya* (1), where it was held that such an appeal did not lie to the High Court. This decision was noticed and commented on in *Imperatrix* v. *Ratnya* (2), where, however, no doubt appears to have been thrown on the authority of the earlier case. The authority of that case is, however, exposed to some doubt and uncertainty owing to the recent decision of this Court in *Emperor* v. *Khalpa Ranchod* (3). For the decision in *Sarya's* case (1) proceeded mainly upon the view that rule 44 of the Rules published under section 3 of Act XI of 1846 was *ultra vires*, and consequently was of no avail to furnish this Court with jurisdiction to entertain an appeal in a case such as the present. But in *Khalpa Ranchod's* case (3) the validity of rule 44 came under the consideration of the Court, and the Chief Justice and Mr. Justice Heaton, after referring to section 4 of Act XI of 1846, observed that rule 44 appeared to them to permit this Court to entertain the appeal of the accused and, if necessary, to resort to the provisions of section 428 of the Criminal Procedure Code, for the purpose of obtaining any additional evidence that might be necessary. It is true that in this case the Court's attention does not appear to have been directed to the decision in *Queen-Empress* v. *Sarya* (1) and that there was also a reference to this Court from the Mewas Agent, the accused having been sentenced to death. At the same time it is, I think, apparent that there is real conflict between the decision in *Khalpa Ranchod's* case (3) and the grounds upon which the decision was rested in *Sarya's* case (1). That conflict is the more noticeable, because the circumstance that Khalpa Ranchod was sentenced to death, and was not sentenced to a term of five years' imprisonment or less, formed no part of the *ratio* of the Court's judgment. Moreover, after such argument as we have heard to day, it appears to me that some grounds do exist for re-considering the decision in *Queen-Empress* v. *Sarya* (1). For even if, as the learned Judges in that case thought, rule 44 was beyond the powers conferred by section 3 of Act XI of 1846—a point which is not wholly free from difficulty—yet it may still be necessary to consider what effect, if any, Act XIV of 1874 may have in the direction of saving this rule 44 and preserving it as a valid rule.

(1) 15 B. 505; 8 Ind. Dec. (N. S.) 342.
(2) 25 B. 667.
(3) 36 Ind. Cas. 581; 18 Bom. L. R. 789; 17 Cr. L. J. 533.

On the whole, therefore, there being this divergence between the decisions, some inherent difficulty in the question itself and some reason to suppose that apart from the latter case the decision in *Queen-Empress* v. *Sarya* (1) may be incorrect, it appears to me desirable that the question should be referred to a Full Bench. The question referred will be that which I have stated at the beginning of this judgment.

SHAH, J.—I agree. I only desire to add that I feel some difficulty in accepting the conclusion in *Queen-Empress* v. *Sarya* (1), that rule 44 of the Rules made under Act XI of 1846 is *ultra vires*. The words of section 3 of the Act are at least equally reasonably susceptible of a construction which would save the rule, and, in my opinion, that construction ought to be preferred. Taking the rules as a whole, particularly rules 43 and 44, it seems to me that the Government have provided that every case shall be liable to the control of the Sadar Fauzdari Adalat referred to in section 4 of the Act, subject to the condition that in a certain class of cases the Agent himself should submit the papers to that Court and that in other cases he is to submit the papers, if required to do so by that Court, on the petition of the accused. The extent of the power of the Sadar Fauzdari Adalat in all cases is the same. If the rules in terms provided that all cases must be submitted by the Agent to the Sadar Fauzdari Adalat, it would be difficult to say that the Government had no power under section 3 of the Act to make such rules. I am unable to see why the result should be otherwise when that is the effect of the present rules, with this difference only that in certain cases the papers must be submitted by the Agent to the Sadar Fauzdari Adalat, whereas in other cases he is to do so if required by that Court on the petition of the accused.

Mr. *Y. V. Bhandarkar*, for the Appellants.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

The Full Bench (Scott, C. J., Beaman, Heaton and Macleod, JJ.) delivered the following

OPINION.—By section 2 of Act XI of of 1846 it was enacted that the administration of criminal justice within the territory referred to by the Act should vest in the Agent to the Governor of Bombay, and by section 3 it was enacted that it should be competent to the Governor-in Council to prescribe such rules as he might deem proper for the guidance of the Agent, and to define the authority to be exercised by the Agent in criminal trials and what cases he should submit to the decision of the Sudder Fauzdari Adalat. By section 4 it was enacted that upon the receipt of any criminal trials referred by the Agent under the rules, which might thereafter be prescribed by the Governor-in-Council, the Sudder Fauzdari Adalat should proceed to pass a final judgment, or such other order as might after mature consideration seem to the Court requisite and proper, in the same manner as if the trial had been sent up in ordinary course from a Sessions Judge. Under section 3 of the Act the Governor of Bombay on the 17th of March 1854 prescribed certain rules for the civil and criminal administration in the villages of six Mewasi Chiefs mentioned in the Schedule to the Act of 1846. Chapter III of those rules relates to the criminal administration. Rule 35 provides that the absolute jurisdiction of the Agent in criminal cases shall extend to fine and imprisonment for five years, and sentences involving a punishment beyond that period, or of a greater severity, must be submitted for the confirmation of the Sudder Fauzdari Adalat. Rule 37 provides that the Agent will obey all injunctions and orders of the Sudder Fauzdari Adalat, and rule 43 that if the punishment deemed to be suitable by the Agent shall exceed his own absolute jurisdiction, he shall record the punishment he would award, but shall forward the case in original to the Sudder Fauzdari Adalat, which Court shall proceed to take cognizance of the case and to pass such sentence or orders as they may think proper, and the instructions conveyed to the Agent from the Superior Court would be carried into effect by him. Rule 44 provides that the Sudder Fauzdari Adalat shall be empowered to call for the Agent's

Re INQUIRY AGAINST MR. M. PLEADER.

proceeding in any case, on petition being made to that Court by any party against whom a sentence may have been passed by the Agent, and the Sudder Court may thereafter proceed according to the provisions of section 4 of Act XI of 1846. Rules 43 and 44 are thus rules which provide for cases in which the Agent shall, under the first rule of his own motion and under the second rule upon requisition by the Superior Court, submit the case for decision of that Court. The power to call for and deal with a case given to the Superior Court implies a direction that the Agent shall refer in compliance with the requisition. Section 4 of the Act of 1846 lays down what shall be done by the Sudder Fauzdari Adalat upon the receipt of any criminal trial referred by the Agent under the rules. The Sudder Court may proceed to pass a final judgment or such other order as may seem to the Court requisite and proper. This procedure is imperative in relation to any case received from the Agent. Such cases may under the rules either be referred by the Agent of his own motion or on requisition by the Court empowered under the rules to make such requisitions. The rules framed by the Governor-in-Council must be read as a whole and although rule 35 states that in a particular class of cases the Agent shall have absolute jurisdiction, that is not inconsistent with, but subject to, the provision in rule 44 that the Sudder Court on petition by any party convicted by the Agent may call for the proceedings and pass a decision thereon. It is immaterial whether the power of the Superior Court is called appellate or revisional, the result is that that Court, now the High Court, may take cognizance of any case on the petition of a convicted party and, if it thinks fit, send for the proceedings and pass a fresh decision. In our opinion, therefore, rule 44 is not *ultra vires*.

This case again came up for hearing before Mr. Justice Batchelor and Mr. Justice Shah on the 4th April 1917, when their Lordships delivered the following

JUDGMENT.—We are satisfied that these convictions must be affirmed. They rest in the main upon the evidence of the injured man Ahmed, his mother Sultanbi and the witness Abdul. We see no reason to think, having regard to the circumstances of the case and the time which elapsed between the offence and the first description of it, that these witnesses invented any of the names of the accused.

The convictions, therefore, must be confirmed, and we think the sentences imposed on Nos. 1 and 8, *i. e.*, Nazar Mahamad and Salmahamad Shahabad, are proper. Them, too, we, therefore, confirm. But in the case of the other convicts, *viz.*, accused Nos. 2, 3, 4, 5, 6, 7 and 9 we reduce the sentence to one year's rigorous imprisonment in each case. The reason for this reduction is that the evidence as to the part which these particular accused played in the crime is not such as to convince us of the exact share of each man's guilty participation.

Convictions confirmed; Sentences reduced.

SIND JUDICIAL COMMISSIONER'S COURT.

FULL BENCH.

CIVIL REFERENCE.

July 20, 1916.

Present:—Mr. Hayward, J. C.,
Mr. Crouch, A. J. C., and
Mr. Fawcett, A. J. C.

Re INQUIRY AGAINST MR. M., PLEADER, FOR PROFESSIONAL MISCONDUCT.

Sind Courts Act (Bom. Act XII of 1866*), s.* 16—*Pleader, duties of—Misbehaviour—Filing second complaint on identical facts without disclosing dismissal of first—Failure to master instructions—Gross neglect.*

A Pleader should take pains to master his instructions and the law relating to them so as to eliminate all inaccuracies. He should not endeavour to conceal any prior unsuccessful proceedings by the same party on the same complaint in another Court so as to mislead the Court in the administration of justice. [p. 645, col. 2.]

As an officer of the Court it is his duty not deceitfully to circumvent but honestly and loyally to uphold the practice of the Court, and to co-operate in the orderly and pure administration of justice by the Court. [p. 646, col. 1.]

Mr. *Lalchand Hassomal*, for the Pleader.

Mr. *E. Raymond* (Government Pleader), for the Crown.

JUDGMENT.

HAYWARD, J. C.—This is a reference for the exercise of our disciplinary jurisdiction in the case of Mr. M., Pleader.

Re INQUIRY AGAINST MR. M. PLEADER.

A complaint of defamation was filed on behalf of a *syce* named Ramadin against another *syce* named Moti by Mr. M. in the Court of the Cantonment Magistrate. It was alleged in the complaint that Ramadin had been falsely reported by Moti to the *jamayet* to have taken liberties with Moti's wife and that Ramadin was in consequence of that false report excommunicated by the *jamayet* at a meeting on the Barracks Maidan. The witnesses were stated to be Ramadan, Gurbux and Moogin and the scene of the offence the Barracks Maidan within the jurisdiction of the Cantonment Magistrate. The complaint was, however, dismissed after a preliminary enquiry on the grounds that Ramadin was not proved by the witnesses to have been reported by Moti to the *jamayet* and that it was established by them that Moti was not present at the meeting of the *jamayet* on the Barracks Maidan. Mr. M. was not present and the statements of the witnesses were not recorded in writing at the preliminary enquiry in the Court of the Cantonment Magistrate.

A second complaint of defamation was thereupon filed on behalf of the *syce* Ramadin against the *syce* Moti by Mr. M. in the Court of the City Magistrate. It was a copy of the previous complaint to which, however, it made no reference. The only alterations were that it alleged that Ramadin had been reported by Moti to the 'Headmen' of the *jamayet* and that the meeting of the *jamayet* took place at Kharadar; and that it stated that the witnesses were Gurbux, Bugoo and Javahir and the scene of offence Kharadar within the jurisdiction of the City Magistrate. This complaint was set down for preliminary enquiry but was eventually dismissed for default. Mr. M. was present, but the witnesses did not appear and so were not examined in the Court of the City Magistrate.

The complainant was subsequently prosecuted and sentenced on conviction to undergo two months' rigorous imprisonment for having brought a false charge in the Court of the City Magistrate; while Mr. M.'s part in the matter has been referred for our consideration in the exercise of disciplinary jurisdiction by the District Magistrate. Mr. M. has submitted his explanation, urging that he merely acted in accordance with his instructions which were in the beginning to the effect that the excommunication was at the meeting of the *jamayet* on the Barracks Maidan within the jurisdiction of the Court of the Cantonment Magistrate, but which were subsequently modified to the effect that the excommunication took place at a prior meeting of the *jamayet* at Kharadar within the jurisdiction of the City Magistrate. Further statements have been recorded before our brother Mr. Crouch and the matter has been fully argued by Mr. Lalchand on behalf of Mr. M. and by Mr. Raymond on behalf of the Crown before us as Full Bench.

Now the ascertainment of the correct facts is a matter of great difficulty in a matter of this kind. The complainant Ramadin and the accused Moti have both been interested in putting forward different versions from that of the Pleader Mr. M. The complainant Ramadin has admitted that the accused Moti reported him to the *jamayet* people at Kharadar but has denied any formal meeting of the *jamayet* at Kharadar. He has alleged that his excommunication was at the *jamayet* meeting on the Barracks Maidan. The accused Moti has denied making any report to the *jamayet* people at Kharadar and has affected ignorance of any meetings of the *jamayet* either at Kharadar or on the Barracks Maidan. The complainant Ramadin has been anxious thus to avoid responsibility for the 2nd complaint and the accused Moti has been anxious thus to avoid liability for defamation. The Pleader Mr. M. has sought shelter under his instructions and has asserted that they eventually were that excommunication had taken place at a meeting of the *jamayet* at Kharadar and not at the meeting on the Barracks Maidan. The witnesses Ramadan, Gurbux and Moogin have not been examined, and the witnesses Bagoo and Javahir, who were examined at the trial in respect of the false charge, have all agreed that a report was made to 8 or 10 people of the *jamayet* at Kharadar, but they have denied that there was any formal meeting of the *jamayet* at Kharadar. They have all, except Javahir who mentioned excommunications both at Kharadar and the Barracks Maidan, asserted that the excommunication took place at the *jamayet* meeting on the Barracks Maidan.

Two other witnesses Mabam and Kanaya were examined at the trial, who stated

that no mention of the excommunication having taken place at Kharadar and not on the Barracks Maidan was made to Mr. M. It is a matter for regret that Mr. M. was not called and examined at the trial by the Magistrate. The probability appears to us on all these statements to be that there was a report made to some member or members of the *jamayet* which preceded the more formal report made before the 8 or 10 members of the *jamayet* who went to meet the Mukhi at Kharadar, and that the formal excommunication resulted at the subsequent meeting of the whole *jamayet* on the Barracks Maidan. That would also explain the otherwise unexplained references in the two complaints to three distinct incidents in paragraph 4 to the report by Moti to the *jamayet*, in paragraph 5 to the further report by Moti to the *jamayet* and in paragraphs 6 to 8 to the further meeting in the absence of Moti held by the *jamayet*. If our conclusions are right, then the reference in paragraph 4 of the 1st complaint to a report by Moti to the *jamayet*, and in paragraph 4 of the 2nd complaint to this report by Moti to the Headman of the *jamayet* must, with the exception of the use of the term Headman both be regarded as substantially correct; but the reference in paragraph 5 of the 1st complaint to the further report by Moti to the *jamayet* must be regarded as inaccurate, inasmuch as it mixed up the report by Moti before the 8 or 10 members of the *jamayet* at Kharadar with the excommunication at the meeting of the whole *jamayet* on the Barracks Maidan, and the reference in paragraph 5 of the 2nd complaint to this further report by Moti to the *jamayet* must also be regarded as inaccurate inasmuch as it still failed to recognise that the report was made only to 8 or 10 members, and did not result in formal excommunication though it did recognise that the report was made at Kharadar and not on the Barracks Maidan. The references in paragraphs 6 to 8 of both complaints to the further meeting in the absence of Moti held by the *jamayet* must also be regarded as inaccurate, inasmuch as they did not specify the place of the meeting or recognize that this was the meeting at which formal excommunication was pronounced by the whole *jamayet* on the Barracks Maidan. There were thus considerable inaccuracies in the 1st complaint which was somewhat reduced in the 2nd complaint, but there still remained serious inaccuracies in both complaints. Such inaccuracies point, in our opinion, not so much to dishonesty of purpose as to incapacity to comprehend his instructions on the part of the Pleader, Mr. M. If he had taken greater pains to master his instructions and the law relating to them, he would have perceived that the 'gravamen' of the alleged offence consisted in what was reported by the accused Moti before 8 or 10 members who went to meet the Mukhi at Kharadar, and not in excommunication in the absence of the accused Moti at the meeting of the whole *jamayet* on the Barracks Maidan, and he would have saved himself the unnecessary recourse to the Court of the Cantonment Magistrate. If again he had had a less clouded impression of his duties and responsibilities as a Pleader, he would have taken particular pains to have eliminated all inaccuracies and to have explained what had already occurred in the Court of the Cantonment Magistrate when filing his second complaint in the Court of the City Magistrate. He would thus have rendered it evident that the 2nd complaint was not an endeavour to press a false charge but to obtain redress for what was *bona fide* believed to be a real wrong and even if the endeavour had eventually failed, he would have saved his unfortunate client the infliction of rigorous imprisonment. He would also have avoided the suspicion, naturally falling on himself, of having been a party to the fraud and of having endeavoured himself by the concealment of the unsuccessful proceedings in the Court of the Cantonment Magistrate to mislead the City Magistrate in the administration of justice in his Court. We can offer no adequate redress now to the unfortunate client, who must already have served out his term of imprisonment beyond this expression of our opinion that he was wrongly convicted under misapprehension of the whole matter, but we have still to consider whether we ought not, while dismissing the suspicion of dishonest purpose, to inflict substantial punishment for the gross negligence disclosed by this enquiry on the Pleader, Mr. M. We shall be content, if adequate compensation is paid to the unfortunate client for his wasted fees

and the expenses incidental to his prosecution, in addition to the expressions of regret for the gross negligence already offered to us on behalf of the Pleader, Mr. M., to censure his conduct without adding thereto a term of suspension, but with this reminder that it is his duty as an officer of the Court not deceitfully to circumvent but honestly and loyally to uphold the practice of the Court as laid down in the case reported as *Usto Sakebdino* v. *Ghulam Kadir* (1) and to co-operate in the orderly and pure administration of justice by the Courts as laid down by the Privy Council in *In the matter of G. Krishnasawmi Aiyar* (2).

We accept the Rs. 100 as a fair and full settlement of the amount due to Ramadin and confirm our order passed provisionally at the last hearing. Steps must be taken for finding and paying Ramadin by the Registrar.

Order accordingly.

(1) 27 Ind. Cas. 924; 8 S. L R. 241.
(2) 16 Ind. Cas. 328; 35 M. 543 at p. 551; 16 C. W. N. 1081; 23 M. L. J. 114; 13 Cr. L. J. 680; 12 M L. T. 396; 14 Bom. L. R. 1079; 16 C. L. J. 634; (1912) M. W. N. 963 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 69 OF 1914.

June 15, 1914.

Present:—Mr. Stanyon, A. J. C.

LOCAL GOVERNMENT—APPELLANT

versus

HAR PERSHAD—RESPONDENT.

Railways Act (IX of 1890), s. 101—"Endangering," meaning of—Shunting train to wrong line—Facts, consideration of.

In every case where a travelling railway train is unexpectedly shunted on to a wrong line by an erroneous laying of the points in a station yard, the safety of persons in the train or about the yard is endangered within the meaning of that term in section 101 of the Railways Act, and if the error in the points is due to such disobedience as is referred to in the enactment, an offence punishable thereunder is committed. [p. 648, col. 1.]

No safe analogy can be drawn from the facts of one case to decide whether in another case danger has arisen. Every case must be judged according to its own facts. [p. 648, col. 1.]

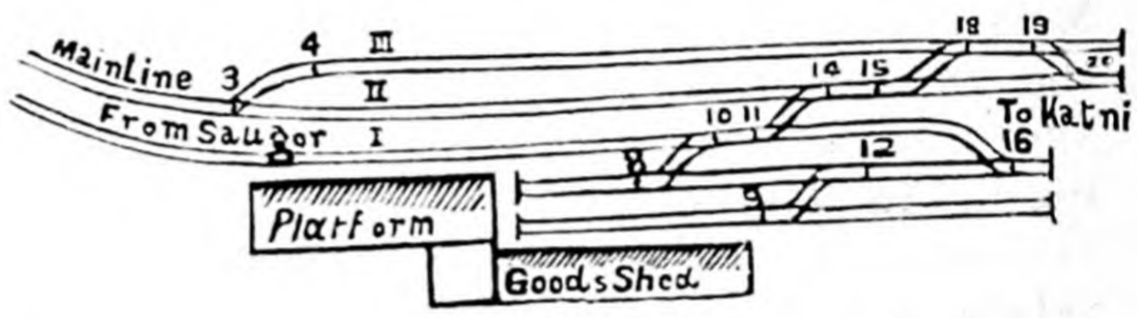
Criminal appeal against the order of acquittal passed by the Magistrate, First Class, Damoh, on the 26th December 1913.

Mr. *G. P. Dick*, for the Crown.

Mr. *M. R. Dixit*, for the Respondent.

JUDGMENT.—The respondent, Har Pershad, is an Assistant station Master in the Great Indian Peninsular Railway, and was stationed at Damoh when the facts giving rise to this case occurred. He was prosecuted for an offence punishable under section 101 of the Indian Railways Act, 1890, and acquitted by the Magistrate who tried him. The Local Government has preferred the present appeal from that order of acquittal.

The following rough sketch of the Damoh station yard, so far as it affects this case, will facilitate the relation and comprehension of the facts: --



This sketch is adapted from exhibit P-2. It is neither accurate nor drawn to scale. The railway lines have, however, been placed in pairs to make the points more intelligible to the untrained intellect than they are in exhibit P-2. It will be seen that, excluding the two sidings for goods which abut on one end of the platform, there are three lines shown in the sketch. No. 1 is the platform line which presumably runs into the main line on the Saugor side at some point beyond the sketch, and, on the Katni side, is divided between the main line and the nearer goods siding. No. II is the only main line, and No. III is a side line running into the main line on the Saugor side, and, on the Katni side, terminating in a dead end after its points of connection with the main line are passed. There are connections from No. III, on both sides, with lines running to the engine shed with which we are not concerned and which, therefore, are not shown in the sketch.

The numbers set at the various crossings are those given to the points worked by pointsmen, and it is necessary to understand that, when a vehicle is passed from one line to another, it is necessary to "lock" all operative points, and to open

others called "facing points," the latter operation being necessary, not to shunt the vehicle, but to prevent damage to all points approached from the reverse side. In the present case we are concerned with points 14 and 15. For a train coming in from the Katni side, both these points have to be locked in order to keep the train on the main line No. II. To shunt it from No. II to No. I, point 15 would be open to protect it and point 14, and the movement would be completed by operating points 11 and 10, 11 being open (to protect the point) and 10 being locked so as not to catch the wheel flanges, and shunt the train on to the goods siding. For a train leaving the platform and proceeding towards Katni, point 11 having been operated to shunt the train to the main line, point 14 would be opened for protection of the point, but point 15 would require to be locked to prevent the train from passing from No. II on to No. III.

On the night between the 10th and 11th of September 1913, Assistant Station Master Har Pershad, was on duty. At 0-45—*i.e.*, 45 minutes past midnight—No. 551 Down Passenger train arrived from the Saugor side, and was duly shunted on to line No. I, halting at the platform. This train was still there at 3-5 A. M., when No. 554 Up Mixed train arrived from Katni. Line No. I being occupied, it was necessary that this later arrival should stop on the main line. Har Pershad, in obedience to a rule requiring that he should personally see to the setting of points for all incoming and outgoing trains carrying passengers including ballast trains conveying labourers, went out and saw that points 14 and 15 were both locked against No. 554, so that she could not leave the main line. The train obeyed the arrangement and pulled up on the main line. It now became practicable for No. 551 to continue its journey towards Katni, and it was necessary to make one change only, namely, to unlock point 14, not in order to shunt the train from the platform line to the main line, but to protect the point from injury. Once more the rule required the Assistant Station Master on duty personally to see that the points were correctly set. But Har Pershad fell into a very common form of neglect. He had a few minutes previously seen points 14 and 15 locked. It was only necessary to unlock No. 14 for the protection of the point. Locked or open No. 14 could not divert the train going out towards Katni. He made over the bunch of keys containing the keys of 14, 15 and other points, to the *mokaddam*: and the *mokaddam* passed them on to a pointsman. The result was that instead of unlocking No. 14, the pointsman unlocked point 15. The train started, and having got on to the main line a less careful driver might have assumed that he had a clear course and put on speed: the driver in charge of the train was, however, on the *qui vive*, and he observed that he had been shunted off the main line on to No. III with a dead end in front of him, for point 19 was locked against the train, and if it had not been stopped a collision with the dead end was inevitable. The driver, however, smartly applied his brakes and pulled up a few yards before the terminus.

The Magistrate has acquitted the accused on the grounds, shortly stated, (1) that the accused having seen point 15 locked for train No. 554 a few minutes before No. 551 started, and having other duties to perform, was not bound to see to the point again, and incurred no responsibility for the unauthorised unlocking of the point by the pointsman; and (2) that the safety of the passengers was not endangered, and an essential of the offence punishable under section 101 of the Indian Railways Act, 1890, was wanting.

I am unable to concur in these views, and I have no doubt that the accused ought to have been convicted. The learned Counsel for the respondent before me rightly gives up, as quite untenable, the contention that the sending of a starting train on to a dead end siding does not endanger the safety of any person. To my mind it is a preposterous argument. The learned Magistrate has relied upon a Punjab case, in which a distinction is drawn between endangering the safety of a person and what is described as the likelihood of endangering the safety of a person. This is a refinement which, with due respect, I am unable to

appreciate or illustrate to my mind. The safety of a person is endangered whenever anything designed to protect the same is removed or destroyed wilfully or by negligence. 'Danger' is itself a 'likelihood' of injury, and I cannot follow the phrase 'likelihood of danger.' In any event we cannot draw any safe analogy from the facts of one case to decide whether in another case danger has arisen. Every case must be judged according to its own facts. It does not make the section above-mentioned less applicable that by the intelligent action of others danger may have been averted. It is the possible consequences of an act of disobedience which section 101 has in view, and it is intended to guard the travelling public and the railway staff against such consequences. If the engine driver in this case had taken for granted that the points were correct, as he was entitled to do; if the brakes had failed to act or given way under the sudden strain; if a railway servant or a truck had wrongly been on line No. III and been run over or into, the accused could not have pleaded any of those circumstances in extenuation of his negligence. There can be no question that in every case, where a travelling train is unexpectedly shunted on to a wrong line by an erroneous laying of the points in a station yard, the safety of persons on the train or about the yard is endangered within the meaning of that term in section 101 aforesaid: and if the error in the points is due to such disobedience as is referred to in the enactment, an offence punishable thereunder is committed.

Then as regards the other question, *viz.*, whether there was a punishable disobedience in this case, I have no doubt that the Magistrate is wrong. The rule which governed the accused is perfectly clear and runs thus:—

"When an outgoing train conveying passengers (including ballast trains) is about to start, the Station Master on duty must warn the staff, lock the necessary facing points and see that all lines over which the train has to pass are clear, and that all shunting has been stopped on all lines which will be fouled by the outgoing train. Having done this he may allow the train to start."

An earlier clause of the same rule reads:—

"The Station Master is personally responsible for the setting and locking of facing points for the reception and despatch of passenger and ballast trains."

These provisions clearly call for the independent treatment of each passenger and ballast train as regards the setting and locking of points. No. 15 was a facing point for the outgoing No. 551 passenger train: and the rule required the Station Master to examine that and all other facing points over which that particular train had to pass. He had no right to assume that such points were correctly set because they had been similarly set for a train coming in from the opposite direction a few minutes previously. Malice, neglect, stupidity, or mechanical breakdown might have made a difference even in those few minutes. Even if the accused had given no orders to unlock point 14 or any other point after No. 554 came in, it was still his duty under the rule to go and see that all was right for No. 551. He disobeyed that rule: facing point No. 15 was unlocked as a result of that disobedience, and the sudden and unexpected diversion of the train created danger to the safety of all on the train—a danger averted by the capability of the engine driver and the efficiency of the brakes.

For the above reasons I allow the appeal, and, reversing the order of acquittal, I convict the accused under section 101 of the Indian Railways Act, 1890. The accused is a well-conducted young man, and to a certain extent his offence is venial. I expect it has been his habit—and no doubt he is far from being alone in that habit—where a point does not require to be changed for consecutive trains, of making only one inspection thereof, for the first train, and assuming that all must be right for the subsequent train. This is just the sort of routine negligence which makes for danger in railway travelling. Here he had seen point 15 locked at about 3 A. M., and it was natural, though culpable, for him to assume it was still so at 3-15. I do not think the case should affect his

appointment or prospects in the railway. He. has had a sharp lesson, and will probably be very careful hereafter. I fine him Rs. 50, or, in default, order simple imprisonment for one month.

Appeal allowed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 674 OF 1917.

July 10, 1917.

Present:—Mr. Justice Teunon and Justice Sir Shamsul Huda, KT.

RESHU KABIRAJ—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 109, 118—Security for good behaviour—Person residing openly within jurisdiction of Magistrate.

The petitioner was required to give security for good behaviour under the provisions of section 118 read with section 109, Criminal Procedure Code on the following facts, *viz.*, that on a certain night the petitioner, who was by profession a *kaviraj*, was found at about midnight in a lane in a town in association with two others who had in their possession house-breaking implements, that on being discovered he fled, that when arrested he remained silent and that the explanation subsequently offered to the Magistrate of his presence at the time and place in question was false:

Held (*Teunon J.*, hesitating), that the facts found did not bring the petitioner within either clause (*a*) or (*b*) of section 109, Criminal Procedure Code, as the petitioner's presence or residence within the Magistrate's jurisdiction was well known. [p. 650, col. 1.]

Per *Huda, J.*—Clause (*a*) of section 109 of the Criminal Procedure Code refers to a continuous act and does not, therefore, apply to a case where there is a momentary effort at concealment to avoid detection or arrest. [p. 650, col. 1.]

Babu *Monmotha Nath Mukherjee* (with him Babu *Charu Chandra Mitra*), for the Petitioner.

Mr. *Camell*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

TEUNON, J.—In this case the petitioner has been required to give security for his good behaviour under the provisions of section 118 read with section 109 of the Criminal Procedure Code.

The facts found are that on the night of the 28th February last, the petitioner, who is by profession a *kabiraj* and a dealer in cocoons, was found at about midnight in a lane in the town of Raghunathgunje in association with two others who had in their possession house-breaking implements, that on being discovered he fled, that when arrested he remained silent, and that the explanation subsequently offered to the Magistrate of his presence at the time and place in question is false.

The Magistrate has, therefore, held that the petitioner was concealing himself with the object presumably of committing the offence of house-breaking.

In this application we are invited to set aside the order against which the Rule is directed, on the ground that the facts found do not bring the petitioner within the provisions of either clause (*a*) on which the Magistrate has relied or of clause (*b*) of section 109.

With regard to clause (*a*) it is urged that the petitioner's presence or residence within the Magistrate's jurisdic ion was well known, that there was no attempt to conceal the same, and that the petitioner's attempt to conceal his presence at a particular spot at a particular time (even if it were with the object of assisting in the commission of house-breaking) does not bring him within the mischief of the clause.

Similarly with regard to clause (*b*) it is urged that inasmuch as his name, residence, description, business and profession are known and his possession of means has been found he has given a satisfactory account of himself, within the meaning of clause (*b*), and that it is not necessary that he should be able to give a satisfactory explanation of what he was doing at a particular place at a particular time.

It is further urged that inasmuch as the Magistrate has proceeded under and relied on clause (*a*), the order cannot be supported in this Court under clause (*b*). Inasmuch as the petitioner had a full opportunity of meeting the facts alleged against him, this last contention, we think, cannot be sustained but in view of the conclusion at which we have arrived it need not be discussed at length.

In support of the two main contentions we have been referred to the cases of *Sharif Ahmad* v. *Emperor* (1) and *Satish*

(1) 12 Ind. Cas. 304; 8 A. L. J. 1097; 12 Cr. L. J. 536.

Chandra Sarkar v. *Emperor* (2), while the Deputy Legal Remembrancer appearing for the Crown has cited *Narendra Mohan Ghose Chowdhury* v. *Emperor* (3).

The case last cited was that of a young man found associating with political conspirators in a district in which he was a stranger and the decision, therefore, on the facts of the case is not opposed to the view taken in the two cases first mentioned. On the whole, though speaking for myself with some hesitation, we have arrived at the conclusion that the facts found do not bring the petitioner within either clause of section 109 of the Code, and in further support of this view we may refer to the case of *Reg.* v. *Bhuja* (4) decided in Bombay in 1872, and also to the provisions of the Calcutta Police Act, section 32. That section appears to be based on and largely to reproduce the provisions of the Vagrancy Act in respect of suspected persons. It would doubtless cover a case such as the present, but the language therein used by the Legislature is very different from that used in section 109 of the Criminal Procedure Code.

In the result we make this Rule absolute and set aside the order complained of. The petitioner will now be set at liberty.

HUDA, J.—I would like to add that in my opinion clause (*a* of section 109, Criminal Procedure Code, refers to a continuous act and does not, therefore apply to a case like the present, where there is a momentary effort at concealment to avoid detection or arrest. I also think that the provisions of clause (*a*) cannot apply to the case of a person brought under arrest as the accused was, for it cannot be said of such a person that he *is* taking precautions to conceal his presence.

Rule made absolute.

(2) 13 Ind. Cas. 913; 39 C. 456; 16 C. W. N. 499; 15 C. L. J. 396; 13 Cr. L. J. 161.
(3) 14 Ind. Cas. 431; 13 Cr. L. J. 239.
(4) (1872) Rat. Un. Cr. C. 63.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 24 OF 1917.

March 28, 1917.

Present:—Mr. Justice Batchelor and Mr. Justice Shah.

EMPEROR—OPPOSITE PARTY

versus

IBRAHIM MIR SHIKARI—ACCUSED—APPELLANT

Prevention of Cruelty to Animals Act (XI of 1890), s. 3 (b)—Cruelty, every form of, not punishable—Seeling of bird's eyes, whether cruelty—Carrying by train of birds with their eyes seeled up—Offence.

The real intention of the language used in section 3 (*b*) of the Prevention of Cruelty to Animals Act is not to punish any form of cruelty but to punish only such cruelty as is inflicted on an animal by causing it unnecessary pain or suffering by reason of the manner or position in which the animal is bound or carried. [p. 651, col. 1.]

The applicant purchased certain cranes whose eyes were seeled or stitched up prior to the applicant's purchase of them. While the applicant was conveying them by rail it was noticed at a station that the birds' eyes were stitched up and were bleeding:

Held, that the cruelty, if any, was caused by the antecedent stitching up of the eyes and not by the manner or position in which the birds were carried in the luggage van of the train. [p. 651, col. 1.]

Obiter.—It may well be that the process of seeling up the eyes of cranes or hawks is in itself a cruel practice. [p. 651, col. 1.]

Criminal application for revision against conviction and sentence passed by the City Magistrate, first class, Poona.

Mr. *Setalvad* (with him Mr. *W. B. Pradhan*), for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

BATCHELOR, J.—The applicant before us has been convicted by the learned Magistrate under clause (*b*) of section 3 of the Prevention of Cruelty to Animals Act, XI of 1890. The facts upon which the conviction was had are these.

The applicant purchased certain cranes known as *siras* and was conveying them by rail from Indore to Kolhapur. They were young birds and prior to the applicant's purchase of them their eyes were seeled or stitched up in accordance with the practice which appears to prevail in India, as it certainly prevails, or used to prevail, in England. At the Poona station it was noticed that the birds' eyes

were thus stitched up and were bleeding. A complaint was consequently lodged against the applicant.

Now it may well be, as the learned Magistrate believes, that this process of seeling up the eyes of cranes or hawks is in itself a cruel practice. But the question before us is, not whether that practice is cruel, but whether the requirements of section 3 (*b*) of the Act are satisfied. The words of that section, so far as they are now material to us, are these: "If any person in any place to which the public have access binds or carries any animal in such a manner or position as to subject the animal to unnecessary pain or suffering," then he shall be liable to the punishment provided. It is not questioned but that the birds are animals within the section, or that the platform of the Poona station is such a place as the section refers to. But it is contended by the learned Counsel for the applicant that the words which I have cited show that the intention of the Legislature is not to punish any form of cruelty, but to punish only such cruelty as is inflicted on an animal by causing it unnecessary pain or suffering by reason of the manner or position in which the animal is bound or carried. That appears to me to be the real intention of the language used, and I do not think it can be said here that the unnecessary pain or suffering which these birds endured was attributable to the manner or position in which they were carried. It is not contended that the applicant bound them in any such place as the section refers to, so that we are concerned only with the question whether he carried them in the manner or position which the section forbids.

Assuming that the Railway Company's carrying of the birds was the applicant's carrying, yet I am of opinion that the cruelty, if any, was caused by the antecedent stitching up of the eyes and not by the manner or position in which the birds were carried in the luggage van of the train. The method and position in which they were carried were admittedly usual and added nothing to the pain which had already presumably been caused by the seeling. I am forced, therefore, though with some regret to the conclusion that the provisions of the Act are not wide enough to cover this form of cruelty and the application, therefore, must be allowed.

The conviction must be set aside, the accused must be acquitted and discharged and the fine, if paid by him, must be refunded to him.

SHAH, J.—I am of the same opinion.

Conviction and sentence set aside.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1986 OF 1915.

March 4, 1916.

Present:—Mr. Justice Shadi Lal.

MURADI—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), ss 420, 109, 114—*Cheating, person introducing complainant to cheater without himself receiving share of money, whether guilty of—Intention.*

The offence of cheating under section 420, Indian Penal Code, is complete where money is obtained on the false pretence that the complainant would be married to a woman; and a person is guilty of abetment under sections 109 and 114 of the Code who introduces the complainant to the cheater, knowing full well that the offence is going to be committed, is present at the time when the agreement and the payment are made but remains silent and while taking no share of the money takes no steps to inform the complainant of what is going to happen with him. [p. 652, col. 1.]

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Shahpur, dated the 2nd December 1915, affirming that of the Magistrate, first class, Shahpur, dated the 13th October 1915, convicting the petitioner.

Mr. *Nand Lal*, for the Petitioner.

Mr. *Nanak Chand*, for the Complainant.

JUDGMENT.—After hearing arguments on both sides I have arrived at the conclusion that there is no adequate reason for dissenting from the concurrent findings of the Courts below that the petitioner Muradi, committed the offence of cheating. There is ample evidence to show that the complainant Dadu was induced to part with Rs. 450 on the representation that *Musammat* Wasai, the alleged second wife of Dara, would marry him after her divorce by

the latter and after the expiration of the period of *iddat*. Now it is beyond question that *Musammat* Wasai lived with Dadu only for two months, and that she then ran away and did not marry him. There can be no manner of doubt that it was never the intention of Dara or *Musammat* Wasai that she should marry the complainant and that their object from the very beginning was to get his money by a false pretence.

All the ingredients of the offence of cheating are present here, and the only question is whether the petitioner Muradi too participated in the crime. Now it appears that Muradi and Dadu live in the same *chak*, and it was Muradi who introduced Dadu to Dara. Further he was present at the time of the payment of the money, and also when the deed of divorce by the husband and the agreement by *Musammat* Wasai in favour of the complainant were executed. The witnesses do not say that Muradi took any active part at that time, but the Magistrate held that Muradi "knew full well that the complainant was being cheated of his money;" and this finding was not, it appears, contested before the learned Sessions Judge: and the only point urged before him was that because the complainant could succeed in a Civil Court, he should not be allowed to have recourse to a Criminal Court. This argument is obviously fallacious because, as observed already, all the requirements of the offence of cheating have been fully established.

The circumstances of the case point to the conclusion that Muradi was fully cognisant of the guilty intention of Dara and *Musammat* Wasai and that he took part in cheating the complainant. It does not, however, appear that he himself received a share of the ill-gotten gains; and considering this fact I do not think any useful purpose would be served by directing the petitioner to go back to jail to undergo the remaining period of the sentence imposed by the Magistrate.

Accordingly I maintain the conviction, but reduce the sentence to the period already undergone by the petitioner. The application for revision is accepted *pro tanto*, and the petitioner is discharged from his bail.

Revision partly accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 235 OF 1917.

May 30, 1917.

Present:—Sir George Knox, KT., Acting Chief Justice

MATUKDHARI SINGH—APPLICANT

versus

JAISARI AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 435—*Proceedings under s.* 145—*Revision—High Court, interference by—Government of India Act* (5 *and* 6 *Geo. V C.* 61), *s.* 107—*High Courts Act* (24 *and* 25 *Vict. C.* 104), *s.* 15—*Jurisdiction.*

Where a Magistrate duly empowered to act under Chapter XII of the Criminal Procedure Code takes proceedings which are in intention, in form and in fact proceedings under that Chapter, the High Court has no power to send for those proceedings either under the Code, or under section 15 of the High Courts Act or under section 107 of the Government of India Act. [p. 653, cols. 1 & 2; p 654, col. 1.]

Jhingai Singh v. *Ram Partap*, 1 Ind. Cas. 762; 31 A. 150; 9 Cr. L. J. 382; 6 A. L. J. 113, *Maharaj Tewari* v. *Har Charan Rai*, 26 A. 144; A. W. N. (1903) 212; 1 Cr. L. J. 339, *Syeda Khatun* v. *Lal Singh*, 25 Ind. Cas. 324; 36 A. 233; 12 A. L. J. 344; 15 Cr. L. J. 572, *Babban Singh* v. *Baldeo Singh*, 4 A. L. J. 91; A. W. N. (1907) 50; 5 Cr. L. J. 117, followed.

Parmessar Singh v. *Kailaspati*, 35 Ind Cas. 801; 1 P. L. J. 336; 17 Cr. L. J. 369; 1 P. L. W. 95; (1917) Pat. 1, distinguished and dissented from.

Nathu Ram v. *Emperor*, 39 Ind Cas. 701; 15 A. L. J. 270, 18 Cr. L. J. 557, *Nathu Mal, In the matter of the petition of*, 24 A. 315: A. W. N. (1902) 74, explained.

Section 107 of the Government of India Act does not differ from or extend the jurisdiction conferred upon the High Court by section 15 of the Charter Act. [p. 654, col. 1.]

Criminal revision from an order of the Magistrate, first class, Mirzapur.

Mr. *M. L. Agrwala*, for the Applicant.

Mr. *Uma Shankar Bajpai*, for the Opposite Parties.

JUDGMENT.—Babu Anrudh Lal Mahendra, a Magistrate of the first class at Mirzapur, was satisfied from a Police report that a dispute likely to cause a breach of the peace existed concerning certain lands situate in Jafar Khani within the local limits of his jurisdiction. He made an order in writing No. 3A on the record, stating the ground of his being so satisfied and requiring the parties concerned in the dispute to attend his Court on the 25th September 1916 and to put in written statements of their respective claims stating the fact of the actual possession of the subject of dispute. It has not been suggested that the order was not properly served as required by law and it may be taken, therefore, that

the notices were originally issued in respect of about 4 *bighas* 19 *biswas* of land in Jafar Khani, but the Magistrate on reading the written statement and petitions of Matukdhari Singh came to the conclusion that the dispute realy existed about 19 *bighas* of land in Sherwa as well as about the land in Jafar Khani. The parties consented (*vide* paper No. 9A on the record) that an enquiry should be held in respect of both the lands in Sherwa and in Jafar Khani. After considering the evidence produced by both the parties the learned Magistrate decided that Jaisri was in possession at the date on which he issued his order of 8th September 1916, and he issued an order declaring Jaisri to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of his possession until such eviction (*vide* his order, dated the 7th of December 1916).

The opposite party Matukdhari Singh is now asking this Court to interfere in revision with the order of the 7th of December 1916, on the grounds that the learned Magistrate had no jurisdiction to entertain a proceeding under section 145 under the circumstances of the case, that the learned Magistrate erred in giving possession of the whole holding to Jaisri, and that the learned Magistrate had not decided the question of possession which was with the applicant. So far as can be judged from the record which was sent for, the proceedings of the learned Magistrate were proceedings carefully and specifically taken under Chapter XII of the Code of Criminal Procedure. Nothing was shown in the application to this Court which threw doubt upon this procedure and I am inclined to doubt whether this Court had any power to send for these proceedings and to enquire into them.

In *Jhingai Singh* v. *Ram Partap* (1) it was held following *Maharaj Tiwari* v. *Har Charan Rai* (2), "That as the law at present stands, where the proceedings below are in intention, in form and in fact proceedings under Chapter XII of the Code of Criminal Procedure by a Magistrate duly empowered to act under that Chapter, this Court has no power to send for those proceedings either under the Code or under section 15 of the Indian High Courts Act of 1861." The Court refused to go into the question where, after being properly seized of the case, the learned Magistrate went out of his way and passed an order which he had no jurisdiction to pass. In *Maharaj Tewari* v. *Har Charan Rai* (2) a Division Bench of this Court held that when a Magistrate having jurisdiction in this behalf with great care and precision laid the proper foundation for his proceedings under Chapter XII of the Code of Criminal Procedure, then by the amendment which was introduced by the Code of Criminal procedure (1898) into section 435 this Court had no power to call for the record of those proceedings. An attempt was made to contend that this Court could under section 15 of the Charter Act and the powers of superintendence thereby given set aside the order of the Magistrate passed under Chapter XII of the Code of Criminal Procedure. This Court declined to do so, inasmuch as it found that the jurisdiction given to it under clause 29 of the Letters Patent contained the express provision "that the proceedings in all criminal cases other than those brought before this Court in the exercise of its ordinary original criminal jurisdiction shall be regulated by the Code of Criminal Procedure or by such further and other laws in relation to the Code of Criminal Procedure as may have been or may be made by the Governor-General in Council" (see page 147) Another Division Bench of this Court in *Syeda Khatun* v. *Lal Singh* (3) followed the cases just quoted above and entirely agreed with the view expressed in those cases. The case of *Babban Singh* v. *Baldeo Singh* (4) is also a case in point upon this question, in which it was laid down that once it was established that a Magistrate had acted with jurisdiction this Court had no further concern with the matter. The remarks of the present learned Chief Justice in *Har Prasad* v. *Pandurang* (5) are very important. He

(1) 1 Ind. Cas. 762; 31 A. 150; 9 Cr. L. J. 382; 6 A. L. J. 113.

(2) 26 A. 144; A. W. N. (1903) 212; 1 Cr. L. J. 339.

(3) 25 Ind. Cas. 324; 36 A. 233; 12 A. L. J. 344; 15 Cr. L. J. 572.

(4) 4 A. L. J. 91; A. W. N. (1907) 50; 5 Cr. L. J. 117.

(5) A. W. N. (1905) 260; 3 Cr. L. J. 48.

held that it would be a matter of great regret if on purely technical grounds the spirit and intention of the Code of Criminal Procedure be ignored. See also *Baldeo Baksh Singh* v. *Raj Ballam Singh* (6).

So far back as the year 1886 a Full Bench of this Court in *Muhammad Suleman Khan* v. *Fatima* (7) had occasion to consider what this Court could and what it could not do in the exercise of its powers of superintendence under section 15 of Statute 24 and 25 Vic. C. 104. The case before the Full Bench was a suit of a civil nature. The Judges of the Full Bench, who were disposed to extend the jurisdiction of the Court to its furthest limit, held that what was stated in section 622 of the Code of Civil Procedure as it then stood (1886) might properly be accepted "as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance and in which their decisions are declared by law to be final." This precedent is cited merely to show that the view taken by this Court, whether in civil or in criminal cases, has been in accord for years past and may be termed the *cursus curiæ* of the Court in this matter.

The learned Counsel for the applicant referred me to a case recently decided by a learned Judge of this Court, *viz.*, *Nathu Ram* v. *Emperor* (8). In that case it was held with reference to an order of attachment purporting to have been made under section 145 of the Code of Criminal Procedure that this Court had power to interfere not under section 435 of the Code of Criminal Procedure but under section 107 of the Government of India Act. I asked the learned Counsel to point out wherein section 107 of the Government of India Act differed from or extended the jurisdiction which had been conferred upon this Court by section 15 of the Charter Act. He was unable to point out any words containing difference or extension of jurisdiction. The case moreover is one in which this Court held that the Magistrate had not shown that he was satisfied that there was likely to be a breach of the peace, unless action was taken under section 145 of the Code of Criminal Procedure. This ground would in itself have been sufficient without invoking section 107. Reference is made in the precedent just cited to the case *In the matter of the petition of Nathu Mal* (9), in which Stanley, C. J., held that "Under the Code of 1898 the revisional powers of the Court in proceedings under Chapter XII were withdrawn, and, therefore...the Court is not empowered to exercise revisional jurisdiction in such proceedings unless in cases where the Magistrate had acted without jurisdiction." Much stress was laid in argument upon the words given at page 317 and which are as follows, "If an order purporting to be made under section 145 is made without jurisdiction, there is no doubt this Court can exercise its powers under section 15 of the Charter Act." But the learned Chief Justice went on to say "The Magistrate has acted within his powers, and if anything has been done by him to which objection can be taken, it was at the most an irregularity, and this Court is precluded from interfering by the express provisions of the Act of 1898." It was contended that where a Magistrate who might have begun proceedings properly under section 145 had purported to go on and pass an order which could not be passed under section 145, this Court could interfere under section 15 of the Charter Act. If this was what the learned Chief Justice intended, his observations in the case were clearly *obiter dicta*.

A stronger case cited to me was *Parmeshar Singh* v. *Kailaspati* (10). This was a case tried by a Special Bench of the Behar High Court. Chief Justice Chamier considered that the cases which had been cited to him, specially those of the Calcutta High Court, taken as a whole, laid down the rule "that a High Court can and will interfere in a case under Chapter XII of the Code where the Magistrate has acted without jurisdiction or has exceeded his jurisdiction." The learned Chief

(6) 2 A. L. J. 274; 2 Cr. L. J. 236.

(7) 9 A. 104; A. W. N. (1886) 309; 5 Ind. Dec. (N. S.) 500.

(8) 39 Ind. Cas. 701; 15 A. L. J. 270; 18 Cr. L. J. 557.

(9) 24 A. 315; A. W. N. (1902) 74.

(10) 35 Ind. Cas. 801; 1 P. L. J. 336; 17 Cr. L. J. 369; 1 P. L. W. 95; (1917) Pat. 1.

Re MATURI VENKATASUBBAYYA.

Justice went on to say that "the policy of the Indian Legislature in connection with the proceedings under Chapter XII of the Code is shown by a provision under section 435 of the Code of Criminal Procedure, 1898, which prevents the High Courts as Courts of Revision under Chapter XXXII of the Code from sending for the record of proceedings under Chapter XII." The result according to him is "that the High Courts in India, which have no statutory power of superintendence, cannot send for the record of proceedings which were in substance and in fact proceedings under Chapter XII of the Code and were conducted by a Magistrate who had jurisdiction." There the learned Chief Justice leaves the question and does not show how, when a High Court cannot send for a record of proceedings, it can consider what proceedings were taken. Is it to act upon arguments and affidavits and in short upon something other than the actual record of proceedings? I find it impossible to arrive at any such conclusion and such a view is undoubtedly opposed to what has been the *cursus curiæ* of this Court. Where a Magistrate has not laid proper foundation for his proceedings, this Court has sent for the record and interfered. As instances I may refer to *Sardha Prasad* v. *Pitamber Lal* (11), *Mahadeo Kunwar* v. *Bisu* (12), in *T. A. Martin, In the matter of the petition of* (13), *Dyawappa Basgunda Patil, In re* (14) and *Jhengar* v. *Baij Nath* (15).

The result is that I hold that this Court is precluded from interfering in the present case. The proceedings were proceedings of a Magistrate of the first class and were very carefully taken under Chapter XII of the Code of Criminal Procedure. He committed no irregularity and if afterwards he erred in any way, that is a matter which cannot be interfered with by this Court in revision under the law as it stands. He intended to exercise jurisdiction under Chapter XII, he did exercise jurisdiction and was entitled to do so. The application is dismissed.

Application dismissed.

(11) 17 Ind. Cas. 409; 10 A. L. J. 465; 13 Cr. L. J. 777.
(12) 25 A. 537; A. W. N. (1903) 102.
(13) 27 A. 296; A. W. N. (1904) 234; 1 Cr. L. J. 917.
(14) 29 Ind. Cas. 66; 17 Bom. L. R. 282; 16 Cr. L. J. 434.
(15) 19 Ind. Cas. 709; 11 A. L. J. 586; 14 Cr. L. J. 277.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 451 OF 1916.

October 3, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

Re MATURI VENKATASUBBAYYA—ACCUSED—PETITIONER.

Madras District Municipalities Act (IV of 1884), *ss.* 188 (1) (b), (5), 189—*License for boiling paddy, application for—Failure to pass order on application within* 30 *days of receipt, effect of—Section* 188 (5), *scope of.*

Where, on the expiry of his license under the Madras District Municipalities Act to boil paddy in a particular place, a person applied for a fresh license and no order having been passed on his application until after the expiry of the period of thirty days fixed by section 188 (5) of the Act, he again boiled paddy after the order refusing license was communicated to him:

Held, that no offence was committed as the order refusing the license not having been passed within thirty days, the place must be deemed to have been licensed for the financial year under section 188 (5) of the District Municipalities Act. [p. 656, col. 1]

Section 188 (5) of the Madras District Municipalities Act should not be read subject to the reference to the refusal of the license in section 189 of the Act. [p. 656, col. 1.]

Petition, under sections 435 and 439, Criminal Procedure Code, Act V of 1898, praying the High Court to revise the Order of the Sub Divisional Magistrate, Gudivada, in Summary Trial No. 2 of 1916.

Mr. *B. Narasimha Rao*, for the Petitioner.

Mr. *E. R. Osborne*, Public Prosecutor, for the Crown.

ORDER.—The petitioner has been convicted of an offence punishable under section 189, Act IV of 1884, that is, boiling paddy in an unlicensed place.

There is no dispute as to the facts. The offence is alleged to have been committed on 29th September 1915. The petitioner's last license expired on 30th April 1915. He applied for a fresh license on 4th May 1915, but received no order granting or refusing one until 6th September 1915, when his application was refused. He subsequently appealed against the refusal unsuccessfully. But that is not material, because he argues that under

section 188 (5) if a license is not refused within thirty days of its being applied for, the place in question shall be held to be duly licensed for the financial year for which the license was sought.

This argument is justified by the wording of section 188 (5); for we cannot accept the learned Public Prosecutor's suggestion that it should be read subject to the reference to the refusal of the license in sections 189. If it were so read, section 188 (5) would to a large extent be deprived of its necessity. We set aside the decision of the Sub-Divisional Magistrate, acquit the accused and order that the fine, if paid, be refunded.

Petition allowed; *Conviction set aside.*

V.R.P.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 3 OF 1917.

March 26, 1917.

Present:—Mr. Justice Batchelor and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

RANCHODLAL AMRATLAL ACCUSED.

Bombay District Municipalities Act (Bom. Act III of 1901), s. 3 (7)—Building—Enclosure—Wall—Wire fence, whether building—Interpretation of Statute—Ejusdem generis.

A wire fence being neither a 'wall' nor an 'enclosure' is not a building within the meaning of section 3 (7) of the Bombay District Municipalities Act, 1901.

The word "enclosure" used in the definition of the word "building" in section 3 (7) of the Bombay District Municipalities Act, must be interpreted as *ejusdem generis* with the preceding words 'hut' and 'shed,' that is to say, must be taken to refer to some fabric or structure or thing built in the more popular acceptation of the word.

Criminal reference made by the Sessions Judge, Ahmedabad, against conviction and sentence passed by the Honorary Magistrate, First Class, Ahmedabad.

Mr. *T. R. Desai*, for the Accused.

Mr. *N. K. Mehta*, for the Municipality.

JUDGMENT.

BATCHELOR, J.—The question before us in this reference from the learned Sessions Judge of Ahmedabad is whether an ordinary wire fence is a building within the meaning of clause 7 of section 3 of the Bombay District Municipalities Act of 1901.

There is not much authority to guide us, but it has been held in this Court that a 'karvi' or reed fencing was not a building within the meaning of that word as used in section 33 of the Act of 1873; see *Queen-Empress* v. *Janardhan* (1). Under the same Act this Court has also held that a mere wattle fence was also outside the definition of building: See *In re Salomibai* (2). It appears, therefore, that consistently with the rulings the wire fence now before us should be regarded as outside the provisions of clause 7 of the present section 3. That is confirmed by the definition of the word 'building' in Webster's Dictionary, where it is expressly mentioned that in the popular acceptation of the word it would not include a mere wall or fence. It is no doubt true to say that by the special provisions of clause 7 a wall is to be included within the word 'building.' But it is so included by reason of the special words importing its inclusion. There are no such special words to sweep in a fence which is, therefore, in my opinion outside the definition. But then Mr. Mehta contended that even if the fence could not be brought inside the definition as being a species of wall, yet it ought to be held to fall within the definition as being an enclosure. Now here the clause reads that 'building' shall include any hut, shed or other enclosure, and, looking to the wideness of these words and to the context, I am of opinion that the enclosure referred to must be interpreted as *ejusdem generis* with the preceding words 'hut' and 'shed,' that is to say, must be taken to refer to some fabric or structure or thing built in the more popular acceptation of the word. In that view it appears to me that the wire fence is as much outside the word 'enclosure' as outside the word 'wall.' Any educated Englishman would, I think, feel that it was a misuse of language to speak of a wire fence as a 'building.'

The conviction, therefore, must be set aside, the accused acquitted and discharged and the fine, if paid by him, must be refunded to him. He must also be reimbursed the process fees which he has paid under section 31, clause 3, of Act VII of 1870.

SHAH, J.—I agree.

Conviction and sentence set aside.

(1) (1880) Rat. Unrep. Cr. C. 145.

(2) (1888) Rat. Unrep. Cr. C. 428; Cr. Rg. No. 92 of 1888.

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE No. 32 OF 1917.
February 28, 1917.
Present:—Mr. Justice Teunon and
Mr. Justice Chaudhuri.
EMPEROR ON THE COMPLAINT OF KAJI SAFIUDDIN—COMPLAINANT
versus
FAZAL SHAIK AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 233, 535—Misjoinder of charges—Persons separately fabricating evidence to defraud complainant, whether can be tried jointly—Re-trial.

Four persons were convicted in a joint trial under section 193, Indian Penal Code, two of them for having falsely executed one *kabuliyat* and the other two for having falsely executed another *kabuliyat* for the purpose of defrauding the complainant:

Held, that there was a misjoinder of charges, that is to say, there ought to have been at least two trials one in respect of each *kabuliyat*.

(The conviction and the sentences imposed were set aside, but no re-trial was ordered in view of the circumstances of the case.)

Reference under section 438, Criminal Procedure Code, dated the 3rd February 1917, from the Sessions Judge, Faridpur, recommending that the order of the Honorary Magistrate, Faridpur, dated the 1st January 1917, convicting accused under section 193, Indian Penal Code, and sentencing them to undergo rigorous imprisonment for 15 days be set aside.

FACTS.—The case of the complainant was that two *kabuliyats* dated 6th *Jaistha* 1323 were executed by the accused with a view to defraud him. The Court below convicted the accused under section 193, Indian Penal Code, and sentenced each of them to rigorous imprisonment for 15 days.

The recommending Judge was of opinion that as the learned Magistrate had committed an error on a point of law, the conviction and sentence ought to be set aside.

The main ground for the reference was that there was a misjoinder of charges, as two of the accused Fazal and Amel executed one *kabuliyat* and the other two Jabed and Sabed on the same date executed another *kabuliyat*. So that the two sets of persons could not under the provisions of section 233, Criminal Procedure Code, be jointly tried in the same case. Such an irregularity in the trial is, according to the Sessions Judge, not curable under section 536, Criminal Procedure Code. *Subrahmania Ayyar* v. *King-Emperor* (1) following *Gul Mahomed Sircar* v. *Cheharu Mandal* (2). The test is that if the transactions are different there cannot be a joint trial. *Hira Lal Thakur* v. *King-Emperor* (3).

Babu *Jyotish Chandra Hazra*, for the Crown.

Mr. *A. K. Fazlul Huq* and Babu *Atindra Nath Mukerjee*, for the Accused.

JUDGMENT.—We have read the letter of reference in this case. It is abundantly clear from the facts set out by the learned Sessions Judge that there was a misjoinder of charges, that is to say, there ought to have been at least two trials, one in respect of one *kabuliyat* and one in respect of the other. On that ground alone we must accept this reference and set aside the conviction and the sentence imposed upon the accused. The question then remains whether this is a case in which we ought to direct a re-trial. Having regard to the facts set out in the letter of reference submitted to us by the learned Sessions Judge and also to the explanation of the trial Magistrate, we are of opinion that this is not a case in which it would be proper for us to direct a re trial. We desire to say further that we are satisfied from the explanation of the Honorary Magistrate that he gave the parties a fair trial and there is no reason whatsoever for the suggestion that he has in any way wilfully disregarded any decision of this Court.

In the result the conviction of and sentence upon the accused persons are set aside and we direct that they be released, or if they be on bail, that their bail bonds be discharged.

Convictions set aside.

(1) 5 C. W. N. 866; 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 2 Weir 271 (P. C.).
(2) 10 C. W. N. 53; 3 Cr. L. J. 141.
(3) 8 C. W. N. 715; 31 C. 1053; 1 Cr. L. J. 713.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 175 OF 1916.

October 5, 1916.

Present:—Mr. Hayward, J. C.

F. W. SOLER—APPELLANT

versus

EMPEROR—OPPONENT.

Sind Courts Criminal Circulars, Chap. V, r. 22—Magistrate, duty of, to proceed from day to day—Court, inherent power of, to check prolix examination and cross-examination of witnesses.

It is the duty of a Magistrate to insist on the trial proceeding from day to day as required by rule 22 of Chapter V of the Sind Courts Criminal Circulars.

The Courts should rigidly check prolix examination and cross-examination of witnesses in the exercise of their inherent powers to prevent abuse of the process, *i. e.*, proceedings of the Court.

Appeal against the order of the First Class Magistrate, Karachi.

Mr. *Lalchand Hassomal*, for the Appellant.

Mr. *C. M. Lobo* (2nd Assistant Public Prosecutor for Karachi), for the Crown.

JUDGMENT.—The difficulties of the case have been materially and unnecessarily increased by the protraction of the proceedings over two and a half years in the Courts of the City Magistrate and the First Class Magistrate and City Deputy Collector, Karachi. This is the second case in a very short period in which such protraction in the magisterial Courts of Karachi has come to the notice of this Court. It seems necessary, therefore, to express strong disapproval of such protraction of criminal proceedings, which amounts to a grave public scandal and renders them a travesty of justice. The appellant has stated, and there is no particular reason to disbelieve him, that he had to spend some Rs. 8,000 in these criminal proceedings and it is not improbable that a great deal more has been spent by the other side, as it has taken two and a half years before they were able to obtain a final decision from the magisterial Courts. The causes of this inordinate protraction have been a gross disregard of the rule requiring day to day trials laid down in rule 22, Chapter V, page 57, of the Sind Courts Criminal Circulars and the lamentable failure to control the prolix examination and cross-examination by Counsel introducing many

wholly irrelevant details of no practical importance either to the prosecution or defence—a failure which is particularly regrettable in the Court of the Magistrates of the high rank of the City Magistrate and the First Class Magistrate and City Deputy Collector, Karachi. It was their duty to insist on the trial proceeding from day to day and rigidly to check prolix examination and cross-examination of witnesses, in exercise of the powers inherent in all Magistrates to prevent abuse of the process, that is to say, the proceedings of the Criminal Courts of the Province.

Convictions and sentences reversed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 538 OF 1917.

June 18, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Richardson.

ABDUL HAKIM KHAN—PETITIONER

versus

BUZRUK ALI KHAN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 258, 436—Penal Code (Act XLV of 1860), ss. 465, 467—Jurisdiction of Sessions Judge to order committal or further enquiry for offence under s. 467, I. P. C., where accused was acquitted of offence under s. 465—Discharge, meaning of.

Per *Richardson, J.*—Where a person accused of forging a document is charged with an offence under section 465 of the Indian Penal Code, and is acquitted by a First Class Magistrate under section 258, Criminal Procedure Code, the Sessions Judge has no power to direct his committal or to order a further inquiry under section 436, Criminal Procedure Code, on the ground that the offence alleged falls under section 467, Indian Penal Code, as it relates to a document which is a valuable security. [p. 659, col. 1; p. 660, col. 2.]

The acquittal of such a person on a charge under section 465, Indian Penal Code, cannot be construed as an order of discharge in respect of the alleged offence under section 467. [p. 660, col. 1.]

An order of discharge under the provisions of the Criminal Procedure Code should precede the framing of a charge, though there might be cases in which an accused can be discharged otherwise than under the specific provisions relating to discharge in the Criminal Procedure Code. [p. 659, col. 2.]

Per *Teunon, J.*—The Magistrate's order acquitting such an accused of an offence under 465, Indian Penal Code, is tantamount to an order discharging the accused of the graver offence in respect of the same

document punishable under section 467, Indian Penal Code. [p. 660, col. 2.]

Baijanath Pandey v. *Gauri Kanta Mandal*, 20 C. 633; 10 Ind. Dec. (N S.) 427, disapproved.

Criminal revision against an order of the Sessions Judge, Backergunge, dated the 16th April 1917.

Moulvi *A. K. Fazlul Huq*, and Babus *Atindra Nath Mukherjee* and *Gagan Chand Boral*, for the Petitioner.

Mr. *P. N. Dutt*, and Babus *Ganesh Chandra Das Gupta* and *Sharat Chandra Mukherjee*, for the Opposite Party.

JUDGMENT.

RICHARDSON, J.—This Rule was issued at the instance of the petitioner, Abdul Hakim Khan.

The petitioner was tried by a Magistrate exercising first class powers upon a charge of forgery framed under section 465 of the Penal Code. The learned Magistrate found him not guilty and acquitted him under section 258 of the Criminal Procedure Code.

The complainant in the case then moved the Sessions Judge of Backergunge upon the grounds that the document to which the charge related was a valuable security and that the petitioner should properly have been charged under section 467 of the Penal Code and committed for trial upon that charge to the Court of Session.

It may be mentioned that an offence punishable under section 465 is triable by a Magistrate of the 1st Class, while the Court of Session alone is empowered to try the aggravated offence of forging a valuable security, punishable under section 467.

The Sessions Judge, having heard the matter, held that the offence alleged fell under section 467 and he made an order directing that the petitioner be committed to the Court of Session for trial upon a charge framed under that section.

The question which arises is whether the learned Sessions Judge had jurisdiction to make that order, and for the present purpose it may be assumed, without deciding the point, that the document which the petitioner is said to have forged is a valuable security.

The order purports to be made under section 436 of the Criminal Procedure Code, which runs as follow:—

"When, on examining the record of any case under section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged."

Then come two provisos:—

"Provided as follows,

(*a*) That the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made.

(*b*) That if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence."

The question before us turns on the meaning of the word "discharged" as used in the section. The same word is used in the following section, section 437. Under the Criminal Procedure Code an acquittal means more than a discharge. A discharge takes place before a finding of "guilty" or "not guilty" is recorded and the guilt or innocence of the accused is not *res judicata*. A discharge generally takes place either under section 209 in the Chapter headed "of inquiry into cases triable by the Court of Session or High Court" or under section 253 in the Chapter headed "of the trial of warrant cases by Magistrates." Both sections contemplate an inquiry into some alleged offence and as a result a discharge before any charge is framed against the accused. A discharge may also take place under section 494, which again illustrates the general rule of the Code that a discharge should precede the framing of a charge. I do not, however, say, and must not be understood as saying, that an accused cannot be discharged otherwise than under the specific provisions referred to. So much for the meaning of the term "discharge".

In the present case the petitioner was acquitted of an offence under section 465 of the Penal Code. With that acquittal the Sessions Judge had no power to interfere. But an offence under section 467 being exclusively triable by the Court of Session

the petitioner under clause (4) of section 403 was (and is) still liable to be tried for that offence, the acquittal under section 465 not operating as a bar, and if the petitioner can be said to have been discharged in respect of any such offence it was competent to the Sessions Judge to direct his committal.

In my opinion the acquittal of the petitioner on the charge actually framed does not necessarily imply that the Magistrate discharged him in respect of any other charge which might have been framed. Nor does the mere omission of the Magistrate to frame a charge under section 467 carry the case further. So far as the record shows, the Magistrate never considered whether the accused had or had not committed an offence under section 467. His mind was never directed to that issue and it was not inquired into. It is not sufficient to say that the result is the same as if the petitioner had been discharged. That argument might be stretched to cover a case in which an accused has never been placed before a Magistrate at all. Clearly the mere fact that an accused has not been charged with an offence is in itself insufficient. At least the Magistrate must consciously do something or make some order which shows that in his opinion, on the materials before him, the accused should not be charged with, or tried for, that offence.

Prima facie, therefore, as section 436 is worded, I should hold that the petitioner was not discharged either properly or improperly in respect of the offence non-alleged under section 467 and that the learned Sessions Judge had no power to direct his committal, or to order a further inquiry under proviso (*b*).

The learned Pleader for the petitioner referred to the decision of this Court in the case of *Baijanath Pandey* v. *Gauri Kanta Mandal* (1), a decision which has been followed in Madras [*Queen-Empress* v. *Hanumantha Reddi* (2)]. Those cases, no doubt, support the view which I have expressed, but they go further than is necessary in the present case. In both cases the Magistrate had taken action which amounted to a refusal to charge the petitioner with the offence exclusively triable by the Court of Session, in respect of which the Sessions Judge had afterwards directed a committal. Moreover, *Hanumantha's* case (2) was overruled and *Baijanath Pandey's* case (1) was dissented from, by a Full Bench of the Madras High Court in *Krishna Reddi* v. *Subbamma* (3). There the Magistrate refused the request of the prosecution that he should frame a charge under section 477 of the Penal Code and acquitted the accused on certain other charges. His order refusing to frame a charge under section 477 was held to be in substance an order discharging the accused in respect of the offence alleged under that section. In cases arising under section 437 of the Criminal Procedure Code it has been similarly held in this Court that an order though not in terms of an order of discharge may amount to such an order [see *Ajab Lal Khirher* v. *Emperor* (4)].

The cases of *Queen-Empress* v. *Gundya* (5) and *King-Emperor* v. *Ayyan* (6), which were also cited before us, are not precisely in point. They show, however, that the proceedings of the Magistrate were not void under section 530 (*p*) of the Criminal Procedure Code.

For present purposes it is sufficient to say that the Magistrate made no order which was either in terms or in substance an order of discharge, and that the learned Sessions Judge, therefore, had no power to direct the petitioner's committal to the Sessions Court for trial. In that view the Rule must be made absolute and the order of the Sessions Judge must be set aside.

TEUNON, J.—As at present advised, I am inclined to hold that the Magistrate's order acquitting the accused of an offence under section 465 of the Indian Penal Code is tantamount to an order discharging the accused of the graver offence in respect of the same document punishable under section 467. That no charge was framed and that the Magistrate was in fact not moved to frame a charge under the graver

(1) 20 C. 633; 10 Ind. Dec. (N. S.) 427.
(2) 23 M. 225; 2 Weir 543; 8 Ind Dec. (N. S.) 560.
(3) 24 M. 136; 2 Weir 544.
(4) 32 C. 783; 9 C. W. N. 810; 2 Cr. L. J 524.
(5) 13 B. 502; 13 Ind Jur. 469; 7 Ind. Dec. (N. S.) 333.
(6) 24 M. 675; 2 Weir 699.

section, I am inclined to think is immaterial. I, therefore, reserve to myself the right at a fitting opportunity to refer to a Full Bench the question whether the case of *Baijanath Pandey* v. *Gauri Kanta Mandal* (1) was rightly decided. Meanwhile in the present case I assent to the order proposed by my learned brother, and I do so all the more readily as in view of the provisions of section 503, sub-section (4), of the Code of Criminal Procedure it appears to be open to the Crown or to the complainant to take such further action as their respective legal advisers may deem appropriate.

Rule made absolute.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE NO. 83 OF 1917.
CRIMINAL REVISION PETITION NO. 69 OF 1917.
April 17, 1917.
Present:—Mr. Justice Seshagiri Aiyar.
C. IYAVOO CHETTY TRADING UNDER THE NAME AND STYLE OF RIPON & CO.—ACCUSED —PETITIONER
versus
JEHANGHIR M. HOLMES, MANAGING PROPRIETOR OF MESSRS. J. HOLMES & CO.—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 96—Search—Warrant, issue of—Magistrate, duty of.

The act of issuing a search warrant is a judicial act and before a Magistrate issues it, it is his duty to weigh the circumstances before making up his mind on the question.

Mahomed Jackariah & Co, v. *Ahmed Mahomed*, 15 C. 109; 12 Ind. Jur. 259; 7 Ind. Dec. (N. S.) 658, followed.

A mere statement in an affidavit that, in the opinion of the deponent, a summons may not have the desired effect, is not sufficient to justify the issue of a search warrant.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the 3rd Presidency Magistrate, George Town, Madras, in Application No. 978 of 1917.

Mr. *C. P. Ramaswami Aiyar*, for the Petitioner.

Messrs. *E. R. Osborne* and *C. Kunhi Raman*, for the Complainant.

The Crown Prosecutor, for the Government.

ORDER.—I have no hesitation in holding that the Magistrate acted in a very high-handed manner in issuing the search warrant. The affidavit in support of the application is a very meagre one. It does not state when the applicant became aware of the offence complained of: it gives the opinion of the deponent that a summons may not have the desired effect.

The Magistrate should, under the circumstances, have asked for further proof from the complainant before issuing the warrant. He seems to have ignored the existence of section 96 of the Code of Criminal Procedure and the limitations it places upon his powers to issue a search warrant. He has recorded no reasons for taking the unusual step of issuing a search warrant in the first instance. It is desirable to draw his attention to the fact that the act of issuing a search warrant is a judicial act, as pointed out in *Mahomed Jackariah & Co.* v. *Ahmed Mahomed* (1), and that it was his duty to have weighed the circumstances before making up his mind on the question.

The materials placed before the Magistrate were wholly insufficient to warrant him in acting as he did. I, therefore, set aside his order in issuing a search warrant.

Mr. Ramaswami Aiyar on behalf of the petitioner (accused) undertakes that the samples of all the articles asked for in the complaint will be left by him in the Magistrate's Court; he must be permitted to take away the rest.

Petition allowed,
Order set aside.

V. R. P.

(1) 15 C. 109; 12 Ind. Jur. 259; 7 Ind. Dec. (N. S.) 658.

PATNA HIGH COURT.
CRIMINAL REFERENCE NO. 3 OF 1917.
January 26, 1917.
Present:—Mr. Justice Atkinson.
MANGRA KHARIA—ACCUSED
versus
RAM DHARI SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 250—.

MANGRA KHARIA *v.* RAM DHARI SINGH.

Frivolous and vexatious accusation—Compensation, order for payment of.

Where a charge in respect of which a complaint is made is a specific and serious one, it cannot be described as frivolous or vexatious unless it is in fact false; and unless it is held to be false, an order for compensation under section 250 of the Criminal Procedure Code is not justified. [p. 662, col. 1; p. 663, col. 1.]

Criminal reference by the Judicial Commissioner, Chota Nagpore, in Criminal Motion No. 40 of 1916, dated the 3rd January 1917.

REPORT.—In this application relief is sought by Mangra Kharia, a cultivator, against the order of the Sub-Divisional Magistrate of Gumla, dated the 28th September 1916, ordering him under section 250, Civil Procedure Code, to pay compensation of Rs. 50 to constable Ramdhari Singh and Rs. 15 each to Dukhan Singh, Manager of his *zemindari*, and Lohra Choukidar.

The facts are briefly that Mangra on the 6th September 1916 lodged a complaint in the Court of the Sub-Divisional Magistrate against the three persons named above, alleging that they had extorted from him Rs. 30 on the ostensible ground that he had concealed information about a connection of his who was wanted by the Police.

On the 10th September the Sub-Divisional Magistrate held a local enquiry, in the course of which he took evidence of the complainant and four other persons. Acting on this evidence he put the three persons named above on trial under section 384, Indian Penal Code.

In the course of the trial some of the witnesses gave evidence conflicting with what they had previously stated and differing from the facts mentioned in the complaint. In consequence of these discrepancies and contradictions the Magistrate discharged the accused under section 253, Criminal Procedure Code. He also ordered the complainant to pay compensation to the extent mentioned above.

The charge in respect of which the complaint was made was a specific and serious one. It could hardly be described as frivolous or vexatious unless it was in fact false. That it is false the Magistrate holds to be the case. The question is whether he is justified on the material before him in coming to this conclusion.

As regards those witnesses who have contradicted their former statements the Magistrate gives his opinion that the original tale was false, and that this is the reason why contradictions appear later on. It is not because the witnesses have been gained over by the accused persons. In my opinion it is hardly safe to draw this conclusion to the prejudice of the complainant. So far as the complainant is concerned, I think the only fair course to take is to rule out absolutely the evidence which is shown to be unreliable and to consider whether the rest of the material before the Magistrate justifies the conclusion that the complainant's case is positively false, a conclusion which goes considerably further than holding that it has not been sufficiently proved. If we rule out this evidence, we are left with the evidence of the complainant himself and that of one other witness namely, Sukra Ahir, the statements of neither of whom as made in the Court differ materially from what they said on former occasions, or with one another. There is no reliable evidence to contradict the evidence of these two men, and consequently I consider that there are no proper grounds for holding the complaint to be false.

An inference adverse to the complainant has apparently been drawn because he brought a similar complaint on the 21st July 1916 which failed. From the record of the proceedings in that connection it does not appear that that complaint was disbelieved.

The present application was filed on the 30th October, the first opening day after the Civil Court vacation. The order of the Magistrate directing payment of the compensation was made during the Civil Court vacation. I do not think there has been unreasonable delay in making the present application.

I accordingly recommend that the order of the Magistrate directing payment or compensation be set aside.

JUDGMENT.—This case comes before me on a reference under section 438 of the Code of Criminal Procedure. I have read the report of the Judicial Commissioner and the explanation of the learned Sub-Divisional Magistrate and I agree with the view expressed by the Judicial Com-

missioner that the order made under section 250 of the Code of Criminal Procedure in favour of Ram Dhari Singh, Dukhan Singh and Lohra Chaukidar ought to be set aside. I do not think that the charge preferred by the complainant was so maliciously false as to justify the learned Sub-Divisional Magistrate in making the order that he did. I accordingly set aside the order of the Sub-Divisional Magistrate of Gumla, dated the 28th September 1916.

Order set aside.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 594 OF 1917.
July 2, 1917.
Present:—Mr. Justice Teunon and Justice Sir Shamsul Huda, KT.
DIGAMBAR CHAKRAVARTI—PETITIONER
versus
RAM TARAN MITTER—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 467, 471—Production of title-deed in answer to summons, whether amounts to "user"—Sanction for prosecution, necessity of—Witness, whether can be prosecuted before sanction is given for prosecuting plaintiff.

A person who is cited by the plaintiff to depose as a witness and to produce his title-deed and who produces the title-deed and gives evidence with regard to it, can be prosecuted on a charge under section 471 read with section 4 7, Indian Penal Code, on the ground that the title-deed is a forged document, before any sanction has been given for the prosecution of the plaintiff, or for the prosecution of the deponent himself under section 193, Indian Penal Code, in respect of the statements made by him regarding the document. [p. 663, col. 2.]

The production of a forged title-deed in answer to a citation in which no particular deed is specified and giving evidence in regard to it amounts to user within the meaning of section 471, Indian Penal Code. [p 664, col. 1.]

Babu *Dasarathi Sanyal*, for the Petitioner.

Mr. *J. W. Chippendale*, for the Opposite Party.

JUDGMENT.—In this case the petitioner has been committed to the Court of Session to take his trial on a charge under section 471 read with section 467 of the Indian Penal Code.

It appears that one Nimai Haldar and others brought a suit to recover possession of some 3 *bighas* of land. They asserted, it would seem, that they were petitioner's tenants and cited him to depose as a witness and to produce his title-deed. He produced as his title-deed the document now said to be a forged document and gave evidence with regard to it.

We are invited in the present application to quash the commitment and in support of the application three contentions are advanced before us. It is urged, *firstly*, that no sanction having yet been given for the prosecution of the plaintiffs, the prosecution of the petitioner should not be allowed to proceed; *secondly*, that no sanction having been given for the prosecution of the petitioner under section 193 of the Penal Code in respect of the statements he made regarding the document, the prosecution in respect of the documents itself should not be permitted; and *thirdly*, that on the facts alleged by the prosecution there has been no 'user' by the petitioner.

We are of opinion that all these contentions fail.

The petitioner was not a party to the suit in question. He was a witness and in the face of the provisions of section 195 (1) (*c*) and of the cases reported as *Akhil Chandra Sen* v. *Queen-Empress* (1) and *Debilal* v. *Dhajadhari Goshami* (2), it cannot be said that sanction to his prosecution in respect of the document produced by him is necessary. No doubt in certain cases, in exercise of its powers of supervision, this Court has stayed the prosecution of minor offenders until the bar to the prosecution of the principals should have been removed. But that is a matter of discretion rather than a question of law, and the case for the prosecution here is that the petitioner was in fact the principal offender. The first two grounds urged cannot, therefore, be sustained.

In support of the third contention we have been referred to the case reported as *In re Muthiah Chetty* (3). But in that case it was found that the production of the document there in question was involuntary. Here it is alleged that the petitioner's

(1) 22 C. 1004; 11 Ind. Dec. (N. S.) 667.

(2) 9 Ind. Cas. 577; 15 C. W. N. 565; 12 Cr. L. J. 101.

(3) 13 Ind. Cas. 286; 36 M. 392; 11 M. L. T. 21; (1912) M. W. N. 455; 13 Cr. L. J. 46.

production of his document, his title-deed in answer to a citation in which no particular deed was specified, was voluntary and mainly to serve the petitioner's own ends. Further it is open to the Court to alter and add to charges, and the question how far the provisions of section 474 of the Penal Code are applicable may be one for the consideration of the Court.

We accordingly discharge this Rule.

Rule discharged.

MADRAS HIGH COURT.

FULL BENCH.

CRIMINAL REVISION CASE NO. 544 OF 1916.

TAKEN UP NO. 21 OF 1916.

April 17, 1917.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Kumaraswami Sastri.

KOLANDAI VELU AND ANOTHER—ACCUSED

versus

REV. J. DEQUIDT—COMPLAINANT.

Christian Marriage Act (XV of 1872), ss. 68, 4, 5—Marriage between Hindu and Christian solemnized by Hindu—Offence.

A Hindu by religion, performing a marriage according to the Hindu mode between two persons either of whom is a Christian, commits an offence under section 68 of the Christian Marriage Act. [p. 667, col. 1.]

The Christian Marriage Act was intended to apply to the marriages of all Christians in India, including marriages where one of the parties is a Christian. [p. 667, col. 1.]

Queen-Empress v. *Yohan*, 17 M. 391; 1 Weir 813; 6 Ind. Dec. (N. S.) 271; *High Court Proceedings, dated the 21st March* 1871; 6 M H. C. R. App. XX; 1 Weir 801, *Queen-Empress* v. *Paul*; 20 M. 12; 1 Weir 820; 7 Ind Dec. (N. S.) 9; followed.

This case coming on for hearing on the 31st October 1916, after service of notice on the accused, and Counsel not appearing on their behalf, upon perusing the record submitted in accordance with the proceedings of this Court, dated the 28th August 1916, and upon hearing the arguments of the Public Prosecutor, on behalf of the Crown, and the case having stood over for consideration till the 9th November 1916, the Court (Sadasiva Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

NAPIER, J.— The records of this case have been called for by the High Court on its own motion, owing to a doubt whether the case relied on by the Sessions Judge to convict the accused is good law. The facts are that a Hindu by religion, a *purohit* among the Valluvas (Hindu Pariahs), performed a marriage in the Hindu mode between a Hindu Valluva and a Christian girl, aged eleven, belonging to the same community. The priest has been convicted under section 68 of the Christian Marriage Act, XV of 1872, and the father of the girl has also been convicted under the above section 68 read with section 114 of the Indian Penal Code, and the Sessions Judge has very properly followed the decision of this Court in *Queen-Empress* v. *Yohan* (1), which follows another decision in *High Court Proceedings, dated the 21st March* 1871 (2). In my opinion, these decisions are wrong and should be reconsidered.

The Christian Marriage Act is a Code repealing and embodying the provisions of several prior Acts which were taken from the numerous English Marriage Acts. The preamble states, "whereas it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion." Section 4 provides that "every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void." Section 5 provides that "marriages may be solemnized in India by any of the five different persons, (1) persons who have received ordination; (2) clergymen of the Church of Scotland; (3) Ministers of religion licensed under the Act; (4) Marriage Registrars appointed under the Act; and (5) persons licensed under this Act to grant certificates of marriage between Native Christians"; and in addition it provides that marriages may be solemnized in the presence of a Marriage Registrar appointed uner this Act. The offence charged here is that the accused "solemnized" a marriage in the absence of the Marriage Registrar. Now it is not suggested that the Marriage Registrar is authorized to attend Hindu marriages, and it

(1) 17 M. 391; 1 Weir 813; 6 Ind. Dec. (N. S.) 271.
(2) 6. M. H. C. R. App. XX; 1 Weir 801.

is to be noted that no person can be appointed a Marriage Registrar other than a Christian (*vide* section 7). If, therefore, a Hindu does marry a Christian girl according to the customs of his caste, both he and the officiating priest render themselves liable to imprisonment or transportation for ten years. It seems to me that this cannot be the intention of the Act. The object of section 68 with its highly penal consequence is to punish persons for the serious offence of purporting to solemnize a marriage between two persons who honestly believed that they were being married, the consequences of such a void marriage being intensely serious. The English Act never contemplated marriages in forms other than those suitable for Christians, and, in my opinion, the Indian Act intended to go no further. The use of the word "solemnized" is, in my view, indicative. It is true that the marriage provided for under the Act need not in all cases be of a religious character just as in England persons can go through a civil ceremony before a Registrar; but the word "solemnized" is never used in this country with reference to a Hindu marriage ceremony. Section 10 provides that "every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening." Section 42 provides that where the marriage is solemnized in the presence of a Registrar, one of the parties must make oath that there is not any impediment of kindred or affinity or lawful hindrance to the said marriage. Section 51 provides that in some part of the ceremony each of the parties shall make a declaration of absence of lawful impediment and shall say to the other, "I call upon these persons here present to witness that I, *A B*, do take *C D* to be my lawful wedded husband (or wife)." Such sections are, on the face of them, inapplicable to Hindu marriages, and the forms in the Schedule are all such as are applicable to Christian marriages. It seems to me that the whole Act has reference to nothing but marriages which purport to be solemnized in accordance with usage among Christians, and we would read section 4 as meaning "Every marriage purporting to be a Christian marriage shall be solemnized, etc." If this section is not to be so read, it would follow that the Legislature in 1872 has declared void all marriages according to caste custom between a Hindu and a Christian, with the necessary result that the children are illegitimate and cannot acquire rights of property. I very much doubt whether the Legislature intended to interfere in this manner with Hindus among whom marriages are regulated by caste customs. There are, as already stated, the decisions reported as *High Court Proceedings, dated the 21st March* 1871 (2) and *Queen-Empress* v. *Yohan* (1), and in addition, there is a later case reported as *Queen-Empress* v. *Paul* (3). The decision in *High Court Proceedings, dated the 21st March* 1871 (2), was on the language of section 56 of Act V of 1865 and the Court decided the point on the strict language of the Act, The case was, however, not argued on either side. *Queen-Empress* v. *Yohan* (1) purported to follow the decision in *High Court Proceedings, dated the 21st March* 1871 (2). In *Queen-Empress* v. *Paul* (3) the only point taken was that the word "solemnized" could only have reference to a religious ceremony, and the Court, having pointed out that the civil marriage is also solemnised under the Act, thought that this point settled the matter. In my opinion, the question raised is of serious importance in view of the large number of Christians among the lower castes, and I, therefore, think it right to refer to a Full Bench the question whether a Hindu by religion performing a marriage according to the Hindu mode between two persons either of whom is a Christian commits an offence under section 68 of the Christian Marriage Act, XV of 1872.

SADASIVA AIYAR, J.—I confess that I was at first not inclined to reopen the question, which my learned brother's order just now pronounced refers to a Full Bench, as that question had been considered in three cases, *High Court Proceedings, dated the 21st March* 1871 (2), *Queen-Empress* v. *Yohan* (1) and *Queen-Empress* v. *Paul* (3), at sufficient intervals of time, and might, in a manner, be deemed to have been settled. But I have been much impressed by the arguments and considerations put forth from the Bench by my learned brother in the course of the hearing of these cases and as set out in his above order, and I cannot say that the judgments in those cases deal so fully and exhaustively with all the aspects

(3) 20 M. 12; 1 Weir 820; 7 Ind. Dec. (N. S.) 9.

of the question as to preclude its authoritative reconsideration by a Full Bench.

For instance, as regards the meaning of the word "solemnize" in section 68, the decision in *Queen-Empress* v. *Paul* (3) says that it only means "conduct, celebrate or perform," and one of the reasons given is that in a marriage "solemnized" before a Marriage Registrar "no ceremonies are necessary." But a Marriage Registrar cannot be the professor of any other religion than the Christian Religion (see section 7 of the Christian Marriage Act) and two ceremonies or ceremonial declarations have to be made before him by each of the parties to the marriage under section 51 of the Act. Those declarations are: "I do *solemnly declare* that I know not of any lawful impediment why I, *A B*, may not be joined in matrimony to *C D*."

"I call upon these persons here present to witness that I, *A B*, do take thee, *C D*, to be my lawful wedded wife (or husband)."

I do not see why these four indispensable solemn declarations (two by each party) required to be made only before a professing Christian, recognized as such by the Government and authorised to record those solemn declarations, should not be called "necessary ceremonies" required to validate the marriage. I am inclined to think that "solemnization" in section 68 indicates the performance of marriages "according to rules, rites, ceremonies and customs" of a Christian Church or after complying with the ceremony of the four solemn declarations prescribed for celebrating marriages before the Christian Marriage Registrar. I think the making of those declarations before the Christian Marriage Registrar means the observance of certain "particular forms and ceremonies" of solemnization and that that is one of the several definite modes of the "solemnization" of marriages contemplated by the Act. In Halsbury's Laws of England, Volume XVI, section 581, page 302, the declarations above-mentioned are described in the margin as coming within "Forms and ceremonies." If the word "solemnize" as used in the Act merely means "celebration" (including celebration with Hindu or Mussalman rites), the Act cannot be said not to violate the principle of religious neutrality followed almost without exception by the Indian Legislature, a violation which visits followers of religions other than the Christian with very severe criminal penalties for doing acts not prohibited by those other faiths. A construction which credits the Legislature with such violation should, if possible, be avoided. A Sunni Mussalman male and a male of one of several of the Shiah sects can validly marry according to his law in the permanent form and with Muhammadan rites a *kitabia* (that is a Jew or a Christian or the follower of any other religion revealed in a *kitab* or sacred book, provided she is not a fire-worshipper or idolatress). According to some other Shiah sects, he can validly marry her in *muta* form. (See Ameer Ali, Volume II, page 320.) If section 68 of the Christian Marriage Act be interpreted as widely as has been done in *Queen-Empress* v. *Yohan* (1) and *Queen-Empress* v. *Paul* (3), a *Kazi* who performs a marriage between a Mussalman male and a Christian female according to Mussalman rites is liable to the punishment of transportation for ten years. Whereas a Christian minister or Marriage Registrar who performs a marriage with Christian rites or the declaration ceremonies mentioned in section 51 between a Mussalman male and a Christian female is not subjected to any such penalty and performs a perfectly lawful and valid act. It may be said that when section 4 declares that a marriage "solemnized" otherwise than in accordance with section 5 between two persons though one of them alone is a Christian is void, the Legislature does interfere with the Mussalman religion and the additional imposition of criminal penalties of a severe nature on such solemnization by the later section 68 does not, in principle, carry the interference further. But if the meaning of the word "solemnize" is confined to (1) the celebration with the marriage rites and ceremonies of a Christian Church and (2) the ceremonies of declaration prescribed to be followed before the Christian Marriage Registrar appointed by the Act, neither of the sections interferes with the tenets and marriage rules of other religions than the Christian. The Full Beuch decision in *Queen-Empress* v. *Fischer* (4) does not

(4) 14 M. 342; 1 M. L. J 458; 1 Weir 802; 5 Ind Dec. (N. S.) 239.

deal directly with the interpretation of the word "solemnize."

However, as I said in the beginning, I have had some hesitation in the matter (especially as the first Christian Marriage Act of 1852 was based on the provisions of English Statutes 14 and 15 Victoria Chapter 10 and other Statutes which did not probably care for the principle of religious neutrality and treated religions other than the Christian with somewhat scant consideration). While, therefore, I do not think it necessary to express a final opinion on the matter, I do not think it undesirable to have the matter reconsidered by a Full Bench. I accordingly join in the reference proposed by my learned brother.

This case coming on for hearing yesterday as per above Order of Reference, upon perusing the said Order of Reference, and upon hearing the arguments of Mr. *T. R. Ramchandra Aiyar*, Vakil, appearing as *amicus curiae* on behalf of the accused, of Mr. *M. D. Devadoss*, Counsel, for the Complainant, and of the Public Prosecutor on behalf of the Crown, and the case having stood over for consideration till this day, the Court expressed the following

OPINION.

We are of opinion that the decisions in *High Court Proceedings, dated the 21st March* 1871 (2) and *Queen-Empress* v. *Yohan* (1) which, were accepted in *Queen-Empress* v. *Paul* (3), were rightly decided. In our opinion the Act was intended to apply to the marriages of all Christians in India, including marriages where only one of the parties is a Christian. Section 4 expressly says that "any marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void;" and section 68 merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act. Offences under the section may vary very widely in gravity, and it has been considered necessary, as in England, to provide a very heavy maximum sentence which would be wholly inapplicable in such a case as the present, but that does not show that cases such as the present do not come within the section. Nor does the use of the word "solemnize", which is referred to in the Order of Reference of Napier, J., give rise in our opinion to such an inference. That word, which is now invariably used in this connection, has a history which may usefully be referred to. The general law of the medieval Church, which regarded marriage as a sacrament as well as a contract, did not regard the presence of a priest in orders as essential to the validity of the marriage. The parties might themselves enter in the contract, and the issue born of the marriage would be legitimate, though such a marriage was regarded as clandestine and irregular as contrasted with a marriage *in facie ecclesiae*, and did not carry with it all the incidents of such a marriage. Bracton in a passage cited in *Reg.* v. *Millis* (5), whilst upholding the validity of such clandestine marriages, says that they did not confer on the wife a right to dower. On the other hand he says that a wife married *in facie ecclesiae* was entitled to dower "*propter solemnitatem*" which we may translate "because of the solemnization of the marriage or the performance of the marriage in solemn form." A solemnized marriage is thus a marriage effected in a solemn and regular manner, as opposed to an irregular and clandestine marriage. The question whether there was a stricter rule in England requiring the presence of a priest in orders arose in the great case of *Reg.* v. *Millis* (5) and was answered in the affirmative in accordance with the view of the Irish Court owing to the Lords being equally divided. To put an end so far as it could to clandestine marriages, the Council of Trent decreed that in future all marriages must be celebrated "*coram parocho*", that is, in the presence of the parish priest, and also in the presence of witnesses. Its decrees were not received in England or Scotland, but Lord Hardwicke's Act, which was passed in 1754 with the same object, put an end to clandestine marriages in England by requiring all marriages to be

(5) (1844) 10 Cl. & Fin. 534; 8 Jur. 717; 17 Rul. Cas. 66; 59 R. R. 134; 8 E. R. 844.

celebrated in the Parish Church. This was considered a hardship by Roman Catholics and Non-conformists, and in 1837 they were allowed to be married at their own places of worship if the marriage was attended by the Registrar, and provision was also made for the solemnization of marriages before the Registrar himself.

As regards Christian marriages in India it was held by Sir Erskine Perry in *Maclean* v. *Cristall* (6) that the rule in *Reg.* v. *Millis* (5) as to the presence of a priest in orders had never been applicable in India. The Legislature, however, considered it necessary to legislate in India on the same lines as in England against irregular and clandestine marriages among Christians and dealt with the subject in Acts XXV of 1864, V of 1865 and XV of 1872, the Act now in force. Under that Act all marriages of Christians, including marriages where only one of the parties is a Christian, must be performed, on pain of nullity, in one of the prescribed forms. The Act makes no distinction between Native Christians and other Christians, except that by section 9 it provides for the issue of licenses to perform marriages between Native Christians to Christians who are not ministers of religion to meet the case of an insufficiency of ministers of religion, and that it directs that the registers of the marriages of Native Christians shall be kept separately from the registers of other Christian marriages, a provision dictated by administrative convenience. The provisions of section 9 have no bearing on the question now before us, as they only apply where both the parties are Native Christians, as expressly declared by Act II of 1892; and, therfore, marriages of Christians with persons who are not Christians must be solemnized in one of the other manners provided in the Act. The general effect of the Act is, as already stated, to require that every marriage where one of the parties is a Christian must, as a condition of validity, be solemnized in one of the prescribed forms, excluding the form prescribed by section 9, unless both the parties are Native Christians. The Act, however, is only concerned with the forms in which the marriage is to be solemnized, and does not deal with objections to the validity of the marriage. As pointed out in *Lopez* v. *Lopez* (7), where the history of this legislation is carefully examined, it requires one of the parties to the proposed marriage to make a declaration that there is no impediment of kindred or affinity or other lawful hindrance, and also requires that the minister of religion or Registrar should be satisfied that there is no lawful impediment; but it provides in section 88 that "nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into." We answer the question in the affirmative.

Reference answered in the affirmative.

V. R. P.

(6) Perry's Oriental Cases 75; 4 Ind. Dec. (o. s.) 69.

(7) 12 C. 706; 11 Ind. Jur. 62; 6 Ind. Dec. (N. S.) 478.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 34 OF 1917.

May 4, 1917.

Present:—Mr. Justice Maung Kin.

NGA PYU—ACCUSED

versus

EMPEROR OPPOSITE PARTY.

Evidence Act (I of 1872), s. 155—Impeaching credit of witness—Criminal Procedure Code (Act V of 1898), Ch. XIV, s 162—Procedure—Proof of statement to Police—Person, whether bound to state truth to Police.

Under section 155 of the Evidence Act the credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. [p. 670, col. 1.]

Section 162 of the Criminal Procedure Code allows the credit of a witness to be impeached in the manner provided by the Evidence Act, by the statement which he is alleged to have made to the Police in the course of an investigation under Chapter XIV of the same Code. [p. 670, col. 1.]

If a Magistrate finds that a witness is recorded as having made a statement different from that which he has made before him and he considers that in the circumstances of the case the discrepancy should be brought to light, he ought to ask the witness if he has made the statement attributed to him by the Police papers. If the witness admits that he has, he should be given an opportunity of explaining why

the contradiction has occurred. If the witness denies that he has made any such statement, the statement must be proved, before it can be used for the purpose of impeaching the credit of the witness. It is not like the deposition of a witness made in the Committing Magistrate's Court, which can be taken off the file of that Court and brought on that of the Court of Session without any proof, because the deposition proves itself. Not so a statement attributed to a witness on the Police papers. [p. 670, col. & 2.]

No person is bound to state the truth to the Police in the course of an investigation under Chapter XIV of the Criminal Procedure Code. Hence a statement to the Police is not evidence, as a statement made on oath before a competent authority is. [p. 670, col. 2.]

Appeal from the order of the Special Power Magistrate, Kyaiklat, dated the 26th January 1917, passed in Criminal Regular Trial No. 221 of 1916.

JUDGMENT.—I have come to the conclusion that this case has not been properly tried. I shall, therefore, order that the Magistrate do commit the case to the Court of Session for trial.

The case of Po Min, the complainant, was as follows :—On the night in question at about 8 or 9 he went from a funeral house to Esoof's house, both houses being at Migyaungaing village. At the latter house he found Maung Kyin, Esoof and accused, Gaung She *alias* Tha Win (who will later be referred to in this judgment as Tha Win) gambling at cards. Po Min remonstrated with the gamblers at which they got angry, Tha Win and Maung Kyin speaking harshly to him. Po Min then left Esoof's house. He was later followed by Maung Kyin, Tha Win and four or five others. There was Nga Pyu also. Maung Nyin told him to go home; otherwise he would be killed. Po Min addressed Mga Pyu saying that he would not. He next told Nga Pyu that he himself should go home and so saying pushed him. Thereupon Maung Kyin caught hold of both his hands and said, "cut him". Nga Pyu then struck Po Min with a bottle, while Tha Win cut him with a *da* twice. This is what Po Min wished. But he contradicted himself on some points of the story and the contradictions were noticed in the judgment of the learned Magistrate. On the main points of the story, Po Min was supported in Court by Tha Po and Po Saing. That night immediately after the occurrence he reported the matter to Maung Sit Aung, the headman, who supported him to the extent that he reported that while Maung Kyin and he were having a conversation Nga Pyu struck him with a bottle once, and Tha Win cut him with a *da* twice. At the Police Station the next morning at 7 Po Min reported that he met Maung Kyin and they had had only a word or two to say to each other, when Nga Pyu came and struck him with a bottle on his left shoulder, that Tha Win cut him with a *da* on his head and that, as he ran, he received a blow on the left shoulder blade with a stick or a *da* from some one striking from behind. Maung Tin, Sub-Inspector of Police, swore that Po Min mentioned only Maung Kyin by name and said that he did not know the names of the other persons and he mentioned Nga Pyu as the man who struck him with a bottle and Ko Kyin as the man who held his hands so that he might be assaulted. But this witness does not appear to have been asked whether Po Min said who had cut him, for there is nothing about that in his deposition.

If Po Min could be believed as supported more or less by the other witnesses above referred to, Tha Win would be the man to be convicted of having cut him and not Nga Pyu. But the Police papers showed that Maung Kyin had stated that Nga Pyu was the man who cut Po Min and he had produced before the Police Po Tun, Po Nyun, Ba Gyaw, Sit Shin and Po Han, all of whom supported Maung Kin's story. That being the case, the Trying Magistrate had to be careful and I notice that some endeavour appears to have been made to scrutinize Po Min's evidence by a fairly close questioning. But when we read the evidence of Maung Kyin and the witnesses he named, the record does not indicate that much effort was expended with a view to scrutinize it. I notice from the Police papers that the Police recorded Maung Kyin's statement on the 19th November and those of his witnesses on the following day, though the case had occurred on the night of the 13th November and the first information report was made at 7 A. M. on the 14th November. The delay in the examination of these people by the Police should

be explained and some endeavour should have been made to inquire into the reason of it for the ends of justice, especially when it is an admitted fact by all parties concerned that Maung Kyin was present at the occurrence. Moreover, the statements of Maung Kyin's witnesses as recorded by the Police appear to be very sketchy. These witnesses should have been subjected to a severe test by close examination by the Court, whether Nga Pyu was defended by Advocate or not. As it happened, he was not defended by any Advocate. Only Tha Win was so defended so that having regard to the particular circumstances of the case, the Magistrate failed in his duty. Then again the special diaries of the investigating Police Officers should have been carefully studied and pertinent questions asked with a view to get legal evidence on the record pertaining to the important stages of the investigation. That should have been done not so much to get a conviction against Nga Pyu or Tha Win as to satisfy the ends of justice. The examination of Maung Tin, Sub-Inspector of Police, was meagre and incomplete and was not, in my judgment, such as was required by the very peculiar circumstances of the case. The other investigating officer was not called.

There is another matter it is my duty to point out. That is the wrong use of the Police papers with regard to Tha Po and Po Saing. I do not find either of these witnesses being confronted by the statements attributed to them by the Police papers, that is to say, neither was asked if they had made any statement different to that they had made in Court. Yet the Magistrate deliberately used those statements in his judgment and argued that the witnesses stood contradicted by them and refused on that account to believe them. Section 155 of the Indian Evidence Act provides, *inter alia*, that the credit of a witness may be impeached by *proof* of former statements inconsistent with any part of his evidence which is liable to be contradicted, and section 162 of the Criminal Procedure Code allows the credit of a witness to be inpeached in the manner provided by the Evidence Act by a statement which he is alleged to have made to the Police in the course of an investigation under Chapter XIV of the same Code. I have underlined (italicised) the word *proof*. The importance of the word will appear presently.

If a Magistrate finds that a witness is recorded as having made a statement different from that he has made before him and he considers that in the circumstances of the case the discrepancy should be brought to light, he ought to ask the witness if he has made the statement attributed to him by the Police papers. If the witness admits that he has, he should be given an opportunity of explaining why the contradiction has occurred. If the witness denies that he has made any such statement, the statement must be proved, before it can be used for the purpose of impeaching the credit of the witness. It is not like a deposition of a witness made in the Committing Magistrate's Court, which could be taken off the file of that Court and brought on that of the Court of Session without any proof, because the deposition proves itself. Not so a statement attributed to a witness on the Police papers. If you want to use it you must first prove it, unless of course it is admitted. There is no law which says that it must be taken to have been correctly recorded. It must also be borne in mind that no person is bound to state the truth to the Police in the course of an investigation under the Chapter. And it is not evidence, as a statement made on oath before a competent authority is. How will you prove it? This point has been the subject of judicial consideration.

In *Emperor* v. *Nilkanta* (1) three Judges of the Madras High Court and in *Muthukumarasawmi Pillai* v. *Emperor* (2), which was a case which arose out of the first on a fiat granted by the Advocate-General, five other Judges of that Court held that, while statements made by a person to a Police Officer in the course of an investigation and taken down in writing may not, by reason of section 162 of the Criminal Procedure Code, be proved by the production of the written record, they may be proved by oral evidence. The law on the point was laid down to

(1) 14 Ind. Cas. 849; 35 M. 247; (1912) M. W. N. 207; 13 Cr. L. J. 305; 22 M. L. J. 490; 11 M. L. T. 1 Supp.

(2) 14 Ind. Cas. 896; 35 M. 397; (1912) M. W. N. 549; 13 Cr. L. J. 352; 12 M. L. T. 1.

the same effect in a later case in Bombay, namely, *Emperor* v. *Hanmaraddi Ramaraddi* (3), and in the unreported case of *Emperor* v. *Salay Gulam Ariff* (4), Robinson, J., held the same view. The question I put above, "How will you prove the statement", is answered by these cases. In order to prevent any misunderstanding I will now point out how the party wishing to prove the statement should set to work. Call the officer who recorded the particular statement and put him a question in the proper form as to what the witness has said on the subject-matter of the statement. If the officer remembers the statement he will say what it is. If he cannot and the Court is satisfied that he made the record at the time the statement was made or so soon afterwards that the matter was at the time fresh in his memory, then the written record may be put into the officer's hands for the purpose of having his memory refreshed. Then the officer can answer the question which has been put, after refreshing his memory. Note that the writing is not thereby used as evidence.

The above procedure was not followed in this case and the Magistrate made an illegal use of the Police papers in regard to the witnesses Po Saing and Tha Po. Their evidence, as it appears on the record, will have to be considered, but in view of the contents of the Police papers within the knowledge of the Court, it should not be acted upon as it stands. Thus I am in a difficulty. It is obvious that these witnesses should be properly examined in the light of their previous statements to the Police and the proper procedure followed as regards the proof of such statements, before their evidence can legally be used for the one side or the other.

For all the above reasons it is my opinion that the case has not been properly tried by the learned Special Power Magistrate. I, therefore, set aside the conviction and sentence and direct the Magistrate to commit the accused, Naga Pyu, to stand his trial on a charge of voluntarily causing grievous hurt to Ismail *alias* Po Min by means of a dangerous weapon, to wit, a *da*, under section 326 of the Indian Penal Code, and I further order that pending his trial before the Court of Sessions he be detained as an under-trial prisoner.

If Nga Pyu is convicted, the case may then be at an end. But if he is acquitted, it will be a question for the Police to consider whether Tha Win who has been discharged should be put on his trial again. When that question arises, they should consult the case of *King-Emperor* v. *Nga Pyu Di* (5).

Conviction set aside.

(3) 26 Ind. Cas. 188; 39 B. 58; 16 Bom. L. R. 603; 15 Cr. L. J. 690.

(4) Criminal Sessions Trial No. 29 of 1915 of this Court.

(5) 2 L. B. R. 27; 10 Bur. L. R. 1; 1 Cr. L. J. 167.

PUNJAB CHIEF COURT.

CRIMINAL REVISION NO. 1910 OF 1916.

January 19, 1917.

Present:—Sir Donald Johnstone, KT., Chief Judge.

PREM SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898) ss. 107, 118—Security to keep peace—Proof—Willingness of accused to give security.

The mere fact that an accused person says he is willing to give security to keep the peace is *not* the kind of proof required by section 118, Criminal Procedure Code, as condition precedent to the taking of security under section 107, and an order for furnishing security under the latter section cannot be made merely upon the strength of such statement. [p. 672, col. 1.]

Criminal revision from the order of the District Magistrate, Jhelum, dated the 28th September 1916.

JUDGMENT.—The orders of the lower Courts are very brief and unilluminating. The only ground stated for taking security is that, when the notice was read to the accused, he said he was willing to give security. Now look at section 107, Criminal Procedure Code—"likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a

In re DAKSHINAMOORTHI.

breach of the peace, or disturb the public tranquillity;" and section 118 –"If.....it is proved that it is necessary for keeping the peace.....that the person.....should execute a bond....."Can it be said in the present case that there is any such proof? When petitioner said he was willing to give a bond, did he mean he intended to break the peace? Far from it, he meant just the reverse. He obviously meant that he so little intended anything of the kind that he was ready, if asked, to execute a bond and provide respectable sureties well knowing the bond would never be enforced. None but a lunatic would say directly or indirectly to the Magistrate—"I admit I intend to break the peace. I cannot, therefore, resist the demand for security."

It is clear, therefore, that there is no proof whatever against this man or against his son Mani, who has also been bound over but has not come up here. I lay it down here that the mere fact that an accused person says he is willing to give security to keep the peace is *not* the kind of proof required by section 118, Criminal Procedure Code, as condition precedent to the taking of security.

I allow this revision and cancel the bonds both of this petitioner and of his son Mani.

Revision allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 582 OF 1916.
CRIMINAL REVISION PETITION NO. 475 OF 1916.
December 14, 1916.

Present:—Mr. Justice Spencer.

In re DAKSHINAMOORTHI—RESPONDENT—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 137—Public nuisance—Procedure on appearance of person showing cause against order for removal of nuisance—Magistrate, duty of.

In an enquiry under Chapter X of the Criminal Procedure Code, a Magistrate should, as provided for by section 137 of the Code of Criminal Procedure, proceed to take evidence in support of the order before the counter-petitioner is called on to produce his evidence to meet it.

Hingu v. *Emperor*, 3 Ind Cas 482: 31 A. 453: 6 A. L. J. 685: 10 Cr. L. J. 297; *Doraiswamy Mudaliar* v. *Sudarsana Chariar*, 27 Ind. Cas. 767; 17 M. L. T. 142; 16 Cr. L. J. 207, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Sivakasi Division, in Miscellaneous Petition No. 8 of 1916.

Mr. *K. S. Ramabhadra Aiyar*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The Magistrate has not proceeded to enquire into this case of public nuisance in the manner provided by section 137 of the Code of Criminal Procedure. On the appearance of the person showing cause against the order, the Magistrate should proceed to take evidence in support of the order before the counter-petitioner is called upon to produce his evidence to meet it [see *Hingu* v. *Emperor* (1) and *Doraiswamy Mudaliar* v. *Sudarsana Chariar*(2)]. In this case at the enquiry none but the defence witnesses were examined. The order does not satisfy the requirements of the section. I set it aside and refer the matter back to the Magistrate to proceed according to law.

Order set aside; Case remanded.

V. R. P.

(1) 3 Ind. Cas. 482; 31 A. 453; 6 A. L. J. 685; 10 Cr. L. J. 297.
(2) 27 Ind. Cas. 767; 17 M. L. T. 142; 16 Cr. L. J. 207.

FANINDRA NARAIN ROY *v.* KACHHEMAN BIBI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 352 OF 1912.

July 5, 1917.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Walmsley.

FANINDRA NARAIN ROY—PLAINTIFF—APPELLANT

versus

KACHHEMAN BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s 2—Consideration, what constitutes—Benefit to promisor, whether necessary—Mortgage by joint mortgagors—Mortgagors not benefited, whether liable.

In order to support a binding promise it is not necessary that the promisor should benefit by the consideration: it is sufficient if the promisee does some act from which a third person is benefited and which he would not have done but for the promise. [p. 674, col 2.]

A along with *B* and *C* executed a mortgage, which the mortgagee accepted in lieu of the security of a prior mortgage executed by *A* alone in his favour:

Held, that *B* and *C* were liable under the mortgage, though they had not received any direct benefit for executing it. [p. 674, cols. 1 & 2.]

Appeal against the decree of the District Judge, Birbhum, dated the 22nd July 1911, reversing that of the Sub Judge, Birbhum, dated the 3rd August 1906.

FACTS of the case appear from the judgment.

Babu *Surendra Nath Ghosal*, for the Appellant.—The main point for determination in this case is whether all the defendants are bound by the mortgage transaction of 1893. This mortgage of 1893 was executed by Sadan, Edu, Badruddin and Lakhu in favour of the plaintiff in lieu of a prior mortgage executed in his favour in 1884. It was decided in a previous suit that the mortgage of 1884 was granted for a valid consideration, consequently the mortgage of 1893 which replaced the prior mortgage must be held to be one for valid consideration and as such *all* the defendants are bound by the mortgage of 1893. They cannot get out of it by any manner of means. The learned District Judge is clearly wrong when he dismisses the suit against the representatives of the mortgagors other than Sadan and Edu. The distinction made by the learned Judge is unsustainable. There is no question of *direct* benefit. All the defendants were benefited by the mortgage of 1893 and so they cannot avoid being bound by it. The definition of 'consideration' in section 2 of the Indian Contract Act is clearly in my favour. Edu, Badruddin and Lakhu along with Sadan entered into a promise to be bound by the mortgage of 1893 and this promise led the mortgagee to refrain from enforcing his prior bond, and so there cannot be the least doubt that there was lawful consideration. They were all parties to the mortgage-deed.

Babu *Hemendra Nath Sen*, for the Respondents.—The representatives of the mortgagors other than Sadan and Edu cannot be bound by the mortgage, inasmuch as they did not derive any benefit whatsoever for the transaction. Unless they got any direct benefit from the transaction, they cannot be made responsible. The consideration is not lawful unless it benefits the promisor. The promisors here other than Sadan and Edu did not benefit by the consideration. The mortgage of 1884 was executed in consideration of the plaintiff's not proceeding against Sadan and others for execution of a decree. This abstinence of the plaintiff did not enure to the direct benefit of those other than Sadan and Edu. So the learned District Judge was right. Defendants Nos. 3 and 10 were not parties to the mortgage-deed at all.

Babu *Surendra Nath Ghosal*, in reply, referred to *Bailey* v. *Croft* (1).

JUDGMENT.—This is an appeal by the plaintiff in a suit instituted on the 26th February 1906 to enforce a mortgage executed in his favour on the 11th April 1893 by four members of a Muhammadan family, by name Sadan, Edu, Badruddin and Lakhu. The suit has now lasted for more than eleven years and has had a chequered career. It was dismissed by the Subordinate Judge on the ground that there was no legal consideration for the mortgage. The decree was confirmed by the District Judge on appeal. On second appeal to this Court, Brett and Sharfuddin, JJ., held that the view which had commended itself to both the Courts below was erroneous in law. The mortgage had been executed in lieu of a prior mortgage granted by Sadan in 1884 in circumstances, which may be briefly narrated. At a sale held in 1880, in execution of a decree against some members of the family, their properties were sold and

(1) (1812) 4 Taunt. 611; 128 E. R. 470.

passed into the hands of the mortgagee. They supplicated to him to re-transfer to them for a sum of Rs. 300 the purchased property (which apparently included their homestead). He consented, and executed a conveyance which, however, was never registered. The judgment-debtors were unable to pay the decree-holder in cash the consideration settled, and the result was that Sadan executed the mortgage of 1884 for Rs. 300 The conveyance was inoperative in law, but as the statutory period has elapsed since the date of the execution sale and as the judgment-debtors have continued in undisturbed possession, it may be taken that the title acquired by the purchaser at the sale has become extinguished. The true position, consequently, was that a mortgage was granted to the plaintiff by Sadan in 1884 in order to induce him to forbear from the exercise of his rights as auction purchaser. On these facts this Court held upon the authority of the decision in *Hurkissen Dass Serowgee* v. *Nibaran Chander Banerji* (2), that the mortgage of 1884 was granted for a lawful consideration. This necessarily justified the inference that the mortgage now in suit, which replaced the earlier mortgage, was also for a lawful consideration. This Court thereupon remanded the case to the District Judge for determination of the other issues in the suit. One of these issues was, whether all the defendants, that is, the representatives of Sadan, Edu, Badruddin and Lakhu, and two other persons, were bound by this transaction. The District Judge has found, as we read his judgment, that the mortgage was, as a fact, granted by these four persons, but he has held that it cannot be enforced against the representatives of the mortgagors other than Sadan and Edu as they were not bound by the execution sale and received no benefit under the mortgage transaction. In this view, he has decreed the suit against the representatives of Sadan and Edu and has dismissed the claim as against the others. We are of opinion that the distinction made by him between the two sets of mortgagors is not sound in principle and cannot be supported.

The mortgagors, under the bond now in suit, are all equally bound by the transaction, although two of them might not have been directly benefited by the mortgage transaction. This is clear from the definition of the term consideration in section 2, clause (*d*), of the Indian Contract Act. That definition, in so far as it is applicable to the facts of this case, may be stated in the following terms: "When, at the desire of the promisor, the promisee has abstained from doing something, such abstinence is called a consideration for the promise." Here, we have, in 1884, a mortgage by Sadan in favour of the plaintiff. The plaintiff was entitled to enforce the security as against Sadan. He was asked to accept, in lieu of that security, a fresh bond executed in 1893 by Sadan along with three other persons, *viz.*, Edu, Badruddin and Lakhu. The promise by Edu, Badruddin and Lakhu to be bound by the mortgage plainly formed a good consideration for the abstinence of the mortgagee to sue Sadan upon the first bond. The respondents have, however, argued that a consideration is not lawful unless it benefits the promisor. There is no foundation for this contention, and were it accepted, we should have to substitute the phrase "at the desire and for the benefit of the promisor" for the phrase "at the desire of the promisor", which finds a place in clause (*d*) of section 2. We are confirmed in the view that the contention of the respondents is not well founded, from an examination of the authorities in England. Valuable consideration has been defined as some right, interest, profit or benefit, accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration: it is sufficient if the promisee does some act from which a third person is benefited and which he would not have done but for the promise. This view is supported by the decisions in *Bailey* v. *Croft* (1), *Alhusen* v. *Prest* (3) and *Haigh* v. *Brooks* (4). We hold accordingly that the reasons assigned by the District Judge in support of his conclusion that Sadan and Edu alone

(2) 6 C. W. N. 27.

(3) (1851) 6 Ex. 720; 20 L. J. Ex. 440; 155 E. R. 735.

(4) (1839) 10 Ad. & E. 309; 2 P. & D. 452; 9 L. J. Q. B. 194; 113 E. R. 119; 50 R. R. 399.

were responsible under the mortgage cannot be accepted. As regards defendants Nos. 3 and 10, however, the District Judge has correctly held that they were in no way bound by the transaction as they were not parties to the mortgage-deed.

The result is that this appeal is allowed in part and the decree of the District Judge modified. The decree will be deemed to have been made against all the defendants other than defendants Nos. 3 and 10. The appellant is entitled to his costs of this appeal as against the defendants other than defendants Nos. 3 and 10, but he must pay the defendant No. 3, who appeared in this Court, his costs of this appeal. The costs incurred by the plaintiff-appellant in all the Courts will be added to the sum due under the mortgage, and a self-contained decree will be drawn up in this Court.

Appeal partly allowed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 232 OF 1916.

June 29, 1917.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

BISHESWAR DAYAL—JUDGMENT-DEBTOR—APPELLANT

versus

RUP KISHORE LAL—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution—Limitation, question of, not pressed at earlier stage of same proceeding—Estoppel—Question of limitation decided in previous execution proceeding, whether can be raised in subsequent proceeding.

An order of a Court directing execution of a barred decree to proceed after due notice to the judgment-debtor precludes the judgment-debtor from repeating his objection in a subsequent execution of the same decree. [p. 677, col. 2.]

Appeal from a decision of the District Judge, Shahabad.

Messrs. *Krishna Sahay* and *Rai Guru Saran Prasad*, for the Appellant.

Messrs. *Kulwant Sahay* and *Raghunath Singh*, for the Respondent.

JUDGMENT.

JWALA PRASAD, J.—This appeal arises out of an order dated 25th August 1916, disposing of an objection by the judgment-debtors under section 47 of the Code of Civil Procedure to the execution of a decree. The decree is dated 30th June 1909 in respect of a sum of about Rs. 389-10-6 against three judgment-debtors, Munshi Bisheswar Dayal, Jai Prakash Lal and Harbans Lal. Harbans Lal is dead and his sons are now on the record as judgment-debtors.

Mohan Koer, the decree-holder, is also dead. The present execution is by Rup Keshwar Lal, the adopted son of the original decree-holder, *Musammat* Mohan Koer. The decree was first executed on 11th May 1910 against the three original judgment-debtors. Bisheshar Dayal, one of the judgment-debtors, contended in that execution that he was liable only for one-third of the decretal amount.

The decree-holder appears to have verbally agreed to the terms set forth in the following order of the Court, dated August the 31st, 1910:—

"The judgment-debtors are two brothers and their nephew and under the decree all the three are jointly liable. Now one brother contends that only one-third should be realised from him by the decree-holder. The decree-holder's Pleader states that if the objector pays one-third at once, the decree-holder will make an attempt to realise the balance from the other judgment-debtors before realising the balance from the objector. This will be a fair arrangement. Let the objector deposit the one-third by September the 7th."

Accordingly the judgment-debtor, Bisheswar Dayal, deposited one-third of the decretal amount in Court, which was withdrawn on 1st August 1910 by the decree-holder. The execution then proceeded against the other judgment-debtor, Munshi Jai Prakash Lal, for the balance. The last step in this execution was taken on March the 10th, 1911, on which date the decree-holder filed a deficit Court-fee of Rs. 4. The Court ordered the issue of warrant which came back unserved. This execution was ultimately dismissed for default of the decree-holder on 1st April 1911.

BISHESWAR DAYAL v. RUP KISHORE LAL.

On 28th March 1914 the decree-holder took out another execution of the decree which was numbered No. 7 of 1914. This execution was barred by limitation as having been more than 3 years from the last step taken in the first execution.

This execution was, however, registered and notice under Order XXI, rule 22, was ordered to be issued fixing 18th April 1914. On 18th April 1914, the Court passed the following order:—

"Notice under Order XXI, rule 22, duly filled in filed. Issue fixing the 18th April 1914." On 18th April 1914 the order was—"Notice served. Affidavit filed. *Decree-holder to take further steps by 25th April* 1914." The judgment-debtors did not appear and no objection to the execution of the decree was made by them.

On 25th April 1914, the decree-holder took no step and the case was put up on 1st May 1914 when it was dismissed for default.

The present execution was filed on the 15th April 1916. This execution was within 3 years from the last execution. Notice was issued upon the judgment-debtor fixing 6th May 1916. On 6th May 1916 Bisheswar Dayal filed an objection under section 47 of the Code of Civil Procedure. In the objection petition eight grounds were taken. The main contention of the judgment-debtor was that the decree-holder was not entitled to execute the decree against him, as he was exonerated by the decree-holder in the first execution on 31st August 1910 on his (judgment-debtor Bisheswar Dayal) paying his one-third share of the judgment-debt. On 13th June 1916 the objection of the judgment-debtor was overruled. In ground No. 6 of the objection petition it was stated that the decree was barred by limitation. This ground apparently was not pressed by the judgment-debtor and there is no mention of it in the order of the 13th June 1916. The execution proceeded. The property of judgment-debtor was attached. On 22nd July 1916 an objection petition was filed by the judgment-debtor as to the valuation put in by the decree-holder. On 29th July this objection petition was heard and a commission was ordered to be issued to determine the value of the property on payment of cost of Rs. 16 by judgment-debtor. The cost was, however, not paid and on the 4th August 1916 the Court ordered sale proclamation to issue fixing the 30th October 1916. On 14th August 1916 the judgment-debtor filed another objection to the execution of the decree. In this petition the main objection taken was that the execution of the decree was barred by limitation. It was also alleged in this petition that the further executions of the decree were against the other judgment-debtors and that he (Bisheswar Dayal) had no knowledge of the facts relating to limitation at the time when his former objection petition was disposed of by the Court on 13th June 1916 and hence the plea of limitation was not pressed by him. The objection of the judgment-debtor was disposed of by the Court on 25th August 1916. The Court declined to entertain the objection as to the execution being barred, on the ground that the objection was taken in the petition of 6th May 1916 but was not pressed by the judgment-debtor when the order of the Court was passed on 13th June 1916 and that, therefore, it was not open to the judgment-debtor to raise the same objection again. Against this order the judgment-debtor has preferred the present appeal to this Court.

It is not disputed that the second execution of the decree, case No. 7 of 1914, was barred as the application for the execution was filed on the 28th March 1914, whereas the last step taken by the decree-holder in the first execution was on the 10th of March 1911. The judgment-debtor did not take any objection to the second execution. It is, however, stated by the judgment-debtor that in the execution case No. 7 of 1914 notice mentioned in the order of 1st April 1914 was not served upon him and that he had no knowledge or information of that execution.

In face of the order of the Court on the 18th April 1914 that the notice was served, we do not think we can go behind that order of the Court, and hold that the notice was not served upon the judgment-debtor. In fact, no attempt appears to have been made by the judgment-debtor in the Court below to show that the notice was not served. The order of the Court

on the 18th April is in the following words "Decree-holder to take further steps by 25th April 1914," amounts to an order directing the decree-holder to proceed with the execution and thus holding that the execution was not barred. The order of the Court of the 18th April 1914 for the decree-holder to take further steps is final between the parties. The order of the 13th June is an order under section 47 of the Code of Civil Procedure and amounts to a decree. It is an appealable order, but no appeal was preferred against this order and the judgment-debtor allowed it to become final. Three months later on the 14th August 1916, the judgment-debtor repeated the objection as to limitation taken in the earlier stage of the last execution.

According to the authority of the Privy Council the judgment-debtor cannot be allowed to re-open in a subsequent execution the question that the execution is barred, when the same objection was either disallowed or taken but not pressed in a previous execution.

Following the principle laid down by Sir Lawrence Jenkins in *Maharaja Sir Rameshwar Singh Bahadur* v. *Rateshwar Singh* (1), it would appear that the District Judge Mr. Rowland had no jurisdiction to set aside the order of his predecessor passed on the 13th June allowing the decree to proceed.

The Punjab Court has distinguished the Privy Council ruling in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (2), on the ground that there would be no bar to the objection of the decree-holder being entertained at a later stage of the same execution proceeding though it may be so in another subsequent execution of the decree. It is, no doubt, true that in all the cases that have been brought to our notice the judgment-debtor was not allowed to take objection in a subsequent execution of the decree and that there is no case in which it has been held that he cannot be allowed to repeat the objection in the later stage of the same execution proceedings, when his objection was disallowed or not pressed in the earlier stage of the execution. The ruling reported as *Sardar* v. *Fatteh Chand* (3), no doubt, lends support to the contention of the appellant that an Appellate Court on an appeal from a final order in the same proceeding can set aside the intermediate orders disposing of the objection of the judgment-debtor as to the execution being time-barred, although interlocutory orders were not appealed from.

Be that as it may, there is, however, an unanimity of opinion that the order of a Court directing execution of a barred decree to proceed after due notice to the judgment-debtor precludes the judgment-debtor from repeating his objection in a subsequent execution of the decree. In this view the order of the Subordinate Judge in the 2nd execution, dated 18th April 1914, directing the execution to proceed precludes the judgment-debtor from objecting to the decree having been barred by the 3rd execution of the decree, even if it was open for him to repeat the objection at a later stage of the 3rd execution when he did not press the objection at an earlier stage.

The contention of the judgment debtor must fail. The appeal is dismissed with costs.

ATKINSON, J.—I concur in the judgment of this Court delivered by my learned colleague.

Appeal dismissed.

(1) 18 Ind. Cas. 841; 17 C. L. J. 125.

(2) 8 I. A. 123; 8 C. 51; 11 C. L. R. 113; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32.

(3) 89 P. R. 1894.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2003 OF 1914.

April 25, 1917.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

In the matter of CHIRANJIB LAL CHOWBEY—APPELLANT

versus

Musammat DOULTEA—RESPONDENT.

Sonthal Parganas Regulation (III of 1872), s. 6, applicability of—Mortgage, usufructuary—Profit amounting to principal—Civil Procedure Code (Act XIV of 1882), s. 108—Decree, suit to set aside—Summons suppressed.

CHIRANJIB LAL CHOWBEY *v.* DAULTEA.

A usufructuary mortgage is clearly a debt or a liability within the meaning of section 6 of the Sonthal Parganas Regulation III of 1872, so that when on taking an account upon a usufructuary mortgage it is found that the profits of the property have amounted to the principal sum advanced, it should be decreed that the mortgage has been extinguished. [p. 678, col. 2.]

A suit lies to set aside a decree solely on the ground that the summons have been fraudulently suppressed. Section 108 of the Civil Procedure Code, 1882, is no bar to such a suit. [p. 678, col. 2.]

Radha Raman Shaha v *Pran Nath Roy*, 28 C. 475; 5 C. W. N. 757 (P. C.), relied upon.

Appeal from a decision of the District Judge, Dumka, dated the 6th March 1914.

Messrs. *L. N. Singh* and *Baidya Nath Narayan Sinha*, for the Appellant.

Mr. *Shivanandan Rai*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit to set aside a decree obtained in Suit No. 4 of 1906 before the Subordinate Judge of Rajmehal. The reliefs prayed for are:—

(*a*) that it be declared that the aforesaid *ex parte* decree of the Subordinate Judge is fraudulent and collusive, and as such, is fit to be set aside;

(*b*) that it be adjudicated that the defendant's claim upon the usufructuary mortgage has been fully satisfied and that there is nothing due;

(*c*) that the plaintiff is entitled to costs of the suit and to any other relief or reliefs that the Court thinks proper.

The lower Courts have concurred in holding that the decree in Suit No. 4 of 1906 was vitiated by fraud in the first instance owing to the fraudulent claim to more than what should have been decreed under the Sonthal Parganas Regulation of 1872, *secondly*, for fraudulent suppression of the summons, and *thirdly*, for suppression of the sale proclamation; and upon these findings have re-tried Suit No. 4 of 1906 and made a decree therein for Rs. 402 instead of Rs. 1,200 as was claimed in the plaint in that suit.

Against that decree the defendant appeals, and the grounds urged are: that there was no fraud in the plaint of Suit No. 4 of 1906; and (2) that the only act of fraud in prosecuting the suit itself was the suppression of summons, and that in accordance with the decision in *Narsing Das* v. *Bibi Rafikan* (1), no suit would lie to set aside a decree solely on the ground, that summons had been suppressed: and (3) that if the lower Court be permitted to disturb the decree of 1906 at all, a decree should be made for Rs. 252, the amount spent on the repairs of the property, with the direction that the appellant be allowed to remain in possession of the property until the principal sum advanced be paid off.

The first ground turns upon the construction of section 6 of Regulation III of 1872. It is urged on behalf of the appellant that this section does not apply to usufructuary mortgages, but the section as worded applies to all debts and liabilities. A usufructuary mortgage is clearly a debt or a liability. There was originally a specific clause 10 of Regulation XV of 1793, whereby it was expressly enacted that when taking an account upon a usufructuary mortgage it should be held that when the profits of the property have amounted to the principal sum advanced, it should be decreed that the mortgage had been extinguished. It seems to me that Regulation III of 1872 has substituted a general section whereby the interest to be paid on any debt or liability should not exceed the principal sum advanced.

Upon the second ground taken that no suit would lie to set aside this decree, it appears to me that the facts are not very distinguishable from the case decided in *Radha Raman Shaha* v. *Pran Nath Roy* (2) by the Judicial Committee. There it was held that where summons had been suppressed and the sale held fraudulently, section 108 of the old Code of Civil Procedure was no bar to the maintenance of the suit to set aside the decree made.

Upon the last ground taken it is clear that the Courts below were not dealing with the suit of 1906 and had no jurisdiction to make a decree in that suit upon the application of any party who was not a plaintiff in that suit. The relief granted by the Courts below must, therefore, be modified. What the plaintiff

(1) 5 Ind. Cas. 198; 37 C. 197; 11 C. L. J. 250; 14 C. W. N. 507.

(2) 28 C. 475; 5 C. W. N. 757.

in the suit before us asks is for an order that it be declared that by enjoyment of the usufruct the whole sum advanced has been repaid. It has been found as a fact that Rs. 402 still remain due on the property; therefore, upon the second ground of relief asked for it will be decreed in this suit that upon paying into Court the sum of Rs. 402 by the 1st July 1917 the plaintiff will be entitled to receive back her property free from all encumbrances. Failing that payment by that date the right to redeeem the mortgage will be permanently extinguished.

Decree modified.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2397 AND 2427 OF 1914.

April 2, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Smither.

MEYOA LALL GHOSE AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOBINDA SUNDER SINHA CHOWDHURY—PLAINTIFF—RESPONDENT.

Landlord and tenant—Suit by landlord for khas *possession of land adjoining tenant's holding—Burden of proof—Bengal Tenancy Act (VIII of* 1885), *s.* 23—Raiyat, *right of, to cut and appropriate timber.*

Where a landlord brings a suit against a tenant for *khas* possession of a plot of land, which is contiguous to the tenant's holding, on the ground that it was not included within the holding, the onus is upon the plaintiff to show that the land was not within the limits of the holding of the defendant. [p. 681, col. 1.]

A tenant *prima facie* has the right to fell the timber growing on the land so as to put the holding, on which the tenant has a right of occupancy, to the best use as an agricultural holding. If the landlord alleges a custom depriving the tenant of that right he must prove that custom. [p. 681, col. 2.]

The timber of trees felled by the tenant in exercise of his right belongs to the landlord, apart from any special custom entitling the tenant to appropriate the same. The burden of proving such special custom is on the tenant. [p. 681, col. 2.]

The right of an occupancy *raiyat* to fell trees growing on the holding is not affected by, and is a totally different right from, the right to appropriate the timber when so felled. [p. 681, col. 2.]

Where on the failure of an occupancy *raiyat* to prove a special custom entitling him to appropriate the timber growing on the holding, the lower Court granted a perpetual injunction to the landlord restraining the tenant from cutting down and appropriating the trees growing on the holding:

Held, that the injunction granted was much too wide and that the landlord's right would be amply protected if a simple declaration were made that the tenant was not entitled to appropriate any tree felled by him and growing on any portion of the land held by him as tenant of the plaintiff landlord. [p. 681, col. 2.]

Appeals against the decrees of the District Judge, Murshidabad, dated the 11th May 1914, affirming the decree of the Sub-Judge, Murshidabad, dated the 17th September 1913.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

"Plaintiff Gobinda Sundar Sinha, a *patnidar*, brought this suit in the Court of the Subordinate Judge of Murshidabad against the defendants for recovery of *khas khamar* right in seventeen plots of land in *Mauza* Guarera and for compensation for fourteen palmyra trees cut down and appropriated by defendants and in the alternative, should the land be found to be in the holding of the defendants, for a perpetual injunction restraining defendants from cutting down and appropriating trees.

The suit has been decreed in part. The land is declared to be in the holding of defendants, but they are declared to have no right to cut down and appropriate trees standing thereon and are ordered to pay Rs. 42 compensation for the fourteen trees which they have cut and appropriated. At the same time the perpetual injunction has been refused.

Both sides have appealed against those findings which are unfavourable. The appeals have been heard together.

To take first the question whether defendants have occupancy rights to the land, I accept the Subordinate Judge's finding that the onus of establishing *khas* title and possession does rest on plaintiff, defendants' *jote* lands being found to adjoin.

I, therefore, concur in the finding that the land in suit appertains to defendants' occupancy holdings.

The next question is the local custom and usage set up by defendants, whereby

they claim to enjoy the long standing right to cut down and appropriate palm-trees standing on their holding without payment to or the permission of the landlord. As regards the onus of proof the Subordinate Judge has rightly placed it on defendants, following the ruling reported as *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (1).

The defendants rely on the ruling reported as *Prodyote Kumar Tagore* v. *Rakhal Chandra Sarkar* (2), but that applies rather to the validity and operation of the customary usage than to the placing of the onus of proof. It is to be held that the landlord has an inherent right in trees wherever situated in his estate, and any local custom infringing that right has to be proved by the person asserting it.

It has been pointed out that the Subordinate Judge has not distinguished between the rights to cut and to appropriate, though the order forbids both. The two rights may be and often are distinguishable. They both have to be established by the tenants, who in this suit have treated them as connected and mutually corroborative rights. There is no more satisfactory evidence, however, in support of the right to cut than there is of the right to appropriate. The permission of the landlord is the test. It is not a formality and it shuts out both the rights. I consider, therefore, that there are ample grounds for the Court's order.

In conclusion must be noted plaintiff's prayers for costs and for a perpetual injunction. The substantial issues in this suit were the *khamar* title, and the local custom of cutting and appropriating trees from tenants' holdings. The fact that the second issue has been decided in favour of plaintiff is a good reason for allowing plaintiff at least half his costs and for granting the perpetual injunction restraining the defendants from cutting and appropriating trees from their holdings without plaintiff's permission.

(1) 22 C. 742; 11 Ind. Dec. (N. S.) 493.

(2) 5 Ind. Cas. 242; 14 C. W. N. 487: 11 C. L. J. 209; 37 C. 322.

Defendants' appeal is dismissed with costs. Plaintiff's appeal is admitted to the extent of granting the perpetual injunction in the terms recited above and of allowing him half his costs in both Courts."

Babus *Dwarkanath Chuckerbutty*, *Gurudas Sinha* and *Panchanan Ghose*, for the Appellant in No. 2427 and Respondent in No 2397.

Babu *Samatul Chandra Dutt*, for the Respondents in No. 2427 and Appellants in No. 2397.

JUDGMENT.

IN No 2427 OF 1914.

FLETCHER, J.—This is an appeal by the plaintiff against a decision of the learned District Judge of Murshidabad modifying a decision of the Subordinate Judge of Barhampur. The suit was brought by the plaintiff for a declaration of his *patni* right in certain lands, for *khas* possession and also for damages against the defendants for cutting and appropriating fourteen palm-trees. The defence was that the lands were parts of a *raiyati* holding of the defendants and that there was a custom in the locality under which the tenants had the right to cut down trees and appropriate the timber. The learned Judges in both the lower Courts held, on the question as to whether the trees felled were growing on the land that formed a portion of the *raiyati* holding of the defendants, that having regard to the facts, the onus lay on the plaintiff. The present appeal is preferred wholly against the learned Judges having placed the onus on the plaintiff in that manner. Now, it is found as a fact by the learned Judges in the Courts below that the lands on which the palm-trees were standing are contiguous to the land comprised in the *raiyati* holding of the defendants and, therefore, it has been urged on behalf of the respondents that, according to the decision of this Court, the Judges rightly placed the onus on the plaintiff and required him to show that these lands were not within the limits of the holding of the defendants. The cases in which that rule has been recognized are many. First of all there is the decision in the case of *Rajendro Kumar Bose* v. *Mohim Chandra Ghose* (3). That decision has, no doubt, been considered in other

(3) 3 C. W. N. 763,

cases, but the rule laid down in that case as applicable to cases where the land is contiguous to the holding of the defendant has been recognized in some recent decisions which are reported in 19 Calcutta Weekly Notes. Those decisions are *Gopini Debi* v. *Lokenath Tewari* (4), *Protap Chandra Roy* v. *Judhister Das* (5). There is also another case in the same Volume at page 149, *H. Manners* v. *Harihar Dutt Koer* (6). Those cases recognize the rule that where the land is found to be contiguous to the holding of the defendant, the onus is on the plaintiff to show that he is entitled to recover *khas* possession. But it is sought to distinguish those cases on the ground that the land which is called the contiguous land is of a different character to the land which forms the *raiyati*-holding of the defendants. That I do not think is well founded. The finding made by the learned Judge in the primary Court was that other tenants in the locality had palm-trees growing on their *jote* lands. I do not think that the mere fact that a portion of the *jote* has palm-trees growing on it whereas the other portion is cultivated with paddy, shows that the land is of a different character to the land which has admittedly formed a part of the *jote* of the defendants. I see no reason to think that the learned Judge did not rightly apply the land when he came to the conclusion that the land was contiguous to the *raiyati*-holding of the defendants and that, therefore, the onus lay on the plaintiff. In that view, the present appeal fails and must be dismissed with costs.

SMITHER J.—I agree.

IN No. 2397 of 1914.

FLETCHER, J.—This appeal arises out of the same judgment which was the subject-matter of Appeal No. 2427 of 1914 just now disposed of. It is preferred by the defendants against the decree passed by the learned District Judge in so far as it granted perpetual injunction restraining the defendants, the tenants, from cutting down and appropriating the trees growing on their holding. The judgment of the learned Judge has been attempted to be supported by the plaintiff on the ground that the trees in the present case were presumably growing on the holding at the time when the property was let out to the defendants. Whether that is so or not, I do not think there is any evidence to show when those trees began to grow and became timber-like trees. The case, I think, is a perfectly simple one and is covered by the general rules that have been laid down having regard to section 23 of the Bengal Tenancy Act. The rules are these without doubt: *first*, that the tenant *prima facie* has the right to fell the timber growing on the land so as to bring the holding on which the tenant has a right of occupancy to the best use as an agricultural holding. If the landlord says that there is a custom under which the tenant has not that right, then the landlord has got to prove that custom. The *second* proposition is that the timber of the trees, felled by the tenant in exercise of his right, when felled, belongs to the landlord apart from any special custom for the tenant to appropriate the same. If the tenant says that there is a special custom for the tenants to appropriate, then he has got to prove that special custom. But that does not in any way interfere with the right of the tenant to fell the trees growing on the holding, which is not affected by and is a totally different right from the right to appropriate the timber when so felled. There was no reason for the learned Judge to interfere with the decree passed by the Court of first instance with reference to the injunction and, in my opinion, the injunction ought to be dissolved. The injunction granted is obviously much too wide in restraining the tenants from cutting down the trees growing on the land and, with reference to the appropriation of the timber so felled, it will be an ample protection to the landlord if a simple declaration is made that the defendants are not entitled to appropriate any trees felled by them and growing on any portion of the land held by them as tenants of the plaintiff. The present appeal must, therefore, be allowed in these terms with costs in this Court only.

SMITHER, J.—I agree.

Appeal No. 2397 allowed;
Appeal No. 2427 dismissed.

(4) 11 Ind. Cas. 696; 19 C. W. N. 140.

(5) 23 Ind. Cas. 69; 19 C. W. N. 143; 19 C. L. J. 408.

(6) 22 Ind. Cas. 563; 19 C. W. N. 149.

KALAN SINGH *v.* SECRETARY OF STATE.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 144 TO 148 OF 1915.

June 7, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

KALAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT NO. 1—RESPONDENT.

Landlord and tenant—Alluvion and diluvion—Tenant, right of, to diluviated area on its re-formation in situ—*Rent, remission of, on diluvion, effect of—Abandonment.*

Although the mere fact of a tenant claiming and accepting remission of rent in respect of lands washed away from time to time by the action of a river does not conclusively prove that the tenant abandoned or agreed to abandon his right to such lands on their re-formation *in situ*, still where the tenant surrenders the diluviated area and agrees to pay a reduced rent for the remainder of the lands, he cannot claim the diluviated area on its re-appearance, as in consequence of his act, his original holding becomes divided into two holdings one of which continues to be his tenancy, while the other which is under water is vested in the landlord free from his subordinate right as a tenant. [p. 683, cols. 1 & 2.]

Appeal against the decree of Mr. Justice D. Chatterjee, dated the 20th August 1915, in Appeals from Appellate Decrees Nos. 1048, 1304 and 1306 to 1308 of 1913

FACTS appear from the following judgment of

D. CHATTERJEE, J.—One of the plaintiffs-respondents in Appeal No. 1303 having died his heirs were not substituted within proper time. The appeal against that respondent has abated. As the decree was a joint decree in favour of the two respondents the appeal is defective and must be dismissed with costs.

In the other appeals the plaintiffs held certain lands as tenants under the Government in the district of Patna. A part of their holdings was diluviated. In respect of the diluviated portion they made an application to the Collector to be allowed to pay Re. 1 per *bigha* as rent instead of Rs. 3 per *bigha* during the period of submergence. The Collector said that if the plaintiffs wanted to retain their lien on the submerged portion they must pay full rent. This order of the Collector was explained to them and the finding is that they gave up and surrendered the diluviated area and accepted abatement of rent for it and paid rent only for the remainder of the lands that existed after diluvion. After the land having re-formed the Government made a settlement with other tenants. The plaintiffs now bring these suits for recovery of possession. The first Court dismissed their suit and the second Court decreed it, holding that the plaintiffs were entitled to claim this land as an accretion to their holding under section 4 of Regulation XI of 1825. I think that the learned Subordinate Judge has, in view of the finding that he has arrived at in respect of the surrender, come to a wrong conclusion on the question of law. If the tenants had not actually given up and surrendered the diluviated portion of their land and had simply taken abatement of rent in respect of the diluviated area without prejudice, they might have been entitled to rely upon the provisions of section 4 of Regulation XI of 1825 to claim the same right in the re-formed land as they have in the adjoining portion of their holding. The finding, however, is that they had given up and surrendered the diluviated portion. That being so, I am not able to say that their rights are, as contended by the learned Vakil for the respondents, the same as they would have been if they had received a reduction in rent under section 52 of the Bengal Tenancy Act. But the finding is more than a mere reduction of rent. The finding is that the whole aspect of the case was placed before the plaintiffs and that if they were to retain a lien on the submerged area and to obtain a settlement after the re-formation, they must pay full rent. It does not matter whether the Collector was justified in making this proposal to them. The Collector did make this proposal but they did not accept it and after they had given up this land, this land re-formed with the *khas* character which was given it at the time of its being given up by the tenants. That being so, the Government was entitled to settle this land with other tenants upon its re-formation.

In this view of the case I allow these appeals and dismiss the plaintiffs' suits with costs.

Babu *Karunamoy Bose*, for the Appellants.

Babu *Ram Charan Mitter*, for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Digambar Chatterjee in a suit for recovery of possession of land upon declaration of title. The plaintiff-appellant held a tenancy under the Government in respect of a tract of 38 *bighas* of land, which abutted on a river. In 1906, 17 *bighas* were diluviated by the action of the river. The tenant, thereupon, approached the Government with an application for reduction of rent, and prayed that he might be required to pay at the rate of Re 1 instead of Rs. 3 per *bigha* in respect of the lands washed away. The Collector declined to accept the suggestion and intimated to the plaintiff that if he desired to retain his title to the area submerged, he must continue to pay the full rent therefor. The plaintiff thereupon offered to surrender the diluviated area. This was accepted by the Collector, with the result that the rent was abated accordingly. The lands diluviated, however, re-appeared the very next year, and on re-appearance were immediately settled by the Government with a number of tenants. The plaintiff next instituted this suit for recovery of possession of the lands upon declaration of title. The Court of first instance dismissed the suit. Upon appeal that decision was reversed by the Subordinate Judge. Mr. Justice Digambar Chatterjee has reversed the decree of the Subordinate Judge and restored the decree of dismissal made by the trial Court. In our opinion, it is clear that the plaintiff cannot possibly succeed.

The fundamental point for consideration in the appeal is the legal effect of the action taken by the plaintiff with the concurrence of the Collector, in respect of the submerged lands. It may be conceded, as was pointed out by the Judicial Committee in the case of *Arun Chandra Singh* v. *Kamini Kumar* (1) that the mere fact of claiming and accepting remission of rent in respect of lands washed away from time to time by the action of a river does not conclusively prove that the owner abandoned or agreed to abandon his right to such lands on their re formation *in situ*. In this case, however, there can be no doubt as to the true effect of the action taken by the plaintiff in respect of the submerged lands. The question in controversy between him and the Collector was whether he should be allowed to retain his title in the submerged lands upon payment of rent at the reduced rate of Re. 1 per *bigha*. The Collector rightly or wrongly refused to accept his proposal; he thereupon surrendered the diluviated area and agreed to pay a reduced rent for the remainder of the lands, which thenceforth constituted his new holding. The true position consequently is that what constituted the original holding was, by the action of the plaintiff, divided into two holdings; one of these continued to be his tenancy while the other vested in the Government freed from his subordinate right as a tenant. This latter portion was at the time of the agreement between the parties under water. When the lands re-formed, they clearly re-appeared as the property of the Government, to which the plaintiff had no right whatsoever. This view is supported by the principles explained by the Judicial Committee in the case of *Felix Lopez v. Muddun Mohun Thakoor* (2), namely, that a person whose lands have been submerged may, as between him and the State, take most effectual means in his power, by continuing to pay rent for it, to prevent the possibility of any question of abandonment being raised as against him. The plaintiff here deliberately decided not to pay rent for the lands submerged and the proceedings between him and the Collector show conclusively that the effect of the agreement between the parties was to reduce the area of the original holding. In these circumstances, no question of accretion arises.

The result is that the decree of Mr. Justice Digambar Chatterjee is affirmed and this appeal dismissed with costs.

It is conceded that this judgment will govern the other Appeals Nos. 145, 146, 147 and 148 of 1915, in each of which a similar order will be drawn up.

Appeals dismissed.

(1) 22 Ind. Cas 317; 41 C. 683; 18 C. W. N. 369; (1914) M. W. N. 175; 15 M. L T. 182; 26 M. L. J. 251; 12 A. L. J. 243; 19 C. L. J. 272; 16 Bom. L. R. 323 (P. C.).

(2) 13 M. I A. 467; 14 W. R. (P. C.) 1?; 5 B. L. R. 521, 20 E. R. 625.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1657 OF 1915.

April 18, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

PEELA YARAKAYYA AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

KANUMURI VENKATA KRISHNAMRAJU AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 3 TO 9—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Order negativing claim, effect of.

An order on a claim petition is conclusive as against a party against whom it is passed under Order XX, rule 63, of the Civil Procedure Code, unless it is set aside in a suit instituted within the time limited by law.

Certain properties were attached in execution of a decree. Defendant put in a claim petition and his claim was disallowed and his title to the property attached negatived. That order he never sought to set aside. In a subsequent suit by the plaintiff to eject the defendant on the basis of a subsequent trespass by the latter:

Held, that the order on the claim petition was conclusive under Order XXI, rule 63, of the Code of Civil Procedure, so far as the defendant was concerned and that the latter could not take advantage of the suit filed by the plaintiff to re-agitate the question of his title. The fact that both the plaint and the written statement in the subsequent suit were within one year from the date of the order did not affect the question.

Bailur Krishna Rau v. *Lakshmana Shanbhogue*, 4 M. 302; 1 Ind. Dec. (N. S.) 1046, followed.

Second appeal against the decree of the District Court, Vizagapatam, in Appeal Suit No. 232 of 1914, preferred against that of the District Munsif, Vizagapatam, in Original Suit No. 21 of 1913.

The Hon'ble Mr. *B. N. Sarma* and Mr. *K. S. Aravamudha Aiyangar*, for the Appellants.

Mr. *D. Appa Rao*, for the Respondents.

JUDGMENT.— The question is exactly covered by the decision in *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (1). Here the defendant's claim to the property was disallowed, it being found by the Court which enquired into his petition of claim that he had no title to the property. He never sought to set aside the order. On the other hand he trespassed upon the property after possession had been given by the Court to the plaintiff. Then the plaintiff brought a suit and the suit happened to have been filed within one year of the order passed on the claim petition of the defendant. The defendant filed a written statement claiming the property as his own. The learned District Judge has held, following the case which we have cited, *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (1), that the order on the claim of the defendant was 'conclusive' as stated in Order XXI, rule 63; and the mere fact that the suit was instituted by the plaintiff to recover possession of the property from the defendant within one year of that order and the defendant put in a written statement also within that time, would make no difference. It is not suggested that the decision in *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (1), has been dissented from in a later decision of this Court, though it is stated that there are some rulings of other High Courts to the contrary. We follow the ruling of this Court and dismiss the appeal with costs.

Appeal dismissed.

V.R.P.

(1) 4 M, 302; 1 Ind. Dec. (N. S.) 1046.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1092 OF 1914.

June 19, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

RAHAMAT ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHIKAN BIBI WIFE OF AZGAR ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Wakf—Wakfnama *directing portion of income to be paid to daughter of founder, validity of*—*Mussalman Wakf Validation Act (VI of 1913)*.

A *wakfnama*, which is not governed by the provisions of Act VI of 1913, will be valid if the dominating purpose and intention of the grantor in executing the deed was to provide for religious and charitable purposes, and the secondary and subsidiary object was to secure for his descendants any surplus that might remain after defraying the expenses necessary for those purposes. [p. 685, col. 1.]

Where a *wakfnama* enjoined the *mutawalli* to perform the acts and ceremonies mentioned in the document and to provide for the preservation and

repair of a mosque and then gave to the daughter of the founder the balance of the income of the *wakf* property after deducting the expenses for those acts and ceremonies:

Held, that the *wakfnama*, though not governed by the provisions of Act VI of 1913, was valid.

Appeal against the decree of the Officiating Subordinate Judge, Chittagong, dated the 19th January 1914, reversing that of the Munsif, first Court, Satkania, dated the 26th June 1912.

Babu *Tarakeswar Nath Mitter*, for Babu *D. L. Kastgir*, for the Appellants.

Babu *Khitish Chandra Sen*, for Babu *Chandra Sekhar Sen*, for the Respondents.

JUDGMENT.—The only question involved in this appeal is whether the *wakfnama* set up by the defendant is a valid document.

In determining the question, we have to see whether the effect of the deed was to give the property in question substantially to religious and charitable uses, or whether the effect was to give the property in substance to the donor's family. See *Mujib un-nissa* v. *Abdur Rahim* (1).

The *wakfnama* enjoins the *mutawalli* to perform the acts and ceremonies mentioned in the documents and provides for the preservation and repair of the mosque. Then it says that after deducting the expenses for all these acts from the income of the *wakf* property, the daughters of the founder would take the balance of the income as their remuneration.

The dominating purpose and intention of the grantor in executing the deed evidently was to provide for religious and charitable purposes and the secondary and subsidiary object was to secure for his daughters any surplus that might remain after defraying the expenses. We think, therefore, that the *wakfnama*, though not governed by the provisions of Act VI of 1913, is valid.

That being so, the decree of the lower Appellate Court is affirmed and the appeal is dismissed with costs.

Appeal dismissed.

(1) 28 I. A. 15; 5 C. W. N. 177; 23 A. 233; 11 M. L. J. 58; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 579 OF 1914.

July 2, 1917.

Present:—Justice Sir Charles Chitty, Kt., and Mr. Justice Beachcroft.

Maulvi MUHFOOZUL HUQ AND OTHERS—DECREE-HOLDERS – APPELLANTS

versus

Maulvi MAZHORUL HUQ AND OTHERS—JUDGMENT-DEBTORS

AND

NAZIMONNESSA KHATUN AND ANOTHER —ORIGINAL DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. III, r. 4—Pleader acting on vakalatnama *not containing his name —Execution petition presented by such Pleader, validity of—Amendment of* vakalatnama.

On the last day of the period of limitation an application for execution of a decree was filed by a Pleader on the authority of a *vakalatnama* executed by the decree-holder and accepted by the Pleader, though the latter's name did not appear in the body of the *vakalatnama*. Notice having been issued upon the judgment-debtors, they appeared and obtained time to file objections, and eventually they objected to the execution on the ground that the Pleader who filed the application having no authority to act, the application for execution was invalid:

Held, that in the absence of any evidence that the Pleader was not in fact engaged by the decree-holder and of objection by the judgment-debtors that the Pleader had never in fact been authorised to make the application, it should be presumed that the decree-holder engaged the Pleader to make the application, so that the omission of his name from the body of the *vakalatnama* was merely a clerical error, which might be rectified by the decree-holder being allowed to amend the *vakalatnama* by insertion of the Pleader's name along with the Pleaders therein named. [p. 687, col. 1.]

Appeal against an order of the District Judge, Mymensingh, dated the 4th September 1914, affirming an order of the Subordinate Judge, Mymensingh, dated the 17th June 1914.

FACTS of the case appear from the judgment.

Babu *Basanta Kumar Bose* (with him Babu *Bipin Chandra Bose*), for the Appellants.—The decree holders' application for execution has been dismissed merely because the Pleader who filed the application was not named in the body of the *vakalatnama*. The *vakalatnama* contained the names of many Pleaders in accordance with the usual practice, but unfortunately this Pleader's name was not included. Nevertheless he

bona fide accepted the *vakalatnama* by endorsing his name on its back. That the Pleader was in fact engaged by the decree-holders has never been disputed. He acted under the *bona fide* belief that he had been authorised to act in the matter. Under these circumstances, I submit that the application for execution should not be regarded as inoperative, especially when a subsequent *vakalatnama* was executed by the decree-holders in favour of that very Pleader, when it was brought to their notice that the original *vakalatnama* was defective.

I rely upon the case of *Chhayunnessa Bibi* v. *Basirar Rahman* (1). Although there the question related to a defective *mukhtearnama*, still the principle deducible from that decision shows that a defective *vakalatnama* might also be amended so as to prevent injustice to the decree holder. The defect was a formal defect due to oversight and should not be allowed to work injustice.

Mr. *Nuruddin Ahmed* (with him Mr. *A. K. Fazul-ul-Haq* and Babu *Biraj Mohan Mozumdar*), for the Respondents. The defect might be due to oversight, but the decree-holder who makes an application for execution through a Pleader should be diligent and careful. He cannot complain of injustice if he suffers for his own carelessness. A Pleader has no authority to act for a party unless he has been appointed by a *vakalatnama* duly executed. In the case cited by the other side, there is an observation of the learned Judge deciding that case that a power-of-attorney need not be in writing and a Mukhtear might be authorised to act without a *mukhtearnama* having been executed in his favour. But a Pleader cannot be appointed without a *vakalatnama*, *vide* Order III, rule 4, Civil Procedure Code. So this Pleader who filed the application for execution had no authority to act for the decree-holder, because he accepted a *vakalatnama* which was not executed in his favour but was executed in favour of other Pleaders who did not accept it. I rely upon the case of *Mohammad Ali Khan* v. *Jasram* (2), the facts of which are indistinguishable from the facts of this case. Moreover, there is another insuperable difficulty in the way of the decree-holders, *viz.*, this very Pleader admitted before the lower Court that he had filed the application for execution without any authority and that the execution case should be dismissed on that account. If the decree-holders contend now that this Pleader was authorised by them to act in the matter of the execution application, then they cannot get rid of the admission made by that Pleader.

Babu *Basanta Kumar Bose*, in reply.—The admission which was made by the Pleader was an admission on a point of law, and cannot be binding upon his clients. The Pleader thought erroneously that the application filed by him was invalid, because the *vakalatnama*, which authorised him to act, did not contain his name.

JUDGMENT.—This is an appeal by the decree-holders, whose application for execution has been rejected by both the lower Courts on the ground that the application, which was filed on the last day of the period of limitation, was filed by a Pleader who had no authority to do so. The application for execution was filed on 24th April 1914 by Babu Srish Chandra Guha, representing himself as Pleader for the decree-holders. On that application notices were ordered to issue and the judgment-debtors appeared on 27th May and took time to file their objections. That time was extended and eventually on 9th June 1914 the judgment-debtors objected that the Pleader for the decree-holders had no authority to act. On the very next day the decree-holders filed another *vakalatnama* in favour of the Pleader. When the matter came before the Subordinate Judge, as appears from the order of 17th June 1914, Babu Srish Chandra Guha, the Pleader for the decree-holders, admitted that the petition for execution of the decree was filed by him without authority and that the case should be dismissed. The case was accordingly dismissed. From that order the decree-holders filed an appeal to the learned District Judge, who held that the *vakalatnama* was not a sufficient authority to the Pleader and that, therefore, the application for execution was not duly presented. He accordingly dismissed the appeal. The learned District Judge was referred to the

(1) 5 Ind. Cas. 532; 11 C. L. J. 285; 37 C. 399.
(2) 23 Ind. Cas. 464; 36 A. 46; 11 A. L. J. 1015.

case of *Chhayunnessa Bibi* v. *Basirar Rahman* (1), but he distinguished that case on the ground that the authority there was a *mukhtearnama* where as in this case it was a *vakalatnama*. Having regard to the facts in the two cases, there does not appear to us to be any substantial distinction between the two, and this was very properly conceded by the learned Pleader for the respondents In that case the Mukhtear was empowered by a *mukhtearnama* which did not contain his name and the same is the case with regard to the Pleader before us. It would appear from the *vakalatnama* that it was merely a clerical error. The *vakalatnama*, as is so often the case, is written out in the names of five Pleaders but the name of Srish Chandra Goha does not appear among them. Overlooking this he appears to have accepted the *vakalatnama* as if his name was contained in it, and he has written his acceptance on the back. He is the only Pleader who has accepted it and he acted as if he was the only Pleader engaged. We think we may safely presume that he was engaged by the decree-holders in this matter. There is certainly no evidence to the contrary; nor did the respondents take the objection before the lower Court that he had never been in fact authorized to make the application. The learned Pleader for the respondents had cited the case *Mohammad Ali Khan* v. *Jasram* (2), in which no doubt a contrary opinion was arrived at. But we think we ought to follow the case decided in our own Court if that is, as we think, indistinguishable from the present. We think the simplest course will be to allow this appeal set aside the orders of both the Courts below, and allow the amendment of the *vakalatnama* by the insertion of the name of Babu Srish Chandra Guha along with the Pleaders therein named. Under the circumstances, we make no order as to costs.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2093 OF 915.

July 19, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

Maharaja BIRENDRA KISHORE MANIKYA *Bahadur*—PLAINTIFF—APPELLANT

versus

AHAMUD ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (*VIII of* 1885), *ss.* 161, 167—*Assignment of portion of rent payable to landlord tenure-holder, whether incumbrance.*

The holders of a tenure, who had granted a *miras* (under-tenure) of the entire tenure at a permanent rent of Rs. 45, sold by a conveyance to the *mirasdar* (under-tenure-holder) their right to receive rent to the extent of Rs. 33 out of the Rs. 45 reserved as the *miras* rent, describing it in the conveyance as their *malikana masahara*. The tenure was sold in execution of a rent decree and the purchaser brought a suit for rent against the *mirasdar*, claiming the full yearly rent of Rs. 45 originally reserved as the *miras* rent:

Held, that what was assigned to the *mirasdar* by the conveyance was a portion of the rent payable to the holders of the tenure for the *miras* and not a portion of the tenure itself, and as such the assignment was an incumbrance within the meaning of section 161, Bengal Tenancy Act, which it was necessary for the auction-purchaser to have annulled by a notice under section 167 of the Act before he could avoid it. [p. 689, col. 1.]

Appeal against the decree of the Subordinate Judge, Tipperah, dated the 22nd May 1915, confirming that of the Munsif, Comillah, dated the 3rd April 1914.

Babu *D. N. Chuckerbutty* (with him Babu *Romesh Chandra Sen*), for the Appellant.

Babu *D. L. Kastgir*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for rent under the following circumstances.

It appears that a *brahmattar* tenure was held by one Golak and Chandratarn within the *zemindari* of the Maharaja of Tipperah. The latter brought a suit and obtained a decree for resumption of the *lakhraj* against Golak in the year 1862, but no rent was assessed on the tenure at the time. On the 27th March 1866, Golak and Chandratarn granted a *miras* to two persons at a permanent rent of Rs. 45. The latter sold the *miras* to one Abkjan Bibi on the 28th February 1871. On the 23rd August of the same year, Golak and Chandratarn sold

the right to receive rent to the extent of Rs. 33 out of the Rs. 45 reserved as the *miras* rent, which was described in the conveyance as *malikana masahara*, to the then holder of the *miras*, Abkjan Bibi. Subsequently in the year 1875, the Maharaja sued Golak, Chandratarn as well as Abkjan Bibi for assessment of rent. The suit was dismissed by the Court of first instance but was decreed on appeal against Golak and Chandratarn only and was dismissed against Abkjan on the ground that she being an under tenant, she ought not to have been made a party to the suit. In that suit not only was the rent assessed but the Maharaja obtained a decree for arrears of rent, and in execution of that rent decree, the tenure held by Golak and Chandratarn was sold and purchased by the decree-holder, the Maharaja himself, in 1888. In 1893 a notice under section 167 of the Bengal Tenancy Act appears to have been served upon the plaintiffs, who are the heirs of Abkjan. No suit, however, was brought by the Maharaja to recover *khas* possession of the *miras*. He dispossessed the *mirasdar* and took possession himself. Thereupon the defendants brought a suit against him for declaration of their *miras* title and the suit was decreed. The question of rent, however, was not decided in that litigation.

The present suit was instituted by the Maharaja on the 6th February 1913 for recovery of rent at the rate of Rs. 45 against the defendants who represented Abkjan, the *mirasdar*. The defence was that by the *kobala* by which the *malikana* was sold to Abkjan on the 23rd August 1871, the rent of the *miras* had been reduced from Rs. 45 to Rs. 12; that Golak and Chandratarn, the landlords, had not realised rent far more than Rs. 12 since the date of that conveyance and that in any case the encumbrance not having been annulled, the Maharaja was not entitled to get anything more than Rs. 12 as rent of the *miras*. The Court below has given effect to these contentions of the defendants and the plaintiff has appealed to this Court.

The question involved in the appeal turns upon the determination of what was transferred by the conveyance dated the 23rd August 1871. The *kobala* states that it was a sale of *malikana masahara* of the permanent *mokurrari jama* (the *miras*), and it purports to convey the profits to the extent of Rs. 33 per year out of the fixed *mokurrari* annual profit or rent of Rs. 45 which is described as the annual *malikana*. It further states that the purchaser on being entitled to the said *malikana* of Rs. 33 in the right of the vendors will continue to enjoy the same down to their heirs with the right of gift and sale. The concluding paragraph of the *kobala* says that after deducting Rs. 33, the profits sold to the *mirasdar*, the latter would pay to the vendors and their heirs a *malikana* of Rs. 12 only and that the latter shall not be entitled to claim more than the said *jama* of Rs. 12.

We do not think that there was any reduction of the *jama* of the *miras* to Rs. 12, The terms of the document which we have quoted above go to show that there was a transfer of a portion of the rent or profits receivable from the *mirasdar*, although the effect of such transfer was that the *mirasdar* became thenceforth liable to pay an annual rent of Rs. 12 only to the vendor. Then the question is whether there was any transfer of the *lakhiraj* right, or merely an assignment of rent to Abkjan Bibi. There is nothing in the document to show that any portion of the resumed *lakhiraj* was transferred.

It is contended, however, before us that the tenure having been let out in *miras* settlement permanently, the interest of the landlord was really nothing more than the right to receive rent from the *mirasdar*, so that Rs. 45, which is referred to in the document as the *malikana*, represented the entire interest which the landlord had in the property and that, therefore, when the *brahmattardars* sold Rs. 33 *malikana* out of Rs. 45, they intended thereby to transfer their interest in the tenure to the extent of Rs. 33. But, in the first place, there is not a single word in the document showing that the right of the vendors in the property itself was going to be transferred. If it was intended to transfer any portion of the property, one would have expected the boundaries of the property and the share which was transferred, stated in the document. Moreover there is nothing in the *kobala* to show that the purchaser of the *malikana* to the extent of Rs. 33 was to be liable for any portion of the head rent, that is, the

rent payable to the Maharaja. It is true that the rent had not been assessed at that time. But the *lakhiraj* had already been resumed by the Maharaja and the parties surely expected that the rent would be assessed on the property: and if there was a transfer of a portion of the property itself, meaning thereby the invalid *lakhiraj* property, there would have been some provision in the *kobala* for the purchasers being made liable for a part of the rent which might have to be paid to the Maharaja. It is contended that notwithstanding the form in which the property was conveyed and the expressions used in the *kobala* there was really a transfer of a portion of the property to the extent of 33/45; that the defendants, therefore, stood in the position of co-sharers of the *mirasdars* Golak and Chandratarn; and that their interest also passed by the sale held in execution of the rent decree at which the plaintiff purchased, and in that case it was not a mere encumbrance within the meaning of section 161 of the Bengal Tenancy Act.

It appears, however, that the suit by the Maharaja in 1875 against Golak, Chandratarn and Abkjan was instituted after Abkjan had purchased the *malikana* for Rs. 33. The suit was dismissed as against her on the ground that she was an under-tenant under Golak and Chandratarn, so that it was decided between the parties, so far back as 1875, that Abkjan's interest was merely that of an under-tenant, although it appears that she produced the *kobala* by which she had purchased the *malikana* from Golak and Chandratarn.

For all these reasons we are of opinion that Abkjan had not purchased any portion of the tenure itself but was an assignee of a portion of the *mirs* rent payable to the *lakhirajdars* Golak and Chandratarn. This assignment of a portion of the rent, we think, was an encumbrance within the meaning of section 161 of the Bengal Tenancy Act and that being so, it was necessary for the plaintiff to have it annulled under the provisions of section 167 of the Bengal Tenancy Act. That was not done. The plaintiff cannot, therefore, recover more rent than what Golak and Chandratarn had been realising before the sale at which the plaintiff purchased.

The appeal accordingly fails and is dismissed with Costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 147 OF 1916.

June 5, 1917.

Present:—Mr. Justice Maung Kin.

PHAUNG THA RHI—APPLICANT

versus

MI ME BAW—RESPONDENT.

Maintenance—Father, whether bound to pay for medical attendance of child.

A father who is paying maintenance for his child under the orders of a Court is not bound to defray the charges for the medical attendance of the child, unless he has expressly or impliedly contracted to pay the same. [p. 689, col. 2.]

Mr. *Kyaw Htoon*, for the Applicant.

JUDGMENT.—Mi Me Baw sued her former husband Phaung Tha Rhi for Rs. 17.4.0, the amount of the medical bill tendered by the medical attendance of her son by the defendant. The parties had been divorced, their son being taken by the mother while the father promised to pay her Rs. 10 per month for the maintenance of the child. The child fell ill and a doctor attended on him and then presented the above bill. According to the doctor he has been paid Rs. 6 by the plaintiff and there still remains Rs 11.4 0 unpaid. I do not understand how she came to sue for 17.4.0 when she had paid only Rs. 6. She cannot sue for what she has not paid or for what she has paid, because the latter amount must have come out of the monthly allowance. Even if she had paid the whole amount out of her own pocket, the monthly allowance having been spent on other requirements of the boy, there is no obligation on the part of the father to pay fees for medical attendance, unless he has expressly or impliedly contracted to pay the same.

In *Mortimore* v. *Wright* (1) it was held that the moral obligation which a father is under to provide for his child imposes no liability to pay the debts incurred by the child and that he is not so liable, unless he has given the child authority to incur them or has contracted to pay them.

(1) (1840) 6 M. & W. 482; 9 L. J. Ex 158; 4 Jur. 405; 55 R. R. 704; 151 E. R. 502.

OLI SHA *v.* FARID SARDAR.

In *Fluck* v. *Tollemache* (2) it was held that a father is not bound to pay for clothes furnished to his son, without some contract, express or implied, on his part to do so.

In *Urmston* v. *Newcomen* (3) the question was whether a father deserting his infant child would be liable *in assumpsit* to a party who supplied the child with necessaries, no further proof of contract being given. It was held that no such action can be maintained, if the father had reasonable ground to suppose that the child was provided for.

The above authorities seem to me to be against the plaintiff, even if she could prove that, the monthly allowance not being available for the purpose of paying the bill, she had paid the whole of the amount of her own pocket.

The application is allowed and the decree of the lower Court is set aside. I shall, however, make no order as to costs of this application, as I think the defendant, being able to pay, as he is a well-to-do broker, should have considered himself morally bound to pay.

Application allowed.

(2) (1823) 1 Car. & P. 5; 28 R. R. 765.
(3) (1836) 4 Ad. & E. 899; 6 N. & M. 454; 5 L. J. K. B. 175; 111 E. R. 1022; 43 R. R. 514.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1046 OF 1914.

July 12, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

OLI SHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

FARID SARDAR AND OTHERS—PLAINTIFFS AND NILA SHAH AND OTHERS—DEFENDANTS RESPONDENTS.

Possession, suit for, on declaration of title—Defendant admitting land to be joint, but pleading separate title on allegation of partition—Burden of proof.

In answer to a suit by the plaintiffs for *khas* possession on declaration of their title to a two-thirds share of a land, on the allegation that they along with one of the defendants joined in purchasing certain lands which included the land in suit, the defendants alleged that the land had long ago been partitioned and that the disputed portion had fallen to their share:

Held, that the burden lay upon the plaintiffs to prove their title, notwithstanding the defendants' plea that the land was originally included within a joint property and on partition fell to their share. [p. 691, col. 2.]

Appeal against the decree of the District Judge, Rajshahye, dated the 31st March 1914, reversing that of the Munsif, Naogaon, dated the 10th February 1903.

FACTS material to the report will appear from the following extract from the judgment of the lower Appellate Court :—

"The question that arises in this appeal is whether the plaintiff, successor-in-interest of one Sabu, and one Hakim can get a declaration that they each have one-third share in the land in suit. The lower Court decided the case against them and they have appealed.

Plaintiff's case stated briefly was that in 1281 Nidhi, Sabu and Hakim of Gandharbapur came to the village of the lands in suit and jointly brought some land of three villages under cultivation. They had one-third share of these lands each while they were joint. Lands in suit were leased to the tenants defendants on two occasions.

Defence admits the arrival of the three men in 1281 and taking up lands but says that there were partitioned as soon as they came under cultivation, that is, in 1281 very soon after their arrival.

From the evidence of the original plaintiff and Mokim (successor of Hakim) the lower Court, putting plaintiff's case in the most favourable light, has found that both the cases as stated are incorrect and that in fact the partition took place gradually, *i.e.*, as land was cultivated, but that at any rate as all the other land was partitioned long before 1307 there is no reason to suppose that this small portion would have been left *ejmali* but that it must have been partitioned also. In coming to this last finding he shifted the burden of proof on to the plaintiff and under the circumstances I think he was not right in doing so.

The land having been originally joint the burden of proof was clearly on defendants to show that Nidhi got it on partition, but they have not been able to do so."

PROSUNNA DEB RAIKAT *v.* PANCHKOWRI MAJUMDAR.

Babu *Surendra K. Bose* (with him Babu *Phanindra Lal Moitra*), for the Appellants.

Babu *Bimal Chandra Das Gupta*, for the Respondents.

JUDGMENT.—It is common ground between the parties to this suit that three persons Nidhi, Suba and Hakim, who were related in some degree to each other, joined in purchasing in the year 1281 certain land, including the land in dispute. The plaintiffs, the respondents before us, are the representatives of Suba and Hakim. The representatives of Nidhi are described by the District Judge as *pro forma* defendants, but it appears from the judgment of the Munsif that they, as well as the tenant defendants, contested the suit.

The plaintiffs brought the suit for a declaration that they were entitled between them as heirs of Suba and Hakim to a two-thirds share of the disputed land and for *khas* possession to the extent of the share claimed. The defendants alleged that the land purchased in 1281 had long ago been partitioned and that the disputed land had fallen to Nidhi's share.

The suit was dismissed by the learned Munsif whose decree, however, was reversed by the learned District Judge on appeal. The respondent tenants claim under a settlement or under-settlements from Nidhi, and both the Courts have found that the lands originally purchased had been partitioned before these respondents were settled upon it and certainly long before 1307, the date to which the plaintiffs ascribed the lease of the *kha* land. Having come to that finding in agreement with the learned Munsif, the learned District Judge states the questions for decision as follows :—

"The point is, however, whether allowing that plaintiff's story as regards the partition is incorrect, there is anything to show that Nidhi or his successor got the lands in suit on partition."

Now, the plaintiff's story as regards the partition was that it took place in 1307 after the settlement of the disputed land with the respondent tenants. That story was clearly rejected and it is difficult to see why its rejection should shift the burden of proof on to the defendants in the suit. According to the ordinary rule, the burden was upon the plaintiffs to prove their title. The learned Judge, however, as is apparent from the mode in which he stated the point for decision, placed the burden on the defendants. That he did so is confirmed by his further observation that "the land having been originally joint, the burden of proof was clearly on defendants to show that Nidhi got it on partition but they have not been able to do so." We are of opinion that the learned Judge's mode of dealing with the burden of proof was erroneous.

Then the Judge goes on to say:—"Both sides clearly set up a false case: so it devolves upon the Court to extract as much truth as possible from the materials before it and plaintiffs no more than defendants can be confined to their original case."

The judgment, read as a whole, seems to us to show that if the Judge had recognised that the burden of proof lay on the plaintiffs, he could not have arrived at a decision in their favour.

In the circumstances, we are of opinion that it would be idle to remit the appeal to be re-heard and that the course that we ought to take is to set aside the judgment and decree of the District Judge and restore the judgment and decree of the Munsif with costs of this Court and of the lower Appellate Court. We order accordingly.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1450 OF 1915.

February 14, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

Kumar PROSUNNA DEB RAIKAT—PLAINTIFF—APPELLANT

versus

PANCHKOWRI MAJUMDAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Tenancy, sub-division of, whether creates new tenancies—Intention of parties.

PROSUNNA DEB RAIKAT v. PANCHKOWRI MAJUMDAR.

The mere sub-division of an old tenancy into several tenancies with apportioned rents is not sufficient to create new tenancies. The answer to the question whether new tenancies have been created by the sub-division depends upon the intention of the parties. No inflexible rule apart from intention can be laid down. [p 692, col. 2.]

Mulluk Chand Das v. *Satish Chandra Das*, 3 Ind. Cas. 306; 11 C. L J. 56; 14 C. W. N. 335, followed.

Appeal against the decree of the District Judge, Dinajpur, dated the 19th March 1915, reversing that of the Assistant Settlement Officer, Jalpaiguri, dated the 6th July 1914.

FACTS of the case appear from the judgment.

Babu *Dwarkanoth Chuckerbutty* (with him Babu *Upendra Lall Roy*), for the Appellant.—The tenancy in question was sub-divided in 1868 and so the original tenancy, which was found to have been created before the date of the Permanent Settlement, came to be held at an apportioned rent. The sub-division of the original tenancy in 1868 created a new tenancy. The learned Judge has reversed the decision of the Assistant Settlement Officer on the strength of the ruling reported as *Bisseswar Ray Chowdhry* v. *Rajenda Kumar Singha* (1), but clearly *Bisseswar Ray Chowdhry* v. *Rajenda Kumar Singha* (1) has no application to the facts and circumstances of the present case.

Babu *Brojo Lall Chuckerbutty* (with him Babu *Bhupendra Chandra Guha*), for the Respondents.—There is no question of separate tenancy here. The other side argues on a footing not covered by the pleadings. Can the presumption be got rid of by reason of the sub division in 1868 of the original tenancy, which was created before the Permanent Settlement came into existence? The other side says there was sub-division and it strongly relies on that, but it has not proved intention. *Mulluk Chand Das* v. *Satish Chandra Das* (2) shows that there must be a clear finding as to the intention of the parties as to whether they wanted the creation of new tenancies or not. In any event, under the circumstances, there ought to be a remand.

Babu *Dwarkanath Chuckerbutty* was not called upon to reply.

(1) 25 Ind Cas. 228; 18 C. W. N. 949.
(2) 3 Ind. Cas. 306; 11 C. L J. 56; 14 C. W. N. 335.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision dated the 19th March 1915 of the learned District Judge of Dinajpur sitting as a Special Judge appointed under the provisions of the Bengal Tenancy Act, reversing the decision of the Assistant Settlement Officer of Jalpaiguri. The proceeding which was before the learned Judge was a proceeding on an application made for assessment of rent. The defence was that the rent was not liable to enhancement. It has been found that originally the tenancy was created before the date of the Permanent Settlement. The evidence showed and it was the common case that in the year 1868 the tenancy was sub divided and that, on that sub-division, the origical tenancy came to be held at an apportioned rent. The Assistant Settlement Officer, having regard to the decision of this Court in existence on the date of the hearing of the application, namely, a decision of Mr. Justice Sharfuddin and Mr. Justice Coxe, came to the conclusion that a mere sub-division was sufficient to create a new tenancy. That case, after the date of the decision of the learned Assistant Settlement Officer, received judicial comment in the case of *Bisseswar Ray Chowdhry* v. *Rajenda Kumar Singha* (1), and the learned Special Judge applying that case has reversed the decision of the Assistant Settlement Officer. In my opinion, the learned Special Judge in reversing the decision of the learned Assistant Settlement Officer failed to make a material finding. The true rule is laid down, I think, in the case of *Mulluk Chand Das* v. *Satish Chandra Das* (2), and the rule that is laid down there is this: that when lands of a tenancy have been sub divided, if a question arises whether new tenancies have been created, the answer must depend upon the intention of the parties. No inflexible rule apart from intention can be laid down It was, therefore, essential for the learned District Judge to come to a finding whether the parties intended that, when this tenancy was sub-divided in 1868, the old tenancy should exist with the rent apportioned or whether what was done amounted to the creation of four new tenancies. The learned District Judge having failed to come to any finding

on that part of the case, his decree must be set aside and the case must go back to him to re-hear the appeal and make a proper finding as to what was the intention of the parties when the tenancy was sub-divided and then to make a proper decree according to law. Costs will abide the result of the re-hearing before the learned District Judge.

RICHARDSON, J.—I agree.

Case sent back.

PATNA HIGH COURT.
FULL BENCH.
CIVIL REFERENCE No. 17 OF 1917.
July 3, 1917.
Present:—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Chapman and Mr. Justice Jwala Prasad.
MOHAMAD SADIK—PLAINTIFF—APPELLANT
versus
AMIYA NATH DUTT—DEFENDANT—RESPONDENT.

Stamp Act (II of 1899), s. 2 (5)—Bond or promissory note—Attestation—Ambiguity—Construction of document—Evidence—Penalty.

A document whereby a person has obliged himself to pay money to another and which is neither payable to order or bearer nor attested by a witness is not a bond within the meaning of section 2 (5) of the Stamp Act.

Where the question is whether a document is a bond or a promissory note within the meaning of the Stamp Act and an ambiguity arises as to its attestation by a witness, it is permissible to look only at the document itself. Evidence cannot be referred to for the purpose of determining the character of the document.

Where a question of penalty is involved in the matter of the stamping of an ambiguous document and there can be two alternative explanations relating to the character of the document, the one more favourable to the executant should be preferred.

Civil reference made by the Subordinate Judge, Cuttack.

Mr. *Sultan Ahmed*, Government Advocate, for the Crown.

JUDGMENT.—This is a reference under section 60 of the Indian Stamp Act. The learned Subordinate Judge making the reference suggests that the stamp duty payable upon the instrument is that payable upon a bond. A bond has been interpreted in the Act to include, among other things,

an instrument attested by a witness not payable to order or bearer, whereby a person obliges himself to pay money to another. The document is an instrument whereby a person has obliged himself to pay money to another and it is not payable to order or bearer. In order to determine whether it is attested by a witness or not it is permissible to look only at the document itself. Evidence cannot be referred to. At the foot of the document there occur the letter and words "W by Chintamon Jena, Mirya Bazaar, Cuttack" with the date. "W by" may mean either written by or witnessed by. Of these two possible alternatives that more favourable to the executants must be preferred, for a question of penalty is involved. We accordingly adopt the alternative "written by." The occurrence of the words "written by" followed by a name affords no foundation for saying that the instrument has been attested by a witness. It is probably merely the certificate of the scribe that the document was written by him. This view is supported by the fact that this writing occurs at the bottom of the document and not at the top where the signatures of the executants are. We find that the document was not attested by a witness and we accordingly decide that the instrument is not a bond and that the stamp of one anna which has been affixed to it is sufficient.

Reference answered affirmatively.

CALCUTTA HIGH COURT.
APPEAL FROM ORIGINAL DECREE No. 515 OF 1914.
June 21, 1917.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.
Srimati SURAJUBALA DASSI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
JAGESWAR RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7, cl. IV (f)—Administration and accounts, suit for—Court-fee payable.

A suit for administration and accounts in respect of an estate is in essence a suit for accounts within the meaning of section 7, clause IV *(f)*, of the Court Fees Act, 1870. So the plaintiff in such a suit is

competent to value the claim for accounts approximately and to pay Court-fee thereon but is not bound to pay *ad valorem* Court-fee on the value of the estate. [p. 694, cols. 1 & 2.]

Appeal against the decree of the Officiating Subordinate Judge, second Court, Hooghly, dated the 24th June 1914.

Babu *Brojo Lal Chakraverty* (with him Babu *Biraj Mohan Mojumdar*), for the Appellants.

Babu *Mon Mohon Bose*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against an order of rejection of the plaint, in a suit instituted by her against the executors of the estate of her father-in-law for administration, for accounts and for other incidental reliefs. She stated that the value of the estate left by her father in-law was Rs. 30,000, but she valued the claim for accounts at Rs. 100. She paid Court-fees *ad valorem* on this sum of Rs. 100 and also paid an additional sum of Rs. 10 apparently on the ground that the claim for administration was incapable of accurate valuation, at least at that stage. The defendants contended that the Court-fee paid by the plaintiff was inadequate and that the suit could not consequently proceed. Their argument in substance was that, as for purposes of jurisdiction, the plaintiff had valued the suit at Rs. 30,000, she was bound to pay Court-fees upon that valuation. The Subordinate Judge thereupon framed an issue to the following effect: "Has the plaint been insufficiently stamped?" On the trial of this issue, he held that the plaint was insufficiently stamped and called upon the plaintiff to pay additional Court-fees of Rs. 965. This order was not carried out, with the consequence that the plaint was rejected. In our opinion the view taken by the Subordinate Judge cannot be supported.

The decision of the Bombay High Court, in the case of *Khatija* v. *Adam Husenally Vasi* (1), shows that a suit for administrations and account is in essence a suit for accounts within the meaning of section 7, clause IV (*f*), of the Court Fees Act, 1870 and that in a suit of this description the plaintiff is competent to value the claim for accounts approximately and to pay Court-fees thereon. Sir Basil Scott, C. J., pointed out that if ultimately a decree should be passed in favour of the plaintiff for a larger amount than that covered by the Court-fees already paid, the plaintiff would be precluded by the provisions of section 11 of the Court Fees Act from executing such decree until the fee payable on the whole amount of the decree had been paid. This view is confirmed by a reference to Form 43 of Schedule I of the Civil Procedure Code of 1908 and was adopted by this Court in *Sasi Bhushan Bose* v. *Manindra Chandra* (2), which arose out of a suit for administration and accounts brought by one of the creditors of a debtor against the trustee of his estate. A similar position had been accepted as sound in the earlier case of *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee* (3). We are clearly of opinion that adequate Court-fees had been paid upon the plaint, which could not consequently have been rejected.

The result is that this appeal is allowed, the order of the Court below set aside and the case remitted to the Subordinate Judge in order that it may be tried on the merits. An order will be made in favour of the plaintiff-appellant under section 13 of the Court Fees Act entitling her to obtain a return of the Court fees paid on the memorandum of appeal presented to this Court. The appellant is entitled to her costs both here and in the Court below. We assess the hearing fee in each Court at two gold *mohurs*.

Appeal allowed.

(1) 29 Ind. Cas. 949; 39 B. 545; 17 Bom. L. R. 574.

(2) 38 Ind. Cas. 835; 24 C. L. J. 448; 21 C. W. N. 310.

(3) 3 Ind. Cas. 247; 10 C. L. J. 503.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 65 OF 1917.

February 26, 1917.

Present:—Mr. Justice Beachcroft and Mr. Justice Walmsley.

BEHARI LAL BISWAS—PETITIONER

versus

NASIMANNESSA BIBI—OPPOSITE PARTY.

Patni Regulation (*VIII of* 1819), *s.* 13—*Lien of*

BEHARI LAL *v.* NASIMANNESSA BIBI.

depositor for rent paid to superior landlord—Transfer of Property Act (IV of 1882), s. 72, applicability of, to deposit under s. 13 of Regulation VIII of 1819.

The holder of a tenure under a *patni*, who is in possession under section 13 of Regulation VIII of 1819, has not a lien under that section for the amounts paid by him as rent to the superior landlord for the years during which he has been in possession, so that he is not entitled to add to his demand the amount of rent so paid. [p. 695, col. 2.]

Section 72 of the Transfer of Property Act has not given a new power to the mortgagee and is not applicable to such a case. [p. 696, col. 1.]

While the holder of a tenure under a *patni* was in possession of it under section 13 of Regulation VIII of 1819, the *patni* was sold under the Regulation and the purchaser offered to pay to the tenure-holder the amount still due to him out of his original deposit:

Held, that the purchaser of the *patni* was entitled to recover possession of it on re-payment only of the sum which was still due to the tenure-holder out of his original deposit, but it was not necessary for him to re-pay the amounts of rent paid by the tenure-holder to the superior landlord for the years during which he was in possession, for the tenure-holder had no right to retain possession until he had recouped himself for such payments of rent. [p. 696, col. 1.]

Rule against the order of the District Judge, Nadia, in Miscellaneous Appeal No. 52 of 1916.

Babu *Provas Chandra Mitra*, (with him Babu *Tarakeswar Pal Choudhuri*), for the Petitioner.

Babu *Ram Chandra Majumdar*, (with him Babu *Probodh Chandra Chatterjee*), for the Opposite Party.

JUDGMENT.

BEACHCROFT, J.—The petitioner is the holder of a tenure under a *patni* tenure. In 1309 in consequence of a default by the *patnidar* the petitioner deposited the *patni* rent in order to save his tenure and was put in possession of the *patni* under section 13 of the Patni Regulation to discharge his lien. The interest of the superior landlord was subsequently transferred and in May last the *patni* was sold at the instance of the new landlord, inspite, the petitioner says, of his having deposited the amount due as *patni* rent. The petitioner has brought a suit to have the *patni* sale set aside and pending suit applied for an injunction to restrain the opposite party, the purchaser of the *patni*, from taking possession.

The Munsif issued an injunction as prayed, but on appeal the District Judge ordered the injunction to be dissolved on the opposite party depositing, as she offered to do, the amount still due to the petitioner out of his original deposit, which he says has not yet been realised. The petitioner has obtained this Rule calling on the opposite party to show cause why the District Judge's order should not be set aside and why an injunction should not issue.

The grounds urged in support of the application are shortly that the petitioner has been in possession of the *patni* ever since 1909, that the balance of convenience is in favour of his being retained in possession, because not only has he not succeeded in fully collecting rent from the tenants, but as he has been paying the superior landlord's rent for a number of years he has to recoup himself for such payments, which amount to something like Rs. 10,000, and he is entitled to retain possession of the *patni* until he has recouped himself, and finally, that if he succeeds in his suits he will be very much embarrassed and there will be a serious complication of accounts if he is dispossessed now.

The last argument may be applied with equal force if the opposite party is successful in the suit. She has already been kept out of possession for nearly a year since her purchase and will shortly again have to pay the *patni* rent, while up to date she has had no return on her purchase money.

Prima facie the petitioner's rights have been secured by the order which the learned Judge has made. Under section 13 of the Patni Regulation the defaulter can recover his tenure on re-payment of the advance made with interest, or on proof that the advance has been realised from the usufruct. But an attempt has been made, relying on the provision in clause 4 of section 13, to the effect that the person making the advance has a lien as if the loan had been made on mortgage, to establish the position that the person making the advance is entitled to add to his demand the rent paid to the superior landlord for the years during which he has been in possession. The argument is based on section 72 of the Transfer of Property Act, which declares the right of a mortgagee to take the necessary steps to preserve the mortgaged property. An exactly similar attempt to add payments on account of the *patni* rent to the debt was made in the case of *Lala Bharub Chandra Karpur* v. *Lalit Mohun Singh* (1), and proved unsuccessful. It is argued

(1) 12 C. 185; 6 Ind. Dec. (N. S.) 126.

for the petitioner that the incidents which gave rise to that suit occurred before the passing of the Transfer of Property Act, and, therefore, that decision must be taken to have been modified by section 72 of the Act. I am not aware that that section has given a new power to the mortgagee in possession, and the same view of section 13 of the Patni Regulation was taken in *Ramjiban* v. *Taj-ud-din* (2) and *Jakhomull Mehera* v. *Saroda Prosad Dey* (3).

For the purposes of this Rule it is not necessary to say more. I must, however, guard myself from being understood to hold, because I have dealt with the merits, that the application is maintainable under section 115, Civil Procedure Code. The opposite party objected that it was not, but in the view which I take of the merits of the application it is unnecessary to express any opinion on that point.

I think the Rule should be discharged with costs, five gold *mohurs*.

WALMSLEY, J.—I agree.

Rule discharged.

(2) 9 Ind. Cas. 489; 15 C. W. N. 404.
(3) 7 C. L. J. 604.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 77 OF 1916.
May 30, 1917.
Present:—Mr Justice Maung Kin.
P. T. CHRISTENSEN—APPELLANT
versus
J. H. CASTOR—RESPONDENT.

Defamation—European called "native"—Journalistic communication termed "rubbish"—Evidence Act (I of 1872), s. 55—Character, evidence as to, relevancy of.

Calling an European or Anglo-Indian a "native" is not defamatory, though it may be grossly abusive. [p. 696, col. 2.]

To describe a journalist's communication as rubbish is defamatory, because the imputation conveyed by the word affects prejudicially his capacity as a journalist. [p. 696, col. 2]

In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant, but evidence may be given only of general character and not of particular acts by which character is shown. [p. 697, col. 2.]

Mr. *McDonnell*, for the Appellant.

Mr. *Wiltshire*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for damages for defamation.

The defamatory matters complained of are contained in the articles marked Exhibits A, B, C and D.

The finding of the lower Courts is that all the four articles contain defamatory statements of and concerning the plaintiff. But in regard to the article contained in Exhibit D the Divisional Court is of the opinion that it did not exceed fair comment upon plaintiff's conduct.

Before me there is no question that Exhibit A is not defamatory. But it is contended that Exhibits B and C are not.

In Exhibit B the plaintiff is described as a "native." It is contended that it may be insulting to call an European or Anglo-Indian a "native", but it is certainly not defamatory within the meaning of Explanation 4 to section 499 of the Indian Penal Code. According to Gour, it would seem that if a person were to call an European an Eurasian or half-caste or a pickaninny, the latter could not be said to suffer in his caste, though the epithet might be resented by him as insulting to him. I would, therefore, hold that Exhibit B is not defamatory, though it may be grossly abusive.

In Exhibit C the defendant describes the plaintiff's communications as "rubbish." It appears the plaintiff had addressed the defendant certain communications and the latter had replied by inserting a paragraph in his newspaper in which he said that they were rubbish To describe a journalist's communications as "rubbish" must be held to be defamatory, because the imputation conveyed by the word affects, and that prejudicially, the plaintiff's capacity as a journalist.

The next point argued is that the lower Appellate Court erred in not remanding the case to the Court of first instance to have evidence recorded on certain points affecting the plaintiff's conduct as a journalist, namely, (1) the allegation in paragraph 6 (1) of the written statement regarding the Moulmein *ghanywallahs'* strike of 1913, and (2) that regarding a letter said to have been written by the plaintiff to one A. Mamsa, inasmuch as these were matters which, if proved, will go in mitigation of damages. The contention in regard to the second point relating to the letter to Mamsa was given up after some argument, as it was discovered

on a reference to the letter, which was on the file but which Counsel for defendant had not read, that it contained nothing which might cause any harm to the plaintiff's character. So that we have only left one particular, the plaintiff's conduct in connection with the *gharrywallahs'* strike. The Court of first instance rejected evidence on this point following *Scott* v. *Sampson* (1), which lays down that particular instances of plaintiff's bad conduct prior to the date of the libel cannot be proved, though the fact that he had a general bad character may be given in evidence in mitigation of damages. In support of his contention, Mr. McDonnell cited *Laidman* v. *Hearsey* (2). That was a criminal prosecution in which the plaintiff was a judicial officer. The alleged libel accused him of (1) having, upon a particular occasion, used abusive language to certain respectable native litigants appearing before him in Court, and (2) having upon other occasions (not specified) treated other respectable natives (not named) "in a similar manner." At the trial the complainant was asked by the defendant's Counsel: "Will you swear that you have never in Court used any offensive expression to any native of the country?" and the question was allowed, notwithstanding strenuous protests on the part of the complainant's Counsel. Later, when the 1st witness for the defence was in the witness-box, the defence Counsel asked the question: "Have you ever heard the complainant use abusive language in Court to natives who had to appear before him?" Counsel for the complainant objected. The Court held that the question must be allowed, *first*, because it relates to the question, what is the reputation which the defendant is said to have harmed; and, *secondly*, because it must be gathered from the document containing the alleged libel as a whole, whether it shows a malicious intention or not. In the course of the argument Counsel for the complainant said:—"Assuming that a man's character is bad, that cannot justify another in making false statements concerning him." The learned Judge (Petheram, C. J.) replied: "If this were a civil action, the case might be different. But here you put the law in motion against a man whom you accuse of committing a crime, and with a view to his punishment." So that apparently the learned Judge considered that the rule might be different in a civil case. The case before me is a civil case. I cannot, therefore, follow a ruling come to having regard to the fact that the case was a criminal and not a civil case. *Scott* v. *Sampson* (1) has been followed in *Wood* v. *Cox* (3) and *Mangena* v. *Wright* (4), and section 55 of the Evidence Act appears to me to be to the same effect as *Scott* v. *Sampson* (1), as it provides that (in civil cases) the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant but that evidence may be given only of general character and not of particular acts by which character is shown. I would, therefore, hold that the evidence sought to be admitted of the character of the plaintiff in connection with the particular occasion, the *gharrywallahs'* strike, is not admissible.

The next point urged is that the Divisional Court should have remanded the case to the Court of first instance to have evidence of general bad character admitted, inasmuch as it held that it was wrong to disallow the question put to Mr. Stewart, a witness for the defence, as to what was the plaintiff's general reputation in Moulmein as a journalist. I do not find the plaintiff asked a single question as to his general reputation as a journalist and the point was raised only for the first time, when Stewart appeared as a witness for the defence. For this reason alone I would reject the question.

Lastly, it is contended that the Divisional Court was wrong in not holding that the plaintiff's own admission that he had written a letter to himself and published an editorial note thereon shows that he was guilty of gross professional misconduct as a journalist. The learned Judge of the Divisional Court observes on this part of the case:—"The ruse was a harmless one and done with the object of being able to write an editorial note in reply, and I am unable to hold that it amounted to professional

(1) (1882) 8 Q. B. D. 491; 51 L. J. Q. B. 380; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408.

(2) 7 A. 906; A. W. N. (1885) 272; 4 Ind. Dec (N. S.) 994.

(3) (1887) 4 T. L. R. 652 at p. 655.

(4) (1909) 2 K. B. 958 at p. 979; 78 L. J. K. B. 100 L. T. 960; 53 S. J. 485; 25 T. L. R. 534.

misconduct." I do not think that there are sufficient materials upon which the Court can say with any decree of certainty that the plaintiff's conduct in this respect is unprofessional. However that may be, his admission of having done one act which may be unprofessional according to the most scrupulous of journalists cannot be pleaded in justification of a libel which is contained in Exhibit A, which Mr. McDonnell admits is correctly described by the learned Divisional Judge as follows:—"In Exhibit A the appellant clearly implied that respondent was *habitually* guilty of dishonourable and unprofessional conduct and was *by habit* a journalistic liar and a writer of low and scurrilous articles." The defendant is bound to prove that the whole of the libel is substantially true in order to succeed on the plea of justification.

The defendant has failed on all the points raised before me except that as to Exhibit B, which I have held is not defamatory. The question then arises as to whether the damages awarded by the lower Courts should be reduced. I think Exhibit B is the least important part of the attack on the plaintiff and there is no reason to think that the lower Courts would have granted less than they did if they had been of the same opinion as this Court in the matter of this Exhibit.

I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2382 OF 1915.

June 18, 1917.

Present:— Mr. Justice Fletcher and Mr. Justice Newbould.

SURENDRA KRISHNA ROY CHOUDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

PEARY MOHAN ROY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 106, suit under—Possession—Title, question of, whether can be gone into.

In a suit under section 106 of the Bengal Tenancy Act where the dispute is between rival proprietors, the question of possession is the only matter that should be gone into. As regards other parties' claim the Court is not limited to the question of possession. [p. 700, cols. 1 & 2.]

Appeal against the decree of the District Judge, 24-Pergannahs, dated the 25th June 1915, affirming that of the Settlement Officer of that District, dated the 14th April 1914.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court: —

"In the suit out of which this appeal has arisen the plaintiff Peari Mohan Roy sued under section 106 of the Bengal Tenancy Act for a declaration that the plaintiff himself was the sole holder of the lands in suit as auction-purchaser of the said lands sold in execution of a decree obtained upon a security bond, dated 30th November 1899; executed by defendant No. 7 in his favour.

"The defence of defendants Nos. 1 to 6 was that the security bond was superseded by a *kistibundi* which was alleged to have been executed by defendant No. 7 in favour of plaintiff on the 15th of *Falgun* 1314 and in consequence of this the plaintiff's decree in execution of which the plaintiff purchased became ineffectual and inoperative. They further contended that the security bond upon which the suit was based could not be considered as a mortgage bond and that defendant No. 7 had executed a mortgage bond along with his brother Probodh Chandra and his mother in their favour, and they thereupon obtained a decree on this mortgage-bond and in execution of this decree the disputed property was sold at auction and purchased by them and consequently they alone should be considered to be the holders of the property in question.

Now the facts would seem to be these:— There is a certain tenure which is owned by two brothers Sidheswar and Probodh. Peari Mohan Roy is the *zemindar*. Sidheswar was his *gomasta* and on the 30th November 1899 he executed the security bond in question in favour of the *zemindar*. This security bond hypothecated his property in so far as it would be liable for any defalcation or damage that he might cause to the *zemindar* up to the extent of Rs. 2,000. According to the appellants an account was taken from Sidheswar and it was found that he was indebted to the landlord and the appellants contend that an instalment mortgage-bond was taken

from Sidheswar in February 1908. The learned Settlement Officer has found, and I am not prepared to disturb his finding on this point, that it has not been proved that this instalment mortgage-bond was really entered into.

Then on the 12th July 1911 the plaintiff brought a suit on the security bond and obtained a decree and in execution of this decree the interests of Sidheswar in this property were sold in August 1912. Meanwhile Sidheswar and Probodh had mortgaged the same tenure in 1904 to defendants Nos. 1 to 6. Defendants Nos. 1 to 6 obtained a decree on their mortgage-bond and in execution sold the tenure and purchased it in May 1908 and are now in possession of the property.

"What the appellants now contend is, first of all, that a security bond is not a mortgage-bond. This point, however, I think, has been clearly decided by the terms of section 79 of the Transfer of Property Act. It was a bond for the enforcement of an engagement and is clearly a security bond. The only question is whether the security bond would take priority over the subsequent mortgage-bond. The security bond was executed in 1899 and the property was sold in execution of a decree obtained on it in 1912. The subsequent mortgage was taken in 1904 and the sale under it was held in 1908. The respondent's contention would be that his security bond took priority over the second mortgage. Section 79 provides that if a mortgage made to secure future advances, the performance of an engagement or the balance of a running account expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances and debits not exceeding the maximum though made or allowed with notice of the subsequent mortgage. Undoubtedly this security bond expresses the maximum and the only question would be whether the mortgagees of the second mortgage had notice of the existence of the security bond. If they had that notice their mortgage would be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum.

On this point the Judge on a consideration of the evidence held that the mortgagees had notice and, therefore, the former mortgage-bond will take priority over the second mortgage-bond to the extent of the maximum named in that bond and, therefore, the sale under the first mortgage-bond will take effect and operate over the sale under the second mortgage-bond. The appeal, therefore, fails and is dismissed with costs."

Dr. *Sarat Chander Basak* (with him Babu *Akhoy Kumar Banerjee*), for the Appellants.—The present appeal arises out of a proceeding under section 106 of the Bengal Tenancy Act regarding a dispute as to an entry in the Record of Rights. In a case for correction of entries in the Record of Rights, the case should not be converted into a title suit. Documents clearly show that my clients were in possession. The property belonged to defendant No. 7 and his brother. They executed a mortgage-bond in favour of the plaintiff on November 30th, 1899. On 12th July 1911 the plaintiff sued on this security bond and in execution of the decree purchased the property in August 1912. In 1904 this very property was mortgaged to defendants Nos. 1 to 6, who are appellants here. Defendants Nos. 1 to 6 bought this property in 1908 and obtained delivery of possession through Court. In the suit of 1911, the defendants Nos. 1 to 6 were not made parties, and they were in possession. Under the Statute they, if they knew, ought to have made defendants Nos. 1 to 6 parties; if they did not know, the appellants must have the right to redeem. They are the owners of the property subject to the first mortgage. The present case is a suit under section 106 of the Bengal Tenancy Act and the question is confined to possession only. Refers to *Aswini Kumar Aich* v. *Sarada Charan Basu* (1), *Ram Chandra Bhanj Deo* v. *Nanda Nandanananda Deb* (2). The Judge should not have gone into the question of title in a suit of this kind. The scope of section 106 is not to decide title as between rival claimants.

[Babu *Amarendra Nath Bose* (with him Babu *Upendra Narain Bagchi*), for the Respond-

(1) 37 Ind. Cas. 253; 24 C. L. J. 79 at p. 82.
(2) 20 Ind. Cas. 2-8; 18 C. W. N. 938; 19 C. L. J. 197.

ent, refers to *Pran Krishna Saha* v. *Trailakhya Nath Chowdhury* (3).]

Pran Krishna Saha v. *Trailakhya Nath Chowdhury* (3) is of no avail. Refers to *Kali Sundari Debya* v. *Girija Sankar Sanyal* (4), *Nilmoni Kumar* v. *Kedar Nath Ghosh* (5). The Rent Law does not permit a Settlement Officer to decide a question of disputed title. The authorities of this Court show that until a decree is obtained in my clients' presence, their possession cannot be disturbed. The appellants were not parties to the suit of 1911. The appellants' possession is not that of a trespasser until my decree is extinguished. I cannot be ousted, *vide Chinnu Pillai* v. *Venkatasamy Chettiar* (6).

[FLETCHER, J.—The sale is not absolute against your clients.]

But the question is—could such a decree be made in a suit under section 106 of the Bengal Tenancy Act?

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants against a decision of the learned Special Judge of the 24-Pergannahs sitting under the provisions of the Bengal Tenancy Act affirming the decision of the Settlement Officer at Alipore. The appeal arises out of a proceeding under section 106 of the Bengal Tenancy Act, and the only question raised in the case whether the Courts were limited to the question as to who was in possession and, having decided that point, whether they could go any further and adjudicate on the rights of the parties. I think on the question of possession there is a short answer, namely, that this point was not raised in either of the Courts below. It is quite true that an issue was settled as to who was in possession, but on appeal, before the learned Judge of the lower Appellate Court, it is quite clear that no stress was placed upon this question and the learned Judge did not deal with the case on that footing. I think that the authorities of this Court show quite clearly that where there are rival proprietors this question of possession is the only matter that should be gone into. As regards the other parties claiming, the Court is not limited to the question of possession [*vide Pran Krishna Saha* v. *Trailakhya Nath Chowdhury* (3)]. In this case the Court, not being limited to the question of possession, was entitled to go into the question as to the plaintiff having purchased in execution of a decree on his mortgage. It is said that these parties in the present case are, in fact, rival proprietors because the property is *brahmatter*; but that is not the meaning of the word within the meaning of the Bengal Tenancy Act or as it is understood in the Indian Courts.

The next point raises a matter that we cannot go into in this case. The plaintiff claims as the purchaser in execution of his mortgage decree and the defendants claim under a subsequent mortgage, although in the suit in execution of the decree in which the plaintiff purchased, the mortgagee under whom the defendants claim was not made a party. We cannot decide the rights of the parties in this case as to whether the plaintiff's case is barred by limitation or any other matter that Dr. Basak's clients may wish to raise either in a suit brought by themselves or in a suit brought by the plaintiff. This suit is limited to the question of amending the entries in the Record of Rights. That being the only point that this Court can go into in this case, all these poinst about the rights of the parties under different deeds and executions are not matters that should be touched or decided in the present case. All that we can say is that the learned Judge of the lower Appellate Court, on the authorities of this Court, came to a right conclusion. In that view, the present appeal fails and must be dismissed with costs.

NEWBOULD J.—I agree.

Appeal dismissed.

(3) 27 Ind. Cas. 883; 19 C. W. N. 911.
(4) 11 Ind Cas. 184; 15 C. W. N 974 at p. 975.
(5) 20 Ind. Cas. 151; 17 C. W. N. 750.
(6) 34 Ind. Cas. 507; 40 M. 77; 30 M. L. J. 347; (1916) 1 M. W. N. 245; 19 M. L. T. 21.

MASILAMANI MUDALIAR v. SETHUSWAMI AIYAR.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 30 OF 1916.

April 30, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Kumaraswami Sastri.

MASILAMANI MUDALIAR—RESPONDENT No. 2—APPELLANT

versus

SETHUSWAMI AIYAR AND ANOTHER—PETITIONER AND RESPONDENT No. 1—RESPONDENTS.

Limitation Act (IX of 1908), *Sch. I, Art.* 182—*Step-in-aid of execution—Oral application for execution*

In order that an oral application may be effective as a step-in-aid of execution, the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that, if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application or by reason of the Code or the rules requiring some further acts to be done before the main reliefs prayed for in the execution application could be granted or enforced. [p. 703, col. 2]

An application for execution of a decree by attachment and sale of the judgment-debtor's property was first made on 13th July 1911. Notice was ordered to issue for 12th August 1911. On that day the judgment-debtor did not appear and an attachment order was issued. The decree-holder failed to pay *batta* within the time allowed and the petition was dismissed on 26th August 1911. A fresh execution petition was presented on 12th August 1914:

Held, (1) that the utmost that could be presumed in such circumstances was that the decree-holder was present in Court on 12th August 1911 either in person or by Pleader and intimated his decree to proceed with the execution, and not that he made any oral application for further attachment; [p. 702, col. 1.]

(2) that even if he made an oral application on that date, it must be presumed to be an entirely superfluous petition and could not operate to save limitation. [p. 702, col. 1; p. 703, col. 1.]

Appeal against the order of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 203 of 1915, preferred against that of the District Munsif, Tanjore, dated 7th November 1914, in Execution Petition No. 526 of 1914, in Original Suit No. 379 of 1906, on the file of the Court of the District Munsif, Kumbakonam.

Mr. *K. R. Subbramania Sastri*, for the Appellant.

Mr. *K. Ramachandra Aiyar*, for the Respondents.

This appeal coming on for hearing on the 28th November 1916, and having stood over for consideration till the 12th December 1916, the Court delivered the following

JUDGMENT.

AYLING, J.—First respondent in this case is the assignee decree-holder in Original Suit No. 379 of 1906 on the file of the Court of the District Munsif of Kumbakonam, and the sole question for disposal is whether his Execution application (Execution Petition No. 526 of 1914) presented on 12th August 1914 was barred by Article 182 of the Indian Limitation Act, 1908 (Schedule I). The next previous application of which there is record was Execution Petition No. 385 of 1911, presented on 13th July 1911; but the decree-holder relies on the following circumstances to save limitation:—

(1) An oral application in aid of execution presumed to have been made on the 12th August 1911 in the course of the hearing of Execution Petition No. 385 of 1911.

(2) An alleged payment towards the decree on 17th August 1911.

As regards the first, the facts are simple. In Execution Petition No. 385 of 1911, the decree-holder applied for attachment and sale of the judgment-debtor's moveables after issue of the preliminary notice required by Order XXI, rule 22 of the Code of Civil Procedure. Notice was accordingly issued to the judgment-debtor for 12th August 1911. On that date as the judgment-debtor did not appear, attachment order was issued; but, as the decree-holder failed to pay *batta* within the time allowed, the petition was dismissed on the 26th August 1911. The Subordinate Judge says:—

"It seems to me, looking to the liberal spirit in which acts done by a decree-holder are viewed by the Madras High Court to operate as steps in-aid of execution [*vide Abdul Kadir Rowther* v. *Krishna Malamal Nair* (1)], it will not be wrong to hold that the decree-holder should be presumed to have made an oral application for issue of a warrant of attachment on 12th August 1911, and this was a step-in-aid of execution."

(1) 23 Ind. Cas. 533; (1914) M. W. N. 563; 38 M. 695; 1 L. W. 271; 26 M. L. J. 433.

Now, in my opinion, the utmost that can be presumed is that the decree-holder was present in Court on 12th August 1911, either in person or by Pleader, and intimated his desire to proceed with execution. He had already asked for attachment in his written application; and assuming that he repeated his request by word of mouth in Court, I am unable to see any ground for viewing this as a fresh step-in-aid of execution. The point is, not that the application was oral, but that it was the merest repetition, and an entirely superfluous repetition, of an application, which he had already made in writing, and which was pending orders of the Court. None of the cases relied on by the 1st respondent's Vakil seem to me to be of use to him. In the Calcutta Full Bench case, *Ambica Pershad Singh* v. *Surdhari Lal* (2), there was an application to issue proclamation nearly a year after the attachment, which indeed the judgment-debtor claimed to be no longer subsisting; and judgment of Garth, C. J., makes it quite clear that he held that, without such a fresh application, no further action should have been taken by the Court. In *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (3), the *batta* memorandum was accompanied by a written application; and the Court lays stress on the fact that the proclamation would not have issued if the *batta* memorandum had not been put in. *Abdul Kadir Rowther* v. *Krishna Malamal Nair* (1) is a case in which Sadasiva Aiyar and Spencer, JJ., held that an oral application by a decree-holder for an adjournment to enable him to adduce evidence was a step-in-aid of execution. This is a view, in which, speaking with all deference, I find it impossible to concur; and, if the facts of that case were similar to those of the present case, I should be inclined to make a reference to a Full Bench. Fortunately they are not: and with the general principle enunciated I have no quarrel, *i.e.*, if even an oral application is for an order which is really a step-in-aid, it may be treated as within the scope of Article 182 of the Indian Limitation Act. I am inclined to think, however, that such applications will be rare.

(2) 10 C. 851; 5 Ind. Dec. (N. S.) 569.
(3) 28 M. 399.

The most recent case, *Varadaraja Mudali* v. *Murugesam Pillai* (4), is cited chiefly for the proposition that Article 182 of the Indian Limitation Act, 1908, should receive a fair, liberal and not too technical construction so as to enable the decree-holder to obtain the fruits of his decree. I quite agree; but it seems to me that the danger is, not of too technical construction of the Article, but that the Courts, in their anxiety to prevent justice being defeated by technicalities, may introduce so much uncertainty, that it will be most difficult for any party to know whether execution of a decree is barred or not. Where the starting point is the recorded date of presentation of a formal application, we are on sure ground; but if any unrecorded oral intimation of the decree-holder's desire to proceed may be treated as such, the ascertainment of the period will be beset by extraordinary difficulties. I feel confident that nothing of the kind was contemplated by the Legislature and that there is nothing in the Act to support such a construction.

I would, therefore, hold that the presumed oral application of 12th August 1911 does not save limitation.

It then becomes necessary to consider the second point regarding which the Subordinate Judge decided against the decree-holder on the ground that the payment was not certified to the Court, and, therefore, under Order XXI, rule 2 of the Code of Civil Procedure, could not be taken into account.

The payment is set forth in column 5 of Execution Petition No. 526 of 1914, which was presented within 3 years of the date of the alleged payment. I see no reason why this should not be accepted as a certificate of payment under clause (1) of the rule; for nothing is prescribed in the rule as to the time within which or the manner in which the decree-holder must certify payment [*Vide Rajam Aiyar* v. *Anantharatnam Aiyar* (5) and *Lakhi Narain* v. *Ferlamani Dasi* (6)]. No doubt a Court will do well to carefully scrutinize evidence of

(4) 30 Ind. Cas. 707; 30 M. L. J. 460; 18 M. L. T. 313; (1915) M. W. N. 769; 39 M. 923.
(5) 31 Ind. Cas. 318; 29 M. L. J. 669; 18 M. L. T. 475; (1916) 1 M. W. N. 127.
(6) 27 Ind. Cas. 11; 20 C. L. J. 131; 18 C. W. N. cxcvi *note*.

payment reported in such circumstances, where the fact of payment is denied; but there is no reason why, if proved, such a payment should not be considered in the light of section 20 of the Indian Limitation Act.

I would, therefore, call for a finding on the following issue from the Court of the Subordinate Judge after taking evidence:

"Is the alleged payment of Rs. 25 by the judgment-debtor on 17th August 1911 true? and does it operate to save limitation under section 20 of the Indian Limitation Act?"

Two months will be allowed for submitting the finding and seven days for filing objections.

KUMARASWAMI SASTRI, J.—I agree and have little to add. I do not think that the *mere* oral repetition of a request contained in the execution application is a step in-aid of execution. Where, however, several reliefs are prayed for in the execution application, which the Court is not bound to grant concurrently, or, where an application to the Court is made, asking it to exercise its discretion in matters where it is not bound to grant the prayer asked for in the execution application as a matter of course, the fact that the relief asked for orally is already contained in the execution application, would not prevent the oral application from being effective as a step-in-aid of execution. Order XXI, rule 11 of the Civil Procedure Code, 1908, after providing for an oral application for execution at the time of the passing of the decree requires a written application containing the particulars specified in the order and specifying the mode in which execution is sought. Rule 176 of the Civil Rules of Practice, 1905, only enables a party to apply orally for orders which are necessary to give effect to or work out the prayers contained in the execution application without the necessity for putting in an application in writing for every small step necessary for realizing the fruits of a decree When the Code requires a written application for execution, it cannot be contended that a mere oral application would be a step-in-aid of execution, and where a written application is filed as required by the Code, an oral application to the same effect is a mere superfluity.

In order that an oral application may be effective as a step-in-aid of execution the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that, if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application, or by reason of the Code or the rules of practice requiring some further acts to be done before the main reliefs prayed for in the execution application could be granted or enforced.

As regards the payments acknowledged in the execution application, the decision of this Court in *Rajam Aiyar* v. *Anantharatnam Aiyar* (5) is clear, and I do not think that the payments can be ignored as not certified if they were as a matter of fact made. I agree with the order proposed by my learned brother.

———.

In compliance with the above order, the Temporary Subordinate Judge of Tanjore submitted the following

FINDING.—I am directed to record a finding after taking evidence on the following issue:—"Is the alleged payment of Rs. 25 by the judgment-debtor on 17th August 1911 true? And does it operate to save limitation under section 20 of the Indian Limitation Act?

* * * * *

I consider that the payment set up is not true and find the issue accordingly.

———

This appeal coming on for final hearing after the return of the findings of the lower Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings and as a result, set aside the order of the Subordinate Judge, and direct that the petition be dismissed with costs throughout.

Appeal allowed;
Execution Petition dismissed.

V. R. P.

SWARNA MOYI DASI *v.* GAYRATULLA SARDAR.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2373 OF 1915.

April 23, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

SWARNA MOYI DASI—DEFENDANT No. 3—APPELLANT

versus

GAYRATULLA SARDAR—PLAINTIFF, AND SRIDHAR MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Occupancy holding, non-transferable—Transfer of portion—Aandonment—Landlord, right of, re-entry of—Tenants holding undivided shares, position of.

So far as the tenants are concerned, an occupancy holding is one and an entire holding of a particular piece of land, though it may be that as between themselves the tenants are entitled in different and undivided shares to the land.

Where a *raiyat* transfers or abandons his undivided share in a non-transferable occupancy holding without parting with the remainder of the holding belonging to his co-sharers, the co-sharer landlord under whom that share was held cannot re-enter as there has been no abandonment of the holding.

Appeal against the decree of the Subordinate Judge, Jessore, dated the 7th June 1915, reversing that of the Munsif, Narail, dated the 26th January 1914.

FACTS of the case appear from the judgment.

Babu *Surendra Chunder Sen*, (with him Babu *Hamender Chunder Sen*), for the Appellant.—It is now settled law that if a *raiyat* of a non-transferable occupancy holding sells a portion of his holding, there can be no abandonment entitling the landlord to re-enter. To entitle the landlord to re-enter the transfer must be of the whole holding.

The defendant in this case has transferred his eight-annas undivided share in the non-transferable occupancy holding and is in occupation of the remaining eight annas on due payment of rent thereof, so on the authority of *Dayamoyi* v. *Ananda Mohan Roy* (1) the plaintiff landlord is not entitled to re-enter.

Babu *Gagan Chander Boral*, for Maulvi *A. K. Fazlul Haq*, for the Respondents.—In this case the finding of the lower Appellate Court is, that there has been an abandonment. The tenant actually refuses to pay rent, and has left the land transferred, so the landlord is entitled to re-enter. The question of abandonment is one of intention. If this intention of abandonment is clear the landlord is entitled to re-enter whether the abandonment is of a part or of the whole. The question of intention was not at all gone into in *Dayamoyi's* case (1).

JUDGMENT.—This is an appeal by the defendant No 3 against the judgment of the learned Subordinate Judge of Jessore, dated the 17th June 1915, reversing the decision of the Munsif at Narail. The suit was brought by a 8-annas co-sharer landlord to recover *khas* possession of his share in a non-transferable holding, on the ground that the original tenant had transferred that share to the appellant, the defendant No. 3, and abandoned the holding. The defendants Nos. 8 to 15 are entitled to the other 8-annas share of the holding, and it is not alleged in the plaint, nor is it found in the judgment, that the other 8 annas has been transferred by the tenant or that the tenant has abandoned that portion of the holding. The view that commended itself to the learned Judge of the lower Appellate Court is clearly wrong. He looks upon this undivided 8 annas or $\frac{1}{2}$ share as one holding belonging to the plaintiff and the remaining undivided 8 annas belonging to the defendants Nos. 8 to 15 as another holding. That is clearly wrong. As regards the tenant, the holding is one and an entire holding of a particular piece of land. It may be that different persons are entitled in different and undivided shares to the land as between themselves. But it not having been found and not having been alleged that the defendant No. 2, the original tenant, has parted with the other 8 annas of the holding belonging to the defendants Nos. 8 to 15, on the judgment of the Full Bench of this Court reported as *Dayamoyi* v. *Ananda Mohan Roy* (1), the tenant has not abandoned the holding so as to give the landlord a right to re-enter. In that view, the judgment of the learned Judge of the lower Appellate Court must be set aside and that of the Munsif restored. The plaintiff's suit is accordingly dismissed with costs in all Courts.

Appeal accepted.

(1) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52.

GAURI SHANKER JOSHI v. MANRAJ SHUKUL.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 519 AND 524 OF 1913.
MISCELLANEOUS APPEAL NO. 75 OF 1914.
June 29, 1917.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

GAURI SHANKER JOSHI—OBJECTOR—APPELLANT

versus

MANRAJ SHUKUL AND ANOTHER—PETITIONERS, SHAM CHAND OJHA—OBJECTOR—RESPONDENTS.

Probate and Administration Act (V of 1881)—Civil Procedure Code (Act V of 1908), O. I, r. 10—Will—Probate—Procedure—Discharge of caveat, when to be allowed—Death of one of two executors—Survivor, whether can proceed with Probate proceeding—Hindu Law—Succession—Bandhu—*Sister's son and maternal uncle, right of succession of, in preference to mother's sister's son.*

If one of two executors dies, the representation of the estate of the deceased and of the interests of the beneficiaries vests in the remaining executor. It is open to the caveators to proceed against him alone. [p. 706, col. 1]

There is no provision in the Probate and Administration Act for the discharge of a caveat. The only rule of procedure governing such a proceeding is Order I, rule 10, of the Civil Procedure Code. A caveat should only be discharged where it is shown that the caveator has no interest in the estate. [p. 706, col. 1.]

The petitioner in a Probate proceeding should at first produce substantial considerations upon which *prima facie* it can be held that the caveator cannot possibly have any interest which he claims, and upon the production of those considerations the caveator should be called upon to rebut the presumption arising from the evidence produced by the propounder. [p. 706, cols. 1 & 2.]

Under the Hindu Law the nearest *bandhu* succeeds. A sister's son and a maternal uncle are, therefore, preferred to a mother's sister's son [p. 710, col. 1.]

Appeal from a decision of the District Judge, Saran, dated the 18th August 1913

Messrs. *Pugh*, *Abul Hassan*, *Muhammad Mustafa Khan*, *Hem Chandra Mitra*, *B. N. Mitra* and *Khurshed Hasnain*, for the Appellant.

Syed *Hasan Imam* and Messrs. *Kulwant Sahai*, *Harnandan Sahay* and *Harnarain Persad*, for the Respondents.

JUDGMENT.—This appeal arises out of proceedings in Probate of the Will of one Avadh Bihari Saran Misser, dated the 7th November 1912. Babu Avadh Bihari died on the 17th of November 1912 leaving him surviving Brindaban Misser, since deceased, who claimed to be Babu Avadh Bihari's mother's brother, Sham Chand who claimed to be his mother's sister's son, and Gauri Shanker who claimed to be both his mother's sister's grandson and his "gotia" in the 9th degree. By the terms of the Will half of the property of Babu Avadh Bihari was left to Permanand Misser the son of Brindaban and the other half was left to Mamraj the husband of Babu Avadh Bihari's deceased daughter. The date of the application for Probate is the 19th of November 1912.

On the 6th of January 1913 Sham Chand and Gauri Shanker filed caveats. Notice of the propounding of the Will was served upon them and on the 17th of January Gauri Shanker filed an objection. Sham Chand filed an objection on the 18th March 1913 and on the 14th of April 1913 an application for Letters of Administration to the estate.

We are informed that Gauri Shanker also made an application for Letters of Administration. The records of the proceedings taken upon these applications for Letters of Administration have not been printed and are not on the record of the case before us. The case as it came before the District Court was tried upon the application of the executors only. Two issues were framed; *firstly*, have the objectors any *locus standi*? *Secondly*, is the Will genuine?

On the evidence that was taken upon the first issue it was found by the learned Judge that neither Gauri Shanker nor Sham Chand had succeeded in proving any interest under which they could contest the genuine character of the Will. The Will was, therefore, proved in common form and Probate granted.

The appeals now filed are against the decision that the objectors had no *locus standi* and against the order granting Probate of the Will.

It is contended on behalf of the respondents, *firstly*, that no appeal lies; *secondly*, that as one of the executors, Brindaban, is dead, the appeal cannot proceed. It does not seem to us necessary to enquire into the question whether an appeal lies against the order refusing permission to the caveators to require proof of the Will in their presence. For if indeed that order was wrong, it is clear that the order granting Probate on proof of the Will in common form was also wrong and that the Probate granted on such proof should be revoked.

GAURI SHANKER JOSHI *v.* MANRAJ SHUKUL.

On the second objection taken we hold that even though one of the executors be dead, representation of the estate of the deceased and of the interests of the beneficiaries vests in the remaining executor. It is open to the caveators to proceed against him alone.

In dealing with the case on the merits it is important to examine closely the position of the caveators and to decide whether it was right to put upon them, as the learned Judge has put upon them, the burden of proof that they have an interest in the estate. There is no provision in the Probate and Administration Act for the discharge of a caveat. The only rule of procedure governing such a proceeding would be Order I, rule 10, of the Civil Procedure Code. We have had the advantage of obtaining from Mr. Hasan Imam the rules of the Calcutta High Court on its original side regulating proceedings for the discharge of a caveat. It appears therefrom that a caveat should only be discharged when it is shown that the caveator has no interest.

We are informed that the practice in Calcutta and in England is to place the burden of proof upon the caveator. We are not prepared to say that this is not in accordance with the Civil Procedure Code. But if it be correct to say that a decision that the caveator has no interest is not *res judicata* as laid down in *Lalit Mohan Das* v. *Radha Raman Saha* (1), it would seem unfair to deny the caveator the right to protect the estate from the effect of a spurious Will unless it can be shown that the Will could not possibly affect his interests. We propose, therefore, in dealing with the evidence upon the record before us to proceed upon the lines which we ourselves would have adopted had we been in the position of the learned Judge. We should have required the petitioners to produce first of all substantial considerations upon which *prima facie* it should be held that the caveators could not possibly have the interest which they claim, and upon the production of those considerations to require the caveators to rebut the presumption arising from the evidence produced by the propounders.

The first document to be considered in this regard is a letter written by Gauri Shanker himself to the deceased (Exhibit 11) protesting against the action of Babu Avadh Bihari in taking criminal proceedings against him with regard to moneys with which Gauri Shanker had been entrusted by Avadh Bihari. In that letter occurs the phrase, "Never mind, you are my maternal uncle and I am your sister's son". Surely if an appeal to any relationship at all was to be made in this letter that appeal would have been made not on the basis of a maternal relationship but upon a direct claim to be Babu Avadh Bihari's nearest agnate and the heir to his estate. It is not necessary to cite numerous other instances in which Gauri Shanker has described Babu Avadh Bihari as his maternal uncle. It is sufficient to say that nowhere in any letter written by Gauri Shanker prior to the death of the deceased was it ever suggested that Gauri Shanker had any nearer claim to Babu Avadh Bihari than that of the grandson of his sister. *Secondly*, there are documents upon the record which show that in dealings in Calcutta for which registered documents were necessary Gauri Shanker had allowed himself without objection to be described as a "Bhader". Babu Avadh Bihari was a "Joshi" and it is admitted that by no possibility could a Bhader be an agnate of a "Joshi." The learned Judge has found it not proved that this entry was made with Gauri Shanker's consent, but it cannot be denied that it was made without objection from Gauri Shankar. We feel that it is extremely improbable that Gauri Shanker should have allowed such an entry to be made if indeed he was Avadh Bihari's heir. Avadh Bihari was a very rich man; Gauri Shanker was almost penniless. His claim to succeed as the sole heir to Avadh Bihari would have been protected with the utmost jealousy. Further, we have it from the evidence of the son in-law Krishna Chandra that when the marriage negotiations were going on, it was not suggested as one of the attractions of the match that Avadh Bihari's property would,

(1) 10 Ind. Cas. 434; 13 C. L. J. 547; 15 C. W. N. 1021.

if no son was born to Gauri Shanker, descend to Gauri Shanker's daughter if Gauri Shanker outlived Babu Avadh Bihari.

Lastly in the genealogical table given by Gauri Shanker himself we find it stated that Shiuji Ram and Rup Ram were brothers. Shiuji Ram's grandson was named Ram Chandra and Rup Ram's son was also named Ram Chandra. It is, as we believe, extremely rare for boys so near akin to be given identical names, and this belief finds corroboration in the evidence of Shanker Ojha, Gauri Shanker's brother-in-law. He says: - "This has never been in my family. I do not recollect any family in which this has happened". It follows, therefore, that it is extremely improbable that the Ram Chandra who was Gauri Shanker's grandfather could have been so near an agnate of the Ram Chandra who was Avadh Bihari's father. All these are weighty considerations. If the executors had been put in the first instance, as we hold they should have been, to the making of a *prima facie* case against the caveator Gauri Shanker, they could and would have put forward a *prima facie* case of very great strength, amply sufficient to throw the burden of proof on to Gauri Shanker's shoulders.

We think, therefore, that although the learned Judge approached the matter from a point of view different to that from which we have approached it, the caveator Gauri Shanker was in no way prejudiced by the form in which the proceeding was conducted. It remains only to be seen whether in the face of the propounder's evidence, Gauri Shanker has succeeded in showing that he has an interest in the estate. It is not necessary to go in detail through the evidence of all his witnesses. The learned Judge has given ample reasons for disbelieving the evidence of Gauri Shanker's own relations. They live at Benares and their object is to get the property away from Brindaban's son and Avadh Bihari's son-in-law who live in Chapra.

We do not follow the argument of the learned Judge that even if it be proved that Rup Ram was the great-grandfather of Gauri Shanker, it has still to be proved that that Rup Ram was the son of Shiuji. It was never the propounder's case that he (Gauri Shanker) was a great-grandson of a Rup Ram who was not the son of Siwai Ram. The sole point in issue was whether Gauri Shanker's great-grandfather's name was Rup Ram and to this point we propose to confine our attention. Gauri Shanker's own evidence, the evidence of his aunt Gopi Kuer, that of his uncle Sham Chand, that of his son-in-law Krishna Chandra, of his cousin Chatardhari, of his brother-in-law Shanker and his sister Makundi is direct evidence but evidence given by partisan witnesses.

We entirely agree with all that Mr. Pugh says regarding the value of evidence given by Brahmins of their ancestry. We accept the proposition that they are taught from an early age to repeat by heart the names of their ancestors to a very remote degree. But it is to be noted that Rup Ram was only distantly connected through Gauri Shanker with all the witnesses who have given evidence. It is possible that they may have occasionally heard casually the name of their maternal cousin's paternal great-grandfather. It is extremely unlikely that they would remember it without constant reminder from the maternal cousin. It is certain that it would not be among the names taught them from infancy. The right place to obtain the evidence of ancestry was the home of Gauri Shanker's ancestors. No evidence at all has been given from that home, which was Jaipore. The evidence that has been given seems to us to be peculiarly valueless. It is to be noted that Krishen Kuar the mother of Gauri Shanker who is still alive has not been examined. The evidence of casual strangers is even more valueless. We cannot go so far as the learned Judge when he says that the evidence of the witness Gobinda Acharja is throughout false. It is possible that he did on one occasion have some kind of interview with Babu Avadh Bihari. It is also possible that he told him on that occasion that Gauri Shanker was a relation of his, but, that he specified that relationship, is extremely improbable; that he said that

he was a "gotia" is still more improbable, for it was his habit to talk of him always as his mother's sister's grandson. Bishun Dutt's evidence is no more convincing; for in the last line of it he says that he remembered that Gauri Shanker had shaved on the occasion of the death of Avadh Bihari's wife after Gauri Shanker had reminded him of the fact.

Mr. Pugh contends that he would have been able to prove his relationship had he been given a fair opportunity of doing so. So far as we can gather from the proceedings in the Court, he had ample opportunity of producing any evidence which might be of value to him, from Benares. The witnesses were cross examined at great length by Counsel brought from Patna. The hearing of the case lasted from the 5th of July to the 25th and arguments were heard from the 26th to the 29th. Gauri Shanker was put upon notice that he was required to produce evidence of his *locus standi* on the 27th of June. It cannot be suggested that he had not ample time to produce all the evidence at his disposal.

It is, however, further contended that he should have been given an opportunity to get his commissions, which he had had issued to Jaipore, brought on the record. We cannot find from the order-sheet that Mr. Eardley Norton in arguing his case ever suggested that there should be an adjournment of the argument for the completion of these commissions. The history of them is that the first commission was issued on the 10th of April 1913 and was returned on the ground that the addresses given were not sufficient to identify the witnesses to be examined. An order was made for a second commission to issue on the 4th of June 1913. No steps seem to have been taken to issue that second commission. All that we can find with reference to it on the record is a reminder from the Jaipore Darbar that the addresses of the witnesses have not yet been received. We must presume that the evidence which it was possible to collect from Jaipore would not have been of any benefit to Gauri Shanker. We have no reason to believe that he has been prevented in any way from producing all the evidence that would have been of use to him. Upon the evidence that he has produced he has failed to make out any case sufficient to rebut the conclusion arising from the documents filed by the executors.

We come next to the claim of Sham Chand. One substantial consideration upon which he should be put to proof of his interest is his own attitude towards the proceeding. We have shown how flimsy was the claim of Gauri Shanker. Sham Chand preferred to let that claim take precedence over his own. He filed no objection until two months after Gauri Shanker's objection had been filed, and even then said that he was willing to stand aside in favour of Gauri Shanker and would only come into the contest after Gauri Shanker's case had failed.

A further consideration is that at the time when Avadh Bihari was a minor Brindaban was selected to be his guardian by the Court of Wards. The inference from that selection is that Gauri Shanker was his nearest male relative. A great deal of trouble has arisen out of a note book which is alleged to have been found among Avadh Bihari's papers. In our view it adds but little, to the case and since it adds so little, it is not likely to have been a forgery. Sham Chand's claim is based on the assertion that Avadh Bihari was the son of his mother's sister Manki. The propounder contests this and asserts that Avadh Bihari was the son of Brindaban's sister Phula Koer. The whole basis of the propounder's claim that this note book proves that Avadh Bihari was the son of Phula Koer is that in a genealogical table on the second page a vertical line is drawn under the name of Phula Koer and under that vertical line appears the name of Avadh Bihari. But in setting out the offspring of Avadh Bihari himself on the previous page we find the names of his two wives Durgadei and Gulab written in succession under his name and a vertical line drawn from Gulab's name and under that line the names of the children of Avadh Bihari appear. These children were admittedly born of Durgadei and not of Gulab. In the body of the history there is a smudge through which are visible the words "Manki *se*"

before the name of Avadh Bihari as the son of Ram Chandra. These words "Manki *se*" were certainly an interpolation made after the rest of the history had been written. Whether the interpolation was made by Avadh Behari himself or by Brindaban or by Sham Chand, the fact remains that it is an interpolation and this fact makes the entry of very little value. As the learned Judge has pointed out, there is a very strong balance of probability that it was done by Sham Chand, but it must be admitted that the whole of the circumstances surrounding this tampering with the record would, even if it was brought home to Sham Chand, prove only that Sham Chand was an unscrupulous person, not that Avadh Bihari's mother was Phula Koer. There is nothing in the book to indicate which of Ram Chandra's wives was Avadh Bihari's mother. We are satisfied that the family history contained in the note book was a history prepared by Avadh Bihari himself and we accept it as substantial evidence that Ram Chandra had two wives, Phula Koer and Manki Koer. The question which of those two wives was Avadh Bihari's mother must be proved by other evidence.

Now it is absolutely certain upon innumerable documents on the record that Brindaban was always called Avadh Bihari's uncle. It is practically certain that he was the brother of one of Ram Chandra's wives.

Sham Chand's evidence has been devoted to a strenuous effort to prove that Ram Chandra had one wife only. That evidence, we have no hesitation in saying, is false. Seeing that he has been driven to make this case, we must presume that he was afraid of the result of admitting that Ram Chandra had two wives. If he had two wives and if Phula Koer was the second wife, it is infinitely more probable that Avadh Bihari was born of Phula Koer than of the elder wife. At the time of Avadh Bihari's birth, it is admitted by Sham Chand's witnesses that Ram Chandra was a lunatic. If he had already a son whose mother was alive and of mature age, it is extremely unlikely that a second marriage would have been allowed. Even if there was no son, it is more than probable that no marriage with Phula Koer would have been allowed until after Manki's death, and on this point it is instructive to read the evidence of Gopi Koer the daughter of Makhan Kuar, the sister of Manki, as to the date of Manki Koer's death. She says: "I came to Chapra only once during Ram Chandra's life".

Q. Where was Manki at that time?

A. She was dead.

Further on she says: *Q.* What was your age when you saw Manki?

A. Eight or nine years. I saw Manki at Chapra in the house of Chaudhuri.

In re-examination she is asked: *Q.* You said that when you came to Avadh Bihari Saran's house after the birth of Avadh Bihari, Manki Koer was not alive and you again said that you met Manki Kuar for the first time at Chapra. When was it and how do you explain?

A. When I saw Manki Koer at Chapra, Avadh Bihari was in the womb.

The evidence of this witness is valueless as proof that Avadh Bihari was the son of Manki and it is in some degree corroboration of the suggestion that Manki died before Phula Koer was married to Ram Chandra.

Another point upon which the propounders are entitled to lay stress is that if we take the ages of these various ladies as given by the caveator's witnesses, we find that it is extremely improbable that Manki could have been Avadh Bihari's mother. Avadh Bihari was born, they say, in 1859. The evidence with which we are dealing was given in 1913 and taking the genealogical table put upon the record by the caveator and writing against the names given in it the ages given by the caveator's witnesses, Sham Chand's age 58, Gopi Kuar's 53, Kishun's 70, we get it that had she been alive in 1913 Makhan the mother of these three would have been at least 84 years old. Manki was the eldest sister and the lowest age possible to be placed against her name is 85 years. She could not possibly, therefore, have been born before 1828. It is almost impossible to believe that her first child should have been born when she was 31 years of age and her husband had become a lunatic,

GAURI SHANKER JOSHI *v.* MANRAJ SHUKUL.

Great ridicule is poured by Mr. Pugh upon the propounders' story that Phula Koer was brought by her brother to the house of this lunatic and married to him. Still greater ridicule must be poured upon the story that after 20 years of married life this lady Manki Koer should have submitted herself to the embraces of this horrible person Ram Chandra and borne of him a son.

The oral evidence of Sham Chand that he is the mother's sister's son of Avadh Bihari consists of the evidence of his family, which as we have shown is in regard to the statement that Ram Chandra had one wife only, certainly false. The remaining evidence is merely that Sham Chand was a *memera bhai* of Avadh Bihari. This without doubt is true. He was called *memera bhai* in every letter written between the parties. But whether that relationship was merely a step relationship or a true relationship it is certain that in common parlance they would be spoken of as cousins.

Nowhere in the pleadings was it denied that Phula Koer was Brindaban's sister. All that was denied was that Avadh Bihari was Phula's son. Nevertheless an offer was made at the last moment to bring a somewhat disreputable Mukhtear and another witness to show that in a document executed for the sale by Brindaban of land in Chapra, Brindaban's father's name was given as Jiwan Ram. This was nobody's case. The women who have been examined are agreed that Brindaban's father's name was Raiji Shukul. This in itself is sufficient to show that the evidence of the Mukhtear and the other witness as to Brindaban's parentage is valueless. It cannot be as Mr. Pugh suggests that Brindaban was the son of Jiwan Ram and was in fact Manki's brother. Had that been so, he was the nearest *bandhu* of Avadh Bihari at the time of his decease and it is now the accepted rule of law that the nearest *bandhu* succeeds. A sister's son is preferred to a mother's sister's son, [*Gunesh Chunder Roy* v. *Nil Komul Roy* (2)] and a maternal uncle is preferred to the mother's sister's son [*Mohandas* v. *Krishnabai* (3)]. But this was never Sham Chand's case. Had it been true it would certainly have been Brindaban's case. Sham Chand stood or fell on his plea that Ram Chandra had one wife only and that Brindaban was not related to that wife and could, therefore, have no claim to the property.

Definite evidence has been given for the propounders by two witnesses who are not connected with the family, and this evidence the learned Judge has accepted. He heard this evidence and we see no reason to disagree with him as to its value. It proves conclusively that Avadh Bihari was the son of Phula Koer and that Phula Koer was Brindaban's sister. This evidence, as we have shown, is far more in accordance with the probabilities than is the evidence adduced by Sham Chand and we feel that if the burden of proof had been put in the lower Court upon the executors to prove that Brindaban was the heir to the estate at the time of Avadh Bihari's death to the exclusion of Sham Chand, we should have had no hesitation in holding that the burden of proof had been supported and that, therefore, Sham Chand had no interest and could not protest against the Probate of the Will of the deceased. We are satisfied that the learned Judge was right in investigating the question as fully as he has done in order to avoid a long and tedious obstruction to the Probate by parties who, it is now proved, have no interest in the estate. From the evidence, of Dhanukdhari one of Sham Chand's cousins, it appears that the object of the Benares family was to force Brindaban to give them a share in Avadh Bihari's property, and we have little doubt that their failure to induce him to forego his rights has resulted in this jealous obstruction.

We hold that Gauri Shanker and Sham Chand were rightly denied the right to have the Will proved in their presence. The appeals are dismissed with costs.

Appeals dismissed.

(2) 22 W. R. 264.
(3) 5 B. 597; 3 Ind. Dec. (N. S.) 393.

ABDUL AZIZ *v.* BEHARI LAL.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2228 OF 1915.

June 22, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

ABDUL AZIZ MANDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

BEHARI LAL BISWAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Putni Regulation (VIII of 1819), *s.* 13, *sub-s.* 4—*Tenure-holder put in possession of* putni, *whether landlord—Limitation for recovery of arrears of rent by tenure-holder—Bengal Tenancy Act (VIII of* 1885), *Sch. III, Art.* 2.

A tenure-holder or *dar-patnidar* who on deposit of the *putni* rent is put into possession of a *putni* under the provisions of section 13, sub-section 4 of Regulation VIII of 1819, occupies the position of a mortgagee put into possession of the mortgaged property under an English mortgage, and is a landlord for the time being of the defaulting *putnidar's* tenants within the meaning of the Bengal Tenancy Act. Therefore, he has a right to recover the unrealised rent that accrued due before he was put into possession and the period of limitation for his suit to recover the arrears of rent is that provided for in the Bengal Tenancy Act, and not that under the Limitation Act. [p. 712, cols. 1 & 2.]

Appeal against the decree of the Additional Subordinate Judge, Nadia, dated the 2nd June 1915, affirming that of the Munsif, Ranaghat, dated the 6th March 1914.

FACTS of the case appear from the judgment.

Babu *Jogendra Nath Mukherjee*, for the Appellants.—The first point is whether the plaintiff, who by depositing the rent due from the superior landlord came into possession of the property, can sue for the rent of the period prior to his taking possession under section 13, sub-section (4), of Regulation VIII of 1819. My submission is that a rent-decree cannot be passed for the *Asar kist* as the plaintiff came into possession only in *Saravan*. He was not the landlord when the *Asar kist* became due. Moreover his position is that of a mortgagee. See *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1) There cannot be two persons having a claim for rent for the same period, the plaintiff and the defaulting *putnidar*. The defaulting *putnidar* has undoubted claim to the rent that fell due before the plaintiff got possession. The next point is that the ordinary law of limitation, *viz.*, Article 110 of the Indian Limitation Act, will apply in this case and the special law of limitation, *viz.*, Article 2 of Schedule III to the Bengal Tenancy Act, cannot apply. See *Mohendra Nath Kalamoree* v. *Koilash Chandra Dogra* (2). Assuming that the plaintiff could realise the rent of the *Asar kist*, still he cannot be regarded as a landlord within the Bengal Tenancy Act. "Landlord" is defined in the Act. It means a person immediately under whom a tenant holds—here it cannot be said that the tenant-defendant held the land under the plaintiff, who is now in possession of the *putni taluk* by virtue of the statutory provision in Regulation VIII of 1819, section 13.

Babu *Tarakeswar Pal Chowdhury*, for the Respondent, not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants against a judgment of the learned Subordinate Judge of Nadia, dated the 2nd June 1915, affirming the decision of the Munsif of Ranaghat. The suit was brought for rent of four holdings. The plaintiff sued as the person entitled to a lien, he being put in possession of the property under the provisions of section 13, sub section (4), of Regulation VIII of 1819. The suit was brought for the years 1316 and 1317. A portion of the rent of 1316 had accrued due prior to the date the mortgagee, the plaintiff, was put into possession. Out of the points that were raised in the lower Courts, only two points have been argued in this Court. The *first* point is whether the plaintiff can recover as a landlord within the meaning of the Bengal Tenancy Act the *kist* of rent for 1316, which accrued due before he was put into possession under the provisions of section 13, sub section (4), of Regulation VIII of 1819; and the *second* point is, "does the period of limitation for recovery of rent provided for in the Bengal Tenancy Act apply to this case or is the plaintiff's claim governed by the period provided for

(1) 23 Ind. Cas. 632; 18 C. W. N. 747 at p. 753; (1914) M. W. N. 397; 15 M. L. T. 380; 12 A. L. J. 653; 27 M. L. J. 4; 41 C. 926, 1 L. W. 1059; 41 I. A. 91; 25 C. L. J. 434 (P. C.).

(2) 4 C. W. N. 605.

by the Indian Limitation Act?" These are the only two points that are open on the present appeal. The other question as to whether the lien of the plaintiff had been satisfied or not, which has been attempted to be argued with some force, is a matter which was not urged in the lower Courts and is not purely a question of law and partly depends on a consideration of other facts which have not been gone into.

The *first* point for consideration is, "what is the position of the person, the tenure-holder or the *dur-putnidar*, who pays the rent in order to save the *putni* from being brought to sale under the provisions of section 13, sub-section (4), of Regulation VIII of 1819?" The sub-section says that he should be considered to have a lien and that that lien is to be in the same manner as if the loan had been made on a mortgage. That is the first provision. The second provision is that he is entitled to obtain immediate possession of the tenure of the defaulter in order to recover the amount so advanced from any profits belonging thereto. The position is the same as that of a mortgagee put into possession under an English mortgage, namely, where the mortgagee can enter into possession by virtue of his mortgage, collect and receive rents and grant receipts for the same. He is not treated as a simple mortgagee who has only the right to have the property brought to sale by a Court of Law for the satisfaction of his claim, but he is given the express right of a mortgagee in possession and he has the right also to recover the amount so advanced from any profits belonging to the property. According to the Bengal Tenancy Act, a tenant has got to hold under the landlord. The question is, whether the tenant holds under the mortgagee in possession under section 13, sub-section (4), of Regulation VIII of 1819, that is, whether the mortgagee in possession is a landlord. I think clearly he is a landlord. He is the only person who having been put into possession can give the tenants receipts for rent. No other person, having regard to the terms of the section, can give the tenants a discharge and, therefore, I think, the person put into possession under sub-section (4) of section 13 of Regulation VIII of 1819 is a landlord within the meaning of the Bengal Tenancy Act. Then the question is, "does the sub-section vest in the person put into possession under the terms of it a right to recover the rent in arrears that has not been paid or realised?" I think it clearly does. The words used are that the person making the payment is to be put into possession in order to recover the amount from any profits belonging thereto. Rents due and unrealised must be profits belonging thereto and being such they pass by virtue of the sub-section to the plaintiff.

The *next* point is, as I have already stated, "Is the mortgagee in possession a landlord?" I have remarked above that there seems to be no doubt that he is. If he is a landlord, the provisions of the Bengal Tenancy Act, the land being agricultural land, apply and the landlord is entitled to the period of limitation mentioned in the Bengal Tenancy Act and not to the period mentioned in the Indian Limitation Act. It is quite clear in this case that the learned Judge of the lower Appellate Court on the points urged before him arrived at a correct conclusion. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—I agree in the conclusion which has been arrived at by my learned brother and also in the reasons which he has assigned for that conclusion. I will only add that in Regular Appeal No. 66 of 1917 decided on the 14th June 1917, it was held by Mr. Justice Nalini Ranjan Chatterjea and myself that a Receiver stood in the position of a landlord and a proprietor for the purpose of bringing a suit in ejectment against a tenure holder under section 66 of the Bengal Tenancy Act. The point decided in that case resembles the point that arises in the present case. The contention that the person who sued in the one case for ejectment and in the other for the rent was not entitled to sue in the capacity of proprietor or landlord cannot, in my opinion, be supported. I agree that the appeal must be dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

FULL BENCH.

LETTERS PATENT APPEAL No. 52 OF 1917.

July 3, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Chapman and Mr. Justice Jwala Prasad.

CHAIRMAN OF GAYA MUNICIPALITY —DEFENDANT—APPELLANT

versus

SHAM LAL GUPTA—PLAINTIFF—RESPONDENT.

Bengal Municipal Act (III of 1884), ss. 237, 238, 240—"*Erect or re-erect a building*", *meaning of*—*Pulling down and again putting up balcony, whether constitutes re-erection.*

The words "erect or re-erect" in section 240 of the Bengal Municipal Act do not necessarily mean build or re-build an entire house from its foundation. The question whether there has been an erection or re-erection depends upon the circumstances of each case. It is a question of degree. [p. 719, col. 1.]

Pulling down and then putting up the whole of a balcony is not a re-erection within the meaning of section 240 of the Bengal Municipality Act. [p. 718, col. 2.]

Letters Patent Appeal against the decision of Mr. Justice Atkinson, in Second Appeal No. 573 of 1917, dated the 22nd February 1917, reversing a decision of the District Judge, dated the 17th April 1916, confirming that of the Subordinate Judge, Gaya, dated the 14th July 1916.

FACTS of the case appear from the following judgment of

ATKINSON, J.—This second appeal comes before me from the decision of the District Judge of Gaya, reversing the decree passed by the Munsif in this action in favour of the plaintiff. The action was brought by the plaintiff, claiming a declaration against the Municipality of Gaya to the effect that he was entitled to repair the walls and roof of his house without obtaining the sanction or permission of the Municipality thereto and that the threats, asserted by the Municipality, that they would remove the new roof put upon the house, and the walls repaired, and the new verandah constructed by way of substitution, were in violation of the plaintiff's legal rights; and that consequently the plaintiff claimed that he was entitled to an injunction against the Municipality. The plaintiff's house is No. 108 of Ward I situated in the town of Gaya. It is a one-storied house in which the plaintiff resides. Fronting the street or Municipal lane the house has two balconies in the lower storey and one on the same evel as the roof, and the house itself is built on a plinth erected on the high road. The plaintiff desired to repair the existing walls of his house and the roof, which had become dilapidated by age or time. Accordingly, thinking that it was necessary to obtain the sanction or permission of the Municipality to the repairs, which the plaintiff contemplated carrying out, he applied on the 17th of June 1913 to the Municipality for leave to carry out the necessary repairs to the walls and roof of his house. The Municipal Officer inspected the plaintiff's house and reported that the "applicant might be allowed to repair the wall and roof which had broken to the interior compound of the house." This is by no means a clear or intelligible order; but anyhow it purports to recommend sanction being given by the Municipality to the plaintiff's repairing the walls and roof of his house.

The plaintiff proceeded to carry out th work and executed the necessary repairs.

On the 10th December 1913, however, two notices were served by the Municipality upon the plaintiff; one requiring the demolition of the new roof and the other the removal of the new balconies, which had been substituted for the old balconies which had become decayed and rotten. In the course of repairing the roof it was discovered that it would be necessary to change or alter the verandah on the top storey because the support for the roof also formed the support for the verandah; and these supports have become rotten by age. Accordingly the two notices were served upon the plaintiff by the defendants complaining of the erection of the building, *viz.*, the roof and the verandah without their sanction; and calling upon the plaintiff to refrain from proceeding further with the repairs to his house and asking him to remove the erection so put up. A second notice was served stating that in the event of the plaintiff's failure to remove the construction complained of by the Municipality, they themselves would take steps to remove the same at their own expense; and the plaintiff would in such event be liable to criminal prosecution under four different sections of the Bengal Municipal Act. The plaintiff failed to comply with the terms of these notices, and

was then proceeded against criminally by the Municipal authority for failing to comply with the requirements of these notices, but the Municipal authority were unsuccessful in obtaining a conviction against the plaintiff. The plaintiff had previously filed a petition of objection in response to the two notices, dated the 10th December 1913, but notwithstanding his petition of objection the prosecution was instituted, and proceeded with and after the prosecution had failed, the petitioner's, *i.e.*, the plaintiff's objection, filed under section 242A of the Bengal Municipal Act, was taken up for adjudication by the Vice-Chairman of the Municipal Board, at whose direction the plaintiff was asked to appear before him by a professional adviser. The matter arising on the plaintiff's petition of objection came on for hearing before the Vice-Chairman alone, in the presence of the plaintiff and his legal adviser: and an order was made by the Vice-Chairman alone requiring the removal of the verandah and the roof which the plaintiff had erected. As far as I can discover from the record, it appears that this order upon the plaintiff's petition of objection against the notices, dated the 10th December 1913, was made by the Vice-Chairman alone who purported to act under section 242A of the Municipal Act (III of 1884). In my opinion the order made by the Vice-Chairman under that section was without jurisdiction. Section 242A expressly provides that an Appellate Court shall be formed consisting of at least three Commissioners to pass orders under that section; and that they and they alone should adjudicate upon any petition of objection which might come before them under that section. As far as I can see on the record, having regard to the notice, dated the 9th of July 1914, served upon the plaintiff, the Vice-Chairman acted alone, under section 242A of the Bengal Municipal Act, and made an order which he had no jurisdiction whatsoever to make and so far as that order is concerned, it is, in my opinion, a nullity; and the plaintiff is entitled to a declaration that the order is null and void; and the plaintiff is, in my opinion in no way bound by that order, which is illegal in point of law. However, it is not on this ground alone that the argument before me mainly proceeded. The main argument in support of the contention that the plaintiff was entitled to the relief he seeks in this action has been, that there was no necessity in point of law for the plaintiff to obtain the sanction or permission of the Municipality to execute mere repairs to the existing walls of his house or to the replacement of a new roof and verandah thereon and thereto. Mr. Akbari, who appears on behalf of the Gaya Municipality, admits that this case is one to which section 237 of the Bengal Municipal Act is applicable and that section 240 has no application whatsoever. He further argues that the definition which section 240 purports to give of the word "erect" and "re-erect" has no application to these words as used in section 237. I agree with that argument; and think that the words "erect" and "re-erect" in the wider and more extensive sense in which they are used in section 240 have no application to this case, nor can the provisions of section 240 be applied in construing section 237. Section 237 deals with the case of a person who "erects or re-erects" a new house.

Mr. Akbari contended before me that the word to erect meant to build a new house and that the words to re erect meant to rebuild the whole or a part of a house; and that thus no person is entitled to effect any repairs to any wall, roof, verandah or any other portion of his house without first obtaining the permission or sanction of the Municipality. In my opinion, that argument is disposed of by the express terms of section 237 itself. To yield to such an argument would, in my opinion, be to violate the language and meaning of section 237 and be in opposition to a long line of authority. It would be a monstrous thing to hold that in the matter of every repair to a wall, roof or verandah of a man's house, however small, such person should have to go to the Municipality for sanction. The Munsif finds in this case that what the plaintiff did was no more than to repair a portion of a wall together with the roof, which was essentially rotten and had to be repaired *in toto*; and as I have pointed out, because the supports of the roof also formed the supports of the verandah, therefore, a new verandah had also to be re-constructed or substituted or re-placed for the old one. These are the facts which have been found by

the learned Munsif and which have not been challenged by the learned District Judge in any way whatsoever; and, therefore, I take it that they are beyond controversy. I fail to see how a mere re-placement or substitution of repair of the kind in question to a portion of a wall, roof and verandah can come under the category of an erection or re-erection of a building as defined by section 237 of the Bengal Municipal Act. The words "erect" and "re-erect" mean, in my opinion, to build and re-build an entire house from its foundation; and do not mean, nor are they intended to apply to, repairs such as have been effected by the plaintiff to his house in this case. I can well understand giving a Municipality power to prevent encroachment upon a public lane or road-way in building or re-building with a view to ensure proper ventilation and affording facilities for public traffic and removal of sewage-matter and so forth. But I can see nothing in section 237 of the Municipal Act which would justify the Municipality in claiming to have the right to prevent a person from repairing any portion of his house. The learned District Judge has dealt with this case in a very summary way; and he does not appear to have considered the actual facts of the case. He lays stress upon the fact that an application was made by the plaintiff for leave to repair the wall, roof and ceilings of his house and permission to do this only was accorded to the plaintiff. The learned Judge then says that, therefore, as the verandah was not included within the terms of the plaintiff's application the repairs to or reconstruction of the verandah must be deemed to have been in violation of the sanction given and, therefore, the defendants were right and justified in demanding the demolition of the verandah and in issuing the notices they did; because the plaintiff had not obtained the sanction or permission of the defendants to the erection of the verandah. In my opinion, the learned Judge is quite wrong in interpreting the section so as to make a verandah a house. In my opinion a verandah is not a house, and I cannot understand why the plaintiff should not be entitled to repair a part of his house, whether it be a wall; a roof or a verandah. The learned Judge never considered at all whether the permission of the Municipality was necessary to effect a repair to an existing house. As I have said the definition of the words erect or re-erect given under section 240 has no application to the words as used in section 237. The law has received judicial consideration in several cases of which it will be sufficient to name one or two. In the case of *Emperor* v. *Mathura Prasad* (1), Prinsep and Stephen, JJ., had to consider a point similar to that in the present case. Their Lordships say: "The act condemned is the commencement of a second storey without permission. We...find no necessity for such permission. The building regulations, section 236 *et seq.* relate to building or re-building a house. The previous sections relating to alterations of a house contemplate obstruction or encroachments on roads. This is not the ground of objection. We do not, therefore, see how the case comes under section 273." Accordingly they set aside the order in that case. To the same effect is the decision given under Statute, similar to the Bengal Municipal Act, in Bombay in *Krishnaji Narayan Pokshe* v. *Municipality of Tasagaon* (2). I think some assistance may also be derived from the decision in *Eshan Chunder Mitter* v. *Banku Behari Pal* (3). No doubt that was a decision on the words contained in section 204, which are not strictly speaking applicable to the construction of section 237 but, nevertheless, it does afford assistance in arriving at the conclusion that the section only contemplates the building and re-building of new houses and not repairs. In the case of *Kamta Nath* v. *Municipal Board of Allahabad* (4), Justice Knox considers the law that is applicable in a case like the present one, and although the facts of that case are distinguishable from those of the present case the judgment is nevertheless interesting. The learned Judge observed that if the Legislature intended to put upon the section the construction which Mr. Akbari seeks to put upon section 237 in this case, it would have to distinctly express its intention. The

(1) 29 C. 491 at p. 493.
(2) 18 B. 547; 9 Ind. Dec. (N. S.) 874.
(3) 25 C. 160; 1 C. W. N. 660; 13 Ind. Dec. (N. S.) 109.
(4) 28 A. '199; 2 A. L. J. 576; A. W. N. (1905) 252; 2 Cr. L. J. 793.

learned Judge says, "If the law intended to restrict the rights of the Municipal citizens of Allahabad in this manner its intention should have been plainly manifested and put beyond reasonable doubt." In this particular case I am satisfied that the plaintiff did not do anything which would amount to erecting or re-erecting a house within the meaning of section 237 and that consequently no permission or sanction by the Municipality was necessary to justify what the plaintiff, in fact did, namely, to repair a portion of the wall, roof and verandah of his house. Hence the Municipality had no power to order the removal of the said portions of the house so repaired and, therefore, the plaintiff was not and is not bound by the order of the Vice-Chairman which is a nulity in point of law. Accordingly, the plaintiff is entitled to the reliefs he seeks, *viz.*, a declaration that no permission or sanction of the Municipality was necessary, for the repairs effected by him to the wall, roof and verandah of his house, No. 108 of Ward I in Gaya Municipality, and that consequently the Municipality had no power to direct him to remove the said wall, roof and verandah. I do not consider that it is necessary to grant an injunction against the Municipality, inasmuch as I feel sure that the Municipality will not, having regard to my observations above as to what the law is, further harass the plaintiff by any more notices.

Accordingly I will allow this appeal and set aside the order of the learned District Judge. I allow the plaintiff his costs in this Court, in the lower Appellate Court and in the Court of the Munsif.

Mr. *Sultan Ahmad* (with him Messrs. *Akhari* and *Khurshaid Hasnain*), for the Appellants.—The principal point in the case is what is the meaning of "erection" and "re-erection" within the meaning of the Bengal Municipal Act. I submit that the definition given in section 240 of the Act is not exhaustive as the word "include" clearly shows. Your Lordships will take into consideration the spirit and scope of the entire Act in order to arrive at the correct meaning. I submit with great respect that the opinion of Mr. Justice Atkinson as expressed in the judgment under appeal that "erect" and "re-erect" mean to build and rebuild an entire house from its foundation does not wholly express the meaning of the two words. His Lordship has relied upon *Emperor* v. *Mathura Prasad* (1) which I submit is an incorrect decision. I submit re-building a part of a house is also "re-erecting" it within the meaning of the Bengal Municipal Act.

[CHAMIER, C. J.—Is "repair" defined in the Act?]

No. In this case the finding is that some of the walls were taken down and re-built. A balcony (*chhajja*) was taken down and an entirely new one erected. I submit that it was clearly "re erecting" and as it was not covered by the permission granted by the Municipality, the Municipality were perfectly competent to issue the notices they have issued. I submit that the correct view is that expressed by Jwala Prasad, J., in *Balde Lall* v. *Emperor* (5). I submit further that Mr. Justice Atkinson's view, that the Vice-Chairman's order dismissing the respondent's objection to the notices issued by the Municipality was *ultra vires* inasmuch as the Vice-Chairman did not comply with the provisions of section 242A, is not a sound one. His Lordship does not seem to have considered the provision of section 176 of the Act.

Mr. *Harnandan Lall Nandkeolyar* (with him Messrs. *K. N. Prasad* and Babu *Kailaspati*), for the Respondent.—I submit on the authority of decisions of the different High Courts of India that so long as I build on the old foundations and keep to the old dimensions, I do not "erect" or "re erect" within the meaning of the Bengal Municipal Act. *Krishnaji Narayan Pokshe* v. *Municipality of Tasgaon* (2), *Municipal Council, Tanjore* v. *Visvanatha Rau* (3), *Mohabir Das* v. *Gaya Municipality* (7), *Kala Govind* v. *Municipality of Thana* (8). Your Lordships will not put an interpretation on section 240 of the Act so as to restrict the natural right of a private citizen which is not expressly taken away by the Legislature. Refers to remarks of Knox, J., in *Kamta Nath* v. *Municipal Board of Allahabad* (4). The word

(5) 38 Ind. Cas. 705; 18 Cr. L. J. 273.
(6) 21 M. 4; 7 M. L. J. 273; 7 Ind. Dec. (N. S.) 359.
(7) 26 Ind. Cas 651; 16 Cr. L. J. 59.
(8) 23 B. 248; 12 Ind. Dec. (N. S.) 164.

"repair" has not been defined in the Act. You cannot read the ordinary meaning of the repair into "re-erect" and "erect." I submit that the preamble and the scope of the Act clearly show that the Bengal Municipal Act is not to have any retrospective effect. Old buildings are recognised as vested rights, and no interference with them can be permitted. Our house is admittedly an old building as having existed from "time beyond ordinary human memory." It is only the construction of new buildings that come within the purview of the Act. I submit we were only repairing our house, inasmuch as it has been found by the Courts below that we have not changed the foundations or the dimensions in the least. We were, therefore, only exercising a right which the Legislature recognises as being vested in us. The Municipality, therefore, had no jurisdiction to interfere. *Eshan Chunder Mitter* v. *Banku Behari Pal* (3).

As regards the order of the Vice-Chairman dismissing my objection to the Municipal notices issued against me I submit it was clearly *ultra vires*.

[CHAMIER, C. J.—But this point is not material to the case before us].

The Municipality was proceeding against me under section 238 and it is clear that my remedy lies only under section 242A.

Mr. *Sultan Ahmad* heard in reply.

JUDGMENT.

CHAMIER, C. J.—The respondent in this case applied to the Municipality of Gaya on July 17th, 1913, under section 235 of the Bengal Municipal Act, III of 1884, for permission to repair certain walls and roofs and on August 28th, 1913, permission was given to him to do so. The Municipality it appears subsequently discovered that the respondent had carried out work which in their opinion amounted to more than repairs, in fact amounted to the erection or re erection of a house within the meaning of the Act. Accordingly on December 10th, 1913, they issued a notice to the respondent under section 238, subsection (1), requiring him to remove what he had built, including in particular a balcony, and on the same day they served a notice upon him under section 204 of the Act with special reference to the balcony. The respondent filed objections which were dismissed by the Vice-Chairman on July 3rd, 1914. He was also prosecuted under section 273 of the Act, but with that we have nothing to do in the present case.

In the present suit the respondent claimed various reliefs all of which relate to the balcony. He claimed no relief in respect of the notice issued under section 238, sub-section (1). But it is conceded that it is unnecessary for us to consider the exact reliefs claimed by the respondent or the exact reliefs which he has obtained, as the object of this appeal is to obtain a decision of this Court as to the meaning of the words "erect or re-erect" in the Act. The respondent's house appears to be a two storied building. Projecting from the upper storey is a blacony or *chha ja* which runs along a considerable part of the front of the house. The Munsif who inspected the house describes the work which was carried out by the respondent as follows: "Upon the evidence on the record and from a local inspection of the disputed balconies or balcony, I am led to the conclusion that the present balconies which are nothing but projecting parts of the old roofs of the house of the plaintiff are not new constructions out and-out, but are re-constructions of the old balconies which have been attached to the house from time out of mind. I find that the roofs and the walls of the exterior part of the house having become old and out of repair, the plaintiff got permission from the Municipality to repair the same and that during repairs the old roofs including the balconies and some of the walls had to be replaced by the present ones, which have been re-constructed on the old site without changing their dimensions in the least. So I hold that the present balconies are nothing but the thoroughly repaired projecting portions of the old roofs of the house and that the said repairs are covered by, and have been done with the permission of, the Municipality".

Section 237 of the Bengal Municipal Act provides that every person who intends to erect or re-erect any house not being a hut shall give notice in writing of his intention to the Commissioners.....Section 238 of the same Act provides that, should

any person commence to erect or re-erect such house, not being a hut, without giving notice or without submitting plans and specifications or without waiting for the orders of the Commissioners or in contravention of any legal orders of the Commissioners, the Commissioners may, by notice to be delivered within 15 days, require the building to be altered or demolished as they may deem necessary. The words "erect or re-erect any house, not being a hut" used in sections 238 and 239 are declared by section 240 of the Act to include "(*a*) any material alteration or enlargement of any building and (*b*) such alteration of the internal arrangements of a house as effect an alteration of its drainage or sanitary arrangements or affect its stability", and the word "house" is defined in section 6 of the Act as including "any hut, shop, warehouse or building". The decision of the Munsif in the case has already been indicated. There was an appeal to the District Judge, who set aside the judgment of the Munsif and dismissed the suit. The learned District Judge was of opinion that the case came within section 238 of the Bengal Municipal Act. There was a further appeal to this Court which was heard by Mr. Justice Atkinson. That learned Judge was of opinion that the words "erect and re-erect" as used in the Act mean to build or re-build an entire house from its foundation, and he was also of opinion that what had been done in the present case amounted to no more than repairs. Accordingly he allowed the appeal, set aside the order of the District Judge and made a certain declaration in favour of the present respondent. He appears to have given the respondent a relief which is not claimed in the plaint, but no objection has been taken to this by the appellant. Several cases have been cited by Counsel on both sides. The first case to which I propose to refer is that of *Emperor* v. *Mathura Prasad* (1). In that case the accused was the owner of a single storied building. He added a second storey to his house without the permission of the Municipality and was convicted by a Magistrate under section 273 of the Bengal Municipal Act, 1884. The case was referred to the Calcutta High Court. The learned Judges who disposed of the case seem to have been of opinion that the accused was entitled to add a second storey to his house without taking the permission of the Municipality. As at present advised I am not prepared to accept this decision as correct. The addition of a second storey to a house appears to me to be at least a material alteration or enlargement of the house within the meaning of section 240 of the Act. In the case of *Mohabir Das* v. *Gaya Municipality* (7) two learned Judges of the Calcutta High Court held that the building of a new and additional masonry wall by which the courtyard of a temple had been materially enlarged was the erecting of a house within the meaning of section 238 of the Act. They observed that house had been defined as including any building and they were of opinion that they ought not to construe the word building otherwise than in its ordinary sense and as including erections, structures and buildings such as masonry walls. In that case, as the judgment clearly shews, what was erected was a new wall where no wall had previously existed. In *Baldeo Lall* v. *Emperor* (5) one of the members of this Bench held that the re-erection of the whole front of a house amounted to a re-erection of a house within the meaning of the Act and we were asked to hold that that decision covered the present case. It appears to me that the question whether there has been an erection or re-erection of a house within the meaning of the Act depends upon the circumstances of the case. As I understand the finding of the Munsif which was accepted by the District Judge, no new structure was erected by the respondent. He intended to repair the upper storey or the roof of his house and in the course of making the repairs he found it necessary to renew some of the walls or parts of the walls of the upper storey and also to renew some of the woodwork of the balcony. In order to do this he had to pull down and put up again the whole balcony. In my opinion he did not erect or re-erect his house within the meaning of section 240. He carried out thorough repairs. Nor am I able to hold that there was within the meaning of section 240 any material alteration of the building. These words do not appear to me to refer to the case of a balcony or wall being

replaced by another of exactly the same dimensions and on the same site. It is clear also from the findings of the Munsif and accepted by the District Judge that there was no enlargement of the buildings. In ordinary parlance the respondent cannot be said to have erected or re-erected a house. It was suggested that section 240 did not apply to this case at all, because that section defines the expression "erect or re-erect any house, not being a hut" only for the purposes of the two last preceding sections. The circumstance that section 240 does not refer to section 237, the section under which notice has to be given to the Commissioners, does not appear to me to affect the case. The section which entitles the Commissioners to require a person to remove a building is section 238 and section 240 does apply to that section.

There is one matter to which I think I ought to refer, although it is unnecessary for the disposal of this appeal. In the course of his judgment Mr. Justice Atkinson expressed the opinion that the plaintiff in this case was entitled to a declaration that the order passed by the Vice-Chairman dismissing his objections was null and void. The learned Judge refers to section 242A, but that section relates only to an appeal. His attention was probably not called to section 176 of the Act, which distinctly provides that except as provided in section 177, such objections shall be heard and disposed of by the Chairman or Vice-Chairman. It appears, therefore, that there was no irregularity in the action taken by the Vice-Chairman. I am not prepared to endorse the opinion expressed by the learned Judge that the words "erect and re-erect" mean build and re-build an entire house from its foundation. The question whether there has been an erection or re-erection depends upon the circumstances of the case. It is a question of degree. A man may pull down the whole of his house except a few walls, but no one would think of holding that there had not been a re-erection merely because a few feet of the old walls were used in the new building. On the facts as found in the present case I am of opinion that there was no erection or re-erection of the house within the meaning of the Act and I would, therefore, dismiss this appeal with costs.

CHAPMAN, J.—I agree.

JWALA PRASAD, J.—I have discussed the law on the subject in the case of *Baldeo Lall* v. *Emperor* (5). In that case the entire frontage of the house had fallen down and was re-constructed. There was thus a "re-erection" of the house under section 240 of the Bengal Municipal Act. In the present case it has been found as a fact that there was no new structure constructed and that there was no "erection" or "re-erection". Whether there has been an "erection" or "re-erection" of a house within the meaning of section 240 of the Act depends upon the circumstances of each case. I have shown in my judgment in the case referred to above that the case of *Emperor* v. *Mathura Prasad* (1) was wrongly decided and I adhere to my view then taken.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 78 OF 1916.

May 1, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Bakewell.

VAIGUNTATHAMMAL AND ANOTHER—DEFENDANTS NOS. 3 AND 4—APPELLANTS

versus

VALLIAMMAI AMMAL AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. III, r. 1, O. IX, r. 12—Power of Court to direct party to appear in person—Failure to appear, effect of—Ex parte *proceedings.*

Under Order III, rule 1, of the Code of Civil Procedure a Court has power to direct a party to appear in person, and on his failure so to appear he may be declared *ex parte* under Order IX, rule 12, of the Code though his Vakil may be present in Court. [p. 721, cols. 1 & 2.]

Satu v. *Hanmantrao*, 23 B. 318; 12 Ind. Dec. (N. S.) 211, dissented from.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Appeal Suit No. 44 of 1915, preferred against that of the Court of the Temporary Additional District Munsif, Tinnevelly, in Original Suit No. 37 of 1914.

FACTS—The plaintiff brought a suit for a declaration of her right to the plaint property and for possession of the same by dividing it by metes and bounds toge-

ther with future profits. Her case was that she had got a moiety of the plaint property from her mother as *stridhanam*, that she had been enjoying it jointly with defendants, and that she found it inconvenient to so enjoy it any longer. The 1st defendant disclaimed all interest in the property. The 2nd defendant contended that a portion had been given away to another, that the remaining property belonged to her, defendants Nos. 3 and 4 and to plaintiff in equal moieties. On 15th August 1914 the District Munsif directed the plaintiff and defendants Nos. 3 and 4 to appear in person at the next hearing, *i.e.*, on 29th August 1914. On that day the plaintiff appeared but the defendants Nos. 3 and 4 did not, but it was represented that the 4th defendant had been recently delivered of a child. There was no reason assigned for the non-appearance of the 3rd defendant. The Munsif told the defendants' Vakil that he would grant a month's time provided both defendants undertook to be present in person then. But the Vakil told him that whatever time was granted, the defendants were determined not to appear and that, therefore, there was no need for granting any time for their appearance. The defendants Nos. 3 and 4 not being persons exempted from appearing in Court and no reason having been assigned why they could not appear, the Munsif declared them *ex parte* and decreed the plaintiff's suit *in toto*. On appeal, it was held that as the parties had wilfully disobeyed the direction of the Court, and insisted on maintaining that attitude, the District Munsif had no other course open but to proceed with the case under Order XVII, rule 3, Civil Procedure Code, and that in so doing, therefore, he did not exercise his discretion illegally. The appeal was dismissed. The defendants Nos. 3 and 4 thereupon preferred this second appeal to the High Court.

Mr. *K. R. Guruswami Aiyar* (with him Mr. *A. Subbarama Aiyar*), for the Appellants.—The defendants Nos. 3 and 4 could have been directed to appear in person only to give evidence. Therefore, Order XVII, rule 3, Civil Procedure Code, directly applies and it provides that on the failure of the party to appear the Court may proceed to decide the suit forthwith. Therefore, the District Munsif had no jurisdiction to declare them *ex parte*.

Mr. *T. R. Venkatarama Sastriar*, for the Respondent.—Order IX, rule 12, Civil Procedure Code, directly applies and whenever a defendant directed to appear in person fails to do so, the Court has the power under this rule to declare him *ex parte*.

[Bakewell, J., pointed out that the Court had jurisdiction under Order III, rule 1, Civil Procedure Code, to direct the personal appearance of any party for any purpose whatsoever.]

Satu v. *Hanmantrao* (1) is no longer law in view of the deliberate deletion from Order IX, rule 12, Civil Procedure Code, of the words "Under the provisions of section 66 or 436", which appeared in the corresponding section 107 of the old Code.

JUDGMENT.

SADASIVA AIYAR, J.—Defendants Nos. 3 and 4 are the appellants in the second appeal. After the issues were settled, which was on the 27th June 1913, the District Munsif on the 15th August 1914 directed the defendants Nos. 3 and 4 to make their appearance in person on the 29th August 1914, to which date the hearing was adjourned. On the said 29th August 1914, defendants Nos. 3 and 4 failed to appear and represented through their Vakil that they would refuse to appear even if they were granted time. The learned Munsif thereupon, on the 29th August 1914, declared them *ex parte* and decided the suit, on the evidence of the plaintiff's husband, in plaintiff's favour. The Subordinate Judge, on appeal, confirmed this decree. Hence this second appeal.

It is to be regretted that the District Munsif did not mention the provision of law under which he acted in calling upon defendants Nos. 3 and 4 to appear in person, nor the provision of law under which, on their failure to do so, he declared them *ex parte*. The learned Subordinate Judge has also failed to state the provision of law under which, according to him, the Munsif acted in calling upon defendants Nos. 3 and 4 to appear in person, though he considered

(1) 23 B. 318; 12 Ind. Dec. (N. S.) 211.

that the decree *ex parte* was granted under Order XVII, rule 3, Civil Procedure Code. I do not see how Order XVII, rule 3, has any application to the circumstances of this case. As my learned brother pointed out during the course of the argument, I think the direction to defendants Nos. 3 and 4 to appear in person must be deemed to have been made under Order III, rule 1, Civil Procedure Code. That rule empowers the Court to make an order that "any appearance required or authorised by law to be made by a party shall be made by the party in person." Now, the appearance for 29th August 1914 was one which was authorised by law to be made by the party and such appearance for that particular date could be directed by the Court under this provision to be made in person. Then, we come to Order IX, rule 12, which provides that if a party who has been ordered to appear in person does not appear in person, or show sufficient cause to the satisfaction of the Court for failing to appear in person, he might be treated as not appearing, even though (I take it) he had engaged a Pleader who had appeared and was then prepared to appear for him in the case. In this view, it is unnecessary to resort to the principle indicated by me (sitting as a single Judge) in *Rajagopala Pandarithar* v. *Muthu Kumara Chettiar* (2) namely, that, even if not empowered by any specific provision found in the Civil Procedure Code, the Court has inherent power to order a party to appear in person if it considers it necessary to do so in the interests of justice. That Order IX, rule 12, applies to all cases where a party has been ordered to appear in person is clear from the fact that the words "under the provisions of section 66" (corresponding to Order V, rule 3) "or section 436" (corresponding to Order XXIX, rules 2 and 3) appearing in the corresponding section 107 of the old Civil Procedure Code have been deliberately omitted from Order IX, rule 12. Cases decided under section 107 of the old Code [for example, *Satu* v. *Hanmantrao* (1)] are, therefore, no authorities on the construction of Order IX, rule 12, so far as this point is concerned. The other contentions put forward on behalf of the appellants need not be dealt with in detail, there being nothing in them. I would, therefore, dismiss this second appeal with costs.

BAKEWELL, J.—A party is bound to attend the Court whenever so required, and although ordinarily he may fulfil this obligation by means of an agent, if the Court so directs, he is bound to attend in person (Order III, rule 1, Civil Procedure Code). If the evidence of the party is required, a summons can be issued in the same manner as to a stranger to the suit; but when the parties are before the Court either personally or by their Pleader, it is competent for the Court to direct them orally to attend without a summons. The provisions of Order IX, rule 12, are perfectly general and are evidently framed for the purpose of dealing with obstructive tactics and of enabling the Court to proceed against any party who does not attend. The diary in the present case shows that there were numerous adjournments for the purpose of settlement and for other reasons, and it may well have been that the District Munsif thought that he should put a stop to these tactics and have the parties before him personally. I think that he was perfectly right in proceeding under this rule. With regard to the provisions of Order X on which the learned Vakil for the appellants relied, I think that they relate primarily to the ascertainment of points in dispute and may point out that they do not refer to the administration of an oath or provide for the examination or cross-examination of parties. I must respectfully dissent from the decision in *Satu* v. *Hanmantrao* (1). With regard to the merits of the case, the plaintiff set up a possessory title under which she and all the defendants claimed the property as owners in common, and I think the evidence was sufficient to support the plaintiff's claim. I agree that this second appeal should be dismissed with costs.

Appeal dismissed.

(2) 17 Ind. Cas. 762; 23 M. L. J. 675; 13 M. L. T. 19.

APPAN CHARAN *v.* KYAUSE MA.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 105 OF 1916.

May 4, 1917.

Present:—Mr. Justice Maung Kin.

Babu APPAN CHARAN—PLAINTIFF—APPELLANT

versus

KYAUSE MA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144 —*Suit for possession—Burden of proof—Laches and acquiescence, difference between.*

Where a plaintiff's claim is based on the ground that he or his predecessor has been dispossessed or has discontinued possession, the period, from which limitation runs is the date of dispossession or discontinuance of possession and the burden is on the plaintiff to show that he or his predecessor-in-title has been in possession within 12 years of the date of suit, and the Article applicable to the suit is Article 142 of the Limitation Act. [p. 722, cols. 1 & 2.]

Where there is a Statute of Limitation applicable to the suit, the objection of simple laches does not apply until the expiration of the time allowed by the Statute. But acquiescence is a different thing; it means more than laches. If a party who can object lies by, and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to and so a kind of permission may be said to be given to another to alter his condition, he is said to acquiesce. [p. 724, col. 2.]

Mr. *Chari* (with him Mr. *Ray*), for the Appellant.

Mr. *Broadbent*, for the Respondent.

JUDGMENT.—Both the lower Courts have held that the defendant-respondent did encroach on the plaintiff-appellant's land to the extent sued for, by building on it.

The main defence is, however, involved in the question whether Article 142 or 144 of the Limitation Act applies. The plaintiff alleges that he was in possession when the encroachment took place in 1908 or 1909, and that he was thereby dispossessed of the land taken up. Following the ruling of their Lordships of the Privy Council in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1), a Division Bench of this Court in *Maung Ya Gyaw* v. *Ma Ngwe* (2) has held that if a plaintiff claims on the ground that he and his predecessors have been in possession but have been dispossessed or have discontinued possession, the period for which limitation runs is the date of dispossession or discontinuance and the burden is on the plaintiff to show that he or his predecessors-in-title have been in possession within 12 years of the date of suit. No other ruling of this Court contrary to that ruling has been cited before me. It must, therefore, be held that Article 142 applies and that the onus is upon the plaintiff to show that he was dispossessed within 12 years of the date of the suit, that is to say, that the defendant built her house within that period.

On this point the Court of first instance held that the defendant did build her house about six years before the suit. The District Court on appeal disagreed with that finding.

The plaintiff's witnesses on this point are Maung Po Thaing, Maung Tun Baw, Maung Po Thin, Kannuswami and Rahim Bux. The Township Judge believed the evidence of the first three, but did not attach much importance to the evidence of the last two. The District Judge explained away the evidence of the three relied on by the Township Judge by holding in effect that they had nothing to go on in their recollections of the time when the encroachment took place. In my view Maung Po Thaing's evidence is absolutely reliable. The witness is a joint sub-registrar and a pensioned *thugyi* and has lived long at Kyauktan in his official capacity as a *taik thugyi* and has had much to do with the buildings of that place. He remembers that in 1892 there was a space of 10 feet between the two houses which were respectively standing on the two sites in question. "The man on the north of it", he says, "owned 5 feet of it, the man on the south of it owned 5 feet of it". The next thing he remembers is that about six or seven years ago the defendant's present house was built by her husband, since deceased, the plaintiff having built his present house before then. The witness goes on to say that the plaintiff built his house exactly on the space taken up by the old house, but that the defendant's husband built his, taking up not only his 5 feet of the vacant space between the two houses but also one foot of plaintiff's land. Maung Po Thaing also remembers that 17 years ago there was a dispute between the owners of the two houses as regards the

(1) 16 C. 473; 16 I A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312.

(2) 2 L. B. R. 56.

boundary line within the two houses and he settled it. Here the witness is talking evidently about the predecessors-in-title of the parties to this suit. He, therefore, has had much to do with the two sites and remembers a great deal about them. He has held a responsible position in which he must have had many opportunities of looking into matters concerning the small group of houses known as the town of Kyauktan. I do not think that such a person's evidence can lightly be disregarded, when he says that a certain house was built such and such a time ago. It cannot be said that he said so in an irresponsible way. He must be credited with some sense of responsibility and must be taken to have thought over the matter and given the time after due consideration. That he assigns no reason for remembering the date of defendant's building is not a matter which can be used against his testimony. It was for the defendant to ask the necessary question. Again, it must be borne in mind that Maung Po Thaing says that the plaintiff's present house was built before the defendant's present house. The plaintiff bought that site with the old house thereon in July 1902 and the suit was brought on the 9th October 1915, a little over thirteen years from the date of the purchase. This being so, Maung Po Thaing's estimate of the length of the time that has elapsed since the building of defendant's house must be held to be reliable. This fact will be presently developed into one of great importance in this case. Regarding the evidence of Maung Tun Baw and Po Thin the learned District Judge says that if their evidence stands alone, he would agree with the Township Judge that it should be accepted but that he thinks Ah Waing's evidence is against their testimony. Now I think that Ah Waing's evidence, when analysed carefully, is not reliable one way or the other. I have no doubt that he had a good reason to remember the date of the defendant's building of the present house before the reason assigned by the District Judge but the question is whether as a fact he remembers it or not. I do not think that he does. Ah Waing says that the plaintiff's present house was built five or six years before the defendant's present house. If that was all he says, there would be no doubt that his evidence support.s Maung Po Thaing, Tun Baw and Po Thin, for the plaintiff's deed of purchase is dated July 1902 and the present house must have been built after the purchase. But Ah Waing goes on to say that the defendant's house was built twelve or thirteen years ago. This cannot be true in view of the date of the plaintiff's deed of purchase; if what he said previously is true. If both the statements are true, the witness has driven himself into an absurdity, for the plaintiff would then appear to have built the house five or six years before the date of his purchase. Ah Waing's evidence is, therefore, unreliable, although it may be said that he appears to be an honest witness.

In the result it is, in my opinion, the proper thing to place reliance upon the evidence of Maung Po Thaing and the other two Burman witnesses. I, therefore, hold that the plaintiff succeeded in discharging the onus that was on him.

Counsel for the defendant argued that, even if the plaintiff's case was established in its entirety, the defendant should not be compelled to pull down her house which she had occupied for so long, but that she should be ordered to pay such compensation as was reasonable under the circumstances. The reason urged for this contention is that the plaintiff waited six or seven years before he filed his suit, without having previously made any complaint. Mr. Broadbent cited *Brommo Moyee Debia Chowdhrain* v. *Komoodinee Kant Banerjee* (3) and *Nil Kant Sahoy* v. *Jujoo Sahoo* (4). In the first case there were two appeals, in the second of which the suit was to have a privy erected upon a very small bit of land, about four *cowries*, demolished. Both the lower Courts had concurrently held that the privy had been erected for seven years or so with the consent of the plaintiffs. The consent appears to have been inferred from the facts that the plaintiffs had been aware of the fact that the privy was erected, and that they allowed it to be completed and to remain standing for many years. The learned Judges of the High Court held that the consent had been rightly inferred and dismissed the appeal

(3) 17 W. R. 466.
(4) 20 W. R. 328.

of the plaintiffs. In the second case the plaintiff claimed to enforce his right to an easement. Upon the facts it was held that he had not proved such uses as would be necessary for the purpose of establishing the right of easement claimed, but the learned Judge went on to say: "We will add that, supposing that the plaintiff had the right which he alleges in this case, he could not be allowed in equity to stand by and see the defendant building a house and erecting a *chulootarah* before he complained in any way of his right being infringed by those acts. He was bound at once to do his best to prevent the defendant from putting a permanent obstacle in the way of the enjoyment of his rights. If he silently stands by and permits him to go to the expense of erecting a building upon his own land before he complains, a Court of Equity ought to be very slow to listen to his complaint when the consequence of giving effect to that complaint will be to cause a very considerable damage and loss to the defendant."

With due respect I am unable to accept the law as laid down in either of these cases, for in my opinion it is too general in expression and too wide in effect. The law was laid down in somewhat similar terms to that in the above cases by a Subordinate Judge in *Gopi* v. *Bisheshar* (5)—"If a man permits another to build upon his land and with the knowledge that the building is being erected, stands by and does not prevent the other from doing so, then, no doubt, equity comes in, and by the rules of equity which in this respect are the same as the rules of law, he cannot eject that other person," and their Lordships of the Privy Council in *Beni Ram* v. *Kundan Lal* (6) remarked that it was to be regretted that the loose and inadequate statement of the rule of equity reported in *Gopi* v. *Bisheshar* (5) should have been accepted apparently without much consideration by the learned Judges of the High Court. I shall first of all deal with the English Law on the subject of laches and acquiescence. "A plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which underlies the Statutes of Limitation, *vigilantibus et non dormientibus lex succurrit*. A Court of Equity refuses its aid to stale demands, where the plaintiff has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his laches. The defence of laches, however, is only allowed where there is no statutory bar. If there is a statutory bar, operating either expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable." (Halsbury's Laws of England, Volume 13, page 168, section 203.) But there appears to be a distinction between laches and acquiescence. In *Archbold* v. *Scully* (7) Lord Wensleydale points out the distinction in the following words:—"I take it that where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the Statute. But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay without losing his right, I conceive, cannot be any equitable bar." With these observations must be read what was said by the same learned Judge and Lord Chancellor Cranworth in *Ramsden* v. *Dyson* (8). There both their Lordships declared that if a stranger builds on the land of another supposing it to be his own and the owner does not interfere but leaves him to go on, equity considers it dishonest in the owner to remain passive and afterwards to interfere and take the profits. But if a stranger builds on the land of another knowingly, there is no principle which prevents the owner from insisting on having back his land, with all the additional value which the occupier has imprudently added to it; and Lord Wensleydale added that, if a tenant does the same thing, he cannot insist on refusing to give

(5) A. W. N. (1885) 100; 4 Ind. Dec. (N. S.) 789.
(6) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022.
(7) (1861) 9 H. L. C. 360 at p. 383; 7 Jur. (N. S.) 1169; 5 L. T. 160; 11 E. R. 769; 131 R. R. 223.
(8) (1865) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W R. 9-6.

up the estate at the end of his term. It was his own folly to build. This was stated in the Allahabad case of *Uda Begam* v. *Inam-ud-din* (9) as the effect of the observations of their Lordships and was adopted as law applicable to India. "These dicta", say the learned Judges of the Allahabad High Court "of the highest authority illustrate the application of the general rule. There must be something more than a mere delaying in instituting proceedings to deprive a man of his legal remedies." Then the learned Judges in dealing with the facts of the case proceed to say that the appellant, knowing that the respondent was building on her lands, abstained from commencing proceedings for one or two years, that the respondents must have known that they had no claim to the land and that they could hardly have doubted that it belonged to the appellant, and that the delay in bringing the suit was, therefore, not sufficient to deprive the appellant of her right to relief

In *Beni Ram* v. *Kundan Lal* (6) their Lordships of the Privy Council adopted the principle laid down by Lord Chancellor Cranworth and Lord Wensleydale in *Ramsden* v. *Dyson* (8). In *Fatehyab Khan* v. *Muhammad Yusuf* (10) the suit was for the removal of a building erected by the defendants upon certain land over which the plaintiffs alleged that all the residents of the *mohulla* where the parties lived had from time immemorial exercised a right of way to and from their residences, besides using it for social gatherings and other common purposes. *Ramsden* v. *Dyson* (8) was followed and Edge, C. J., observed on the facts:— "It appears to me that the acquiescence cannot possibly arise here. It is not suggested that there was any evidence that the plaintiffs had given their actual consent to the building; and the only evidence of acquiescence can be that they did not immediately protest. It appears to me that the defendants in creating this building must have known perfectly well that they were building upon a courtyard which their neighbours had a right to sue."

It is clear from the foregoing that besides the plaintiff's delay in instituting proceedings the Court would have to go into the question as to whether or not the person building had reasonable grounds for supposing that the land built on was his own land.

In *Muhammad Umar Daraz Khan* v. *Maru* (11) Karamat Hussain, J., following *Beni Ram's* case (6), laid down the law as follows: "In order to constitute acquiescence and to raise the plea of equitable estoppel an abstinence from interference is not enough. In addition to this there must also be a mistaken belief in the builder that the land upon which he was building was his own property." So that the defendant may show that he did not build on the land of another knowingly but under a mistaken belief that it was his.

Turning to the question of fact whether the defendant's husband knew that he was building on a portion of the plaintiff's land or whether he had reasonable ground for believing that he was doing so on his own land but that he had made a mistake, I am unable to come to any other conclusion than that the defendant's husband built the house taking in a portion of the plaintiff's land knowingly and that there was no possibility of a mistake having occurred as to whose property that portion was. Maung Po Thaing's evidence makes it clear that originally there was a well defined boundary between the two houses in the shape of a fence, and that there was vacant space, 5 feet wide, on either side of the fence and that when the defendant's house was re-built, not only was his own vacant space taken up, but a foot of land beyond the fence.

This evidence is, in my opinion, reliable. Maung Po Thaing is the only witness in the case who could speak with some knowledge of the place and he speaks very clearly on all the matters he was examined. I hold, therefore, that the defendant's husband built his house knowing that he was thereby encroaching upon a portion of the plaintiff's land and that there was no possibility of his having made a mistake in thinking that the portion was his.

The appeal is allowed. The decree of the District Court is set aside and that of

(9) 1 A. 82; 1 Ind. Dec. (N. S.) 74.

(10) 9 A. 434; A. W. N. (1887) 82; 5 Ind. Dec. (N. S.) 725.

(11) 1 Ind. Cas. 821; 6 A. L. J. 57; A. W. N. (1908) 282.

the Court of first instance restored. The defendant-respondent will not, however, be ordered to pay any costs in any of the Courts, as I think the plaintiff should have brought his suit earlier than he did.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2960 OF 1915.

June 25, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

NAFAR JOARDAR—DEFENDANT—APPELLANT

versus

PRATIMA SUNDARI DASSYA—PLAINTIFF, AND SHYAMA CHARAN BISWAS AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 13—Chittas, private, admissibility of—Appeal, second—Objection as to non-admissibility, whether can be taken for first time.

Semble.—Private *chittas*, however old, are not admissible in evidence under section 13 of the Evidence Act. [p. 727, col. 2.]

Where private *chittas* were admitted in evidence in the primary Court without objection and the Judges of the lower Courts and the Commissioner acted on them:

Held, that an objection to the proceedings in the lower Courts, on the ground that they were based on the terms of the *chittas* which were inadmissible in evidence, could not be allowed to prevail in second appeal. [p. 728, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Nadia, dated the 20th May 1915, affirming that of the Munsif, Kushtea, dated the 22nd August 1913.

FACTS of the case appear from the judgment.

Babu *Sarat Chundra Roy Chowdhury* (with him Babu *Dhirendra Kumar Roy*), for the Appellant.—The points are two:—

(1) There is no finding on the question of title by exchange, as set up by the plaintiff, and

(2) the *chitta*, upon which the division has been based, is no legal evidence as against the defendant-appellant, in that he was no party to it and had nothing to do with it, the *chitta* being one prepared by the landlord of the plaintiff respondent.

The defendant-appellant was a third party so far as the *chitta* was concerned, purporting to hold the lands under a different landlord in a different *mauza*. The Privy Council speak of *chittas* as no evidence of title in boundary disputes between rival proprietors [*Sree Eckowrie Sing* v. *Heeraloll Seal* (1)].

Even Government *chittas* of *khash mahals* have been held to be no evidence against private persons. [*Ram Chunder Sao* v. *Bunseedhur Naik* (2)].

Babu *D. N. Bhagchi*, for the Respondents.—There is no force in the first contention. Although there is no specific finding on the question of plaintiff's title by exchange, there is a general finding as to the plaintiff's title to all the lands in dispute; and particularly having regard to the finding that relationship of landlord and tenant existed between the parties, and the defendant as such gave *barga* paddy to the plaintiff by way of rent, it did not lie in the mouth of the defendant to question the title of the plaintiff.

The above is sufficient to dispose of the other contention as well. But to take it by itself, it is not correct to say that either of the cases referred to by my learned friend for the appellant goes the length he would have them. He has taken the cases in part and not in whole and has misread and misapprehended them. The Privy Council ruling says that those *chittas* would be no evidence when they are *without further accounts, introduction or verification*, words which my learned friend left out in interpreting the ruling, and those words make all the difference in the interpretation. And so also in *Ram Chunder Sao* v. *Bunseedhur Naik* (2), they would not be evidence for a *particular purpose*. It is nowhere stated that they would be no evidence for any purpose and under any circumstances. To the contrary, as has been pointed out by Mr. Justice Woodroffe and Mr. Field in their Treatise on the Law of Evidence, measurement *chittas* would be evidence under section 13 of the Evidence Act even against third parties, but their weight as evidence would depend upon the parti-

(1) 2 B. L. R. (P. C.) 4; 11 W. R. (P.C.) 2; 12 M. I. A. 136; 20 E. R. 292.

(2) 9 C. 741; 7 Ind. Jur. 653; 4 Ind. Dec. (N. .) 1143.

cular circumstances under which they were prepared (*vide* Woodroffe on Evidence—under head *Chittas*). The *chitta* in the present case was of the year 1869—a very ancient *chitta*, prepared when apparently there existed no dispute between any of the parties and friendly relations prevailed. But what is most extraordinary, no objection was taken to the admissibility of the *chitta* in either of the Courts below and is being taken for the first time before your Lordships in second appeal. That is too late in the day. If such objection had been taken earlier the Courts below could have determined under what circumstances the *chitta* was admitted as evidence. Such objection cannot now be raised for the first time.

Babu *Sarat Chundra Roy Chawdhury*, in reply.—Whether the *chitta* is admissible in evidence is a question of law and can be raised as such in second appeal for the first time. *Madhabi Sundari Dassya* v. *Gaganendra Nath Tagore* (3) and *Kanto Prashad Hazari* v. *Jagat Chandra Dutta* (4).

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant against a decision of the Additional Subordinate Judge at Nadia affirming the decision of the Munsif of Kushtea. The suit was brought for a declaration that the lands appertained to the *jote* of the plaintiff held by her under one Bama Sundari and that the defendant was a tenant under her at a rent payable in kind. There was a clear and definite finding made by the learned Judge of the lower Appellate Court, quite apart from the question of the *chitta* and the exchange, that the defendant held on *barga* the disputed land under the plaintiff. If that finding is not displaced there is nothing to say in the case. The appeal has been argued on two points. First of all there was the point that the exchange had not been proved. I do not know that having regard to the finding of fact it was necessary to prove the exchange. That, in any case, was merely a formal omission and probably, as Mr. Roy Chowdhury said, it was overlooked by everybody, as the learned Judge was trying four cases at one time. I suppose, not only a Judge but everybody else cannot do more than one thing at the same time and when one tries four cases at the same time he is liable to make some such slip. However, I do not think the question of exchange, having regard to the finding as to the relationship of landlord and tenant, is material to the case. If that relationship is established, as the defendant is, in fact in possession of this land in *barga* the rent being partly in kind, it does not matter whether the plaintiff got the land by exchange or not.

The other point is a much more serious point and this is as to the admissibility of what is called a private *chitta* under the provisions of the Indian Evidence Act. The *chitta* was, as the learned Judge remarks, a very old one. It is objected that these *chittas* are not admissible in evidence under any circumstances and, therefore, whatever conduct the appellant might have been guilty of in the lower Courts in arguing the case and in conducting the case both before the Judges and the Commissioner with reference to the *chitta*, yet as the document is absolutely excluded from evidence under the provisions of the Indian Evidence Act, the matter having been taken into consideration by the learned Judge, his decree cannot stand. Of course, that is putting the case far too high. It may be that as against the objecting defendant a private *chitta* cannot be given in evidence without his consent, although the text-book writers suggest that these private *chittas* can be given in evidence under the terms of section 13 of the Indian Evidence Act. We all know that section 13 of the Indian Evidence Act has secured a very wide interpretation, probably in some cases too wide. We may take it substantially that most things that one cannot get in under any other section of the Indian Evidence Act can be got in under section 13. Having regard to the authorities it is very difficult to say that the document is not admissible. I am not prepared as at present advised to dissent from Mr. Roy Chowdhury's argument that these documents, although the text-book writers say that they are admissible under section 13, are not so. I think there are strong reasons for saying so. However, in this case, the document went in without objection. The Commissioner

(3) 9 C. W. N. 111.
(4) 23 C. 335; 12 Ind. Dec. (N. S.) 224.

and the two Judges acted on it. It is quite impossible now at this stage to destroy the whole of the proceedings that have taken place on the terms of the *chitta* and to say that the whole suit must be tried again from its inception. I think, having regard to the finding about the defendant holding the land in dispute on *barga*, we should support, although not without some difficulty, the judgment appealed from and dismiss the appeal with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1795 AND 2150 OF 1913.

March 16, 1917.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Cuming.

HON'BLE *Maharaja* MANINDRA CHANDRA NANDI BAHADUR —DEFENDANT NO. 1—APPELLANT

versus

RANGALAL MONDAL AND OTHERS—RESPONDENTS.

Chowkidari Act (VI B. C. of 1870), ss. 50, 51—Suit by putnidar *for possession of* chowkidari chakran *lands —Limitation applicable—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Suit for possession of lands—Plaint, amendment of, by addition of new lands—Operation of plaint.*

Where the plaint filed in a suit for possession of certain plots of land was subsequently amended by the inclusion of certain other plots in the plaintiff's claim:

Held, that the case was not one of amendment of plaint but of an addition of entirely new lands and that, therefore, as regards such new lands the suit must be taken to have been filed on the date when the claim in respect thereof was made by the application for amendment, and not from the date when that application was granted by Court. [p. 729, col. 2]

Article 144 of the Limitation Act applies to the suit of a *putnidar* brought against the *zemindar* for the recovery of possession of *chowkidari chakran* lands transferred to the latter under the Chowkidari Act, and to ascertain when the *zemindar's* possession became adverse, the Court must find when the lands were settled by the *zemindar* with tenants and when those tenants took possession of the lands and whether such possession was to the knowledge of the *putnidar*. [p. 730, col. 1.]

Appeals against the decrees of the Subordinate Judge, Birbhum, dated the 10th March 1913, confirming those of the Munsif, Rampurhat, dated the 30th March and 30th August 1912, respectively.

FACTS material to the report will appear from the judgment and the arguments.

Babu *Ram Charan Mitra* (with him Babus *Jogesh Chandra Dey*, *Hemendra Nath Sen* and *Sarat Kumar Mitra*), for the Appellant.—The amendment relied upon by the other side is not really an amendment under the law. The Court of Appeal finds that by this amendment new lands were substituted for old lands, and it admits that for purposes of limitation the suit must be regarded as instituted on the date when the amendment was ordered to be made. We submit that limitation should run from the date when the lands were transferred to the *zemindar* by the Collector, the 3rd March 1899. The amendment was made more than twelve years after that, *i.e.*, on the 29th August 1911. Even if limitation runs from the date when the tenant got possession from the *zemindar*, the suit is barred as the lease to defendants Nos. 2 and 3 was executed on the 8th July 1899.

Babu *Dwarka Nath Chakravarty* (with him Babu *Baranashibasi Mookherjee*), for the Respondents.—Amendment when allowed by the Court is only an amendment and the suit must be regarded as filed when the unamended plaint was filed. We submit that there was no bar to the Trial Judge allowing the amendment. In the body of the plaint there was a proper description of the lands in suit as being the *chowkidari chakran* lands of village Goyta and others which had been resumed by the Collector and transferred to the *zemindars*. This description has not in any way been changed and forms the whole basis of the suit. The plaintiff need not have given any boundaries of the lands and could have asked for discovery from the defendants. He says in his petition that the *amlas* made mistakes and he is supplying correct boundaries after inquiry. For principles on which amendment is permissible see the analogous provision in Order VI, rule 17, clause (2), Civil Procedure Code, and the case of *Asgar Ali* v. *Trilokya Nath Ghose* (1).

(1) 17 C. 631 at p. 639; 8 Ind. Dec. (N. S.) 960.

Limitation should not run from the date of transfer by the Collector as such transfer is not in derogation of but in full recognition of the title of the *patnidar* as against the *zemindar*. See sections 50 and 51 of Act VI (B. C.) of 1870.

A suit of this character is a suit under Article 144 and not under Article 142 of the Limitation Act. Adverse possession began when the plaintiff demanded possession from the *zemindar* and it was refused, or at any rate from the time when the *zemindar* settled the lands with other persons who took possession of the lands to the knowledge of the *patnidars* and their under-lessees who had title to the lands, so that even if the date of amendment be taken to be the date of institution of the suit, it was not barred by limitation.

Babu *Jogesh Chandra Dey*, in reply.—The finding is that the defendants Nos. 2 and 3 got possession from the date of their lease. So that the possession became adverse from the 8th March 1899 and the suit was barred on the 29th August when the amendment was ordered.

Babu *Baranashibasi Mookherjee* pointed out that if the suit be regarded as instituted when the new boundaries were supplied the date of application for amendment, and not the date when the plaint was ordered to be amended, should be taken as the date of institution of the suit.

JUDGMENT.

IN APPEAL FROM APPELLATE DECREE NO. 1795 OF 1913.

WOODROFFE, J.—This appeal arises out of a suit for possession of certain *chowkidari chakran* lands. The suit was filed on the 3rd March 1911. The plaint set out the resumed lands in a schedule containing 9 plots of land of an area of 26 *bighas* said to be of the value of Rs. 305. On the 16th August 1911 an application was made for what was called an amendment of this plaint and was granted on the 29th August 1911. The result of this order was that the suit became one for 59 plots in lieu of 9 plots of an area of 69 *bighas* instead of 26 *bighas* and for lands of the value of Rs. 705 instead of Rs. 305. The question, therefore, which first arises is whether this so-called amended plaint includes or not the lands set out in the schedule of the unamended plaint. If it does so, what are those lands? If there are such lands the plaintiff would be entitled to a decree in respect of the same. If there are no such lands then the case must be dealt with as stated later on in this judgment. I may here observe that the Subordinate Judge in his judgment says that "the plaintiffs struck out all the plots claimed at first and put in new plots altogether of more value than that of plots claimed originally." It is not, however, clear to me whether the Subordinate Judge by that statement meant to find or had it in his mind that none of the plots added were included in the original plaint. From an inspection of the plaint it appears that the schedule was erased and it may be that it was to this fact that the Subordinate Judge referred. It, therefore, becomes necessary, as I said, to definitely ascertain whether the so called amended plaint includes any lands as set out in the schedule to the unamended plaint.

The next point which we consider is as regards such lands as were added on the 16th August 1911 and were not included in the original plaint. The question which arises as regards such lands is, when was the suit instituted as regards them.

For the respondent it is contended that the suit was instituted as regards all the lands on the 3rd March 1911 when the plaint was received. It might be so if this were a case of amendment proper; but this is not so, because this is not a case of amendment properly so called, but a case of an addition of entirely new lands, and, therefore, as regards such new lands the suit which is taken to have been filed will date from the date when the claim was made in respect thereof, namely, on the 16th August 1911. Therefore, as regards all lands not included in the plaint at first filed, the suit must be taken to have been instituted on the 16th August 1911. As regards all lands not included in the plaint at first filed there are two dates upon which it may be argued that the suit can be taken to have been instituted, namely, either on the 16th of August 1911 when the application was made for amendment or on the 29th August 1911 when the application was granted. Something may be said on behalf of either of these dates, but

we are in favour of the respondent's view of taking the earlier date, namely, the 16th August 1911, seeing that this is a point which is not seriously contested. We, therefore, hold that as regards all lands not included in the plaint as first filed, the suit must be taken to have been instituted on the 16th August 1911.

The next point, therefore, which arises is whether the suit is barred or not as regards those lands; and this raises the question whether Article 142 or Article 144 of the Limitation Act applies. For the respondent it has been contended that Article 144 applies, whereas the appellant has put forward Article 142. It is true that paragraph No. 4 of the plaint alleges that the properties described in the schedule were held by certain *chowkidars* as *chakran* lands under the plaintiffs the *se-patnidars* who obtained their services and enjoyed the said lands in *se-patni* right. But this was a possession under another title. This is not a case in which possession was obtained under the resumption proceedings and was then lost. In my opinion, therefore, Article 144 applies to this case. The Court must, therefore, ascertain when possession became adverse to the plaintiffs, and for this purpose it must find when the lands were settled by the first defendant with the tenants and when the appellants tenants entered upon the lands and was such possession to the knowledge of the plaintiffs. Either party may adduce further evidence upon this question of possession, and such evidence may be taken either by the lower Appellate Court itself or under its direction by the Court of first instance.

I may draw here the attention of the lower Appellate Court to the 8th paragraph of the written statement of the second and third defendants. It runs as follows :—

"The defendant No. 1, after getting the land in suit transferred to him, caused notices to be served in Goyta village and adjoining villages and proclaimed by beat of drum that he will settle the same. The plaintiffs were fully aware of these. They were also aware of the settlement of the land to these defendants. They did not make any objection at the time of the settlement of the land to these defendants. The defendants are in possession of the land for 12 years paying rent to defendant No. 1. The plaintiffs did not make any objection to these knowing full well all the facts. They never made any opposition to these defendants' possession of the said lands".

The judgment and decree, therefore, of the Subordinate Judge must be set aside and we must remit this case to the lower Appellate Court in order that the Subordinate Judge may deal with the same in accordance with the directions contained in this judgment.

Costs of this appeal will abide the result of the trial by the lower Appellate Court on remand.

CUMING, J.—I agree.

IN APPEAL FROM APPELLATE DECREE No. 2150 OF 1913.

The learned Vakil for the appellant does not press this appeal.

This appeal is, therefore, dismissed with costs.

Appeal No. 1795 *sent back*;
Appeal No. 2150 *dismissed.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1902 OF 1914.

May 3, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

FATEH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHANJU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 171, 177—*Civil Procedure Code (Act V of* 1908), *O. XXII, r.* 11, *O. XXXIV, r.* 1—*Abatement—Mortgage, joint and indivisible—Mortgagee respondent, death of—Failure to bring legal representatives on record and to have abatement set aside—Limitation.*

In the case of a joint and indivisible mortgage all the mortgagees or their legal representatives are necessary parties to a suit for redemption, and the same principle is applicable to an appeal by the mortgagor against the mortgagees in such suit. Consequently where one of the mortgagee respondents to an appeal dies and no application to bring his legal representatives on record is made within six months, as required by Article 177 of the 1st Schedule to Act IX of 1908, and the application to have the consequent abatement set aside is also out of time, the whole appeal abates. [p. 731, col. 2.]

Second appeal from the order of the Additional Divisional Judge, Mianwali, dated the 8th May 1914, affirming that of the Munsif, first Class, Bhakkar, District

Mianwali, dated the 24th February 1914, dismissing the plaintiff's claim.

Dr. *Shuja-ud-Din*, for the Appellants.

Lala *Ude Bhan*, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the Additional Divisional Judge of Mianwali upholding the order of the Munsif, first Class, dismissing the plaintiff's suit for redemption as barred by time. Mr. Ude Bhan, Pleader for the respondents, raises a preliminary objection that the appeal has abated because Khota Ram, one of the original defendants-respondents, died and no application to bring his legal representatives on the record was made within the statutory period of six months. The original defendants were Khota Bam and Teju Ram, who are said to be mortgagees of the land in suit in equal shares. They are descendants of Girdhari, the original mortgagee. Khota Ram is said to have died on the 27th November 1914. Counsel for the respondents has put in a certified copy of the entry in the death-register which shows that this is the date of his death. Mr. Shuja-ud-Din on behalf of the appellants does not dispute the correctness of this entry and admits that the appeal has abated as against Khota Ram, the application to implead his legal representatives not having been made until the 19th July 1915. He does not, however, admit that this partial abatement results in the total abatement of the appeal and he also urges that there are sufficient grounds for setting aside the abatement, because his clients live in a village five or six miles from Bhakkar where Khota Ram lived.

It was pointed out in *Hadu* v. *Lala* (1) and in *Inayat* v. *Ganga* (2) that where the interests of defendants-respondents were joint and the decree could not be reversed without the representatives of the deceased respondent being brought on the record, the whole appeal must abate when it abates against the deceased respondent. In *Hadu* v. *Lala* (1) and *Khuda Bakhsh* v. *Mathra Das* (3) it was held on the facts of those particular cases that the appeal having abated against one of the respondents could not proceed against any of the respondents. In the present case Khota Ram and Teju Ram were joint mortgagees and a suit for redemption could not have proceeded against one of them without the other being impleaded. Similarly when Khota Ram died the appeal could not proceed against Teju Ram alone without impleading the representatives of Khota Ram. The mortgage was a joint and indivisible one and all the representatives of the original mortgagee were necessary parties to a suit for redemption.

We, therefore, hold that the appeal abated against all the respondents six months after the death of Khota Ram *i. e.*, on the 27th May 1915. The application to bring Khota Ram's legal representatives on the record was made one month and 23 days after this.

An application to have the abatement set aside should have been made within sixty days of the abatement, but none was made until it was made orally to us at the hearing of the appeal, that is to say, nearly two years after the abatement. In our opinion there is no sufficient cause within the meaning of section 5 of the Limitation Act for hearing an application made so long after time. When the appellants made their application for impleading the legal representatives of Khota Ram on the 19th July 1915, they stated that he had died about six months before that date. They ought to have ascertained exactly how long ago he had died and should have taken care to make an application to get the abatement set aside within the sixty days prescribed by law. Moreover in the application of 19th July 1915, they said they had come to know of his death about a month previously. No explanation was given as to why they did not at once make an application. We accordingly hold that no sufficient cause for setting aside the abatement has been shown, or for hearing such a belated application to that end as has been made in this case. We accordingly refuse to set aside the abatement.

The appellants will pay the respondents' costs in this Court.

Appeal dismissed.

(1) 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914.

(2) 32 Ind. Cas. 829; 3 P. R. 1916.

(3) 18 Ind. Cas. 182; 62 P. R. 1913; 85 P. L. R. 1913; 89 P. W. R. 1913.

KRISHNA PROMODA DASI *v.* KEDAR NATH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3214 OF 1914.

March 23, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Smither.

Srimati KRISHNA PROMODA DASI—PLAINTIFF—APPELLANT

versus

KEDAR NATH BASU AND OTHERS—DEFENDANTS—RESPONDENTS.

Executor, decree obtained by—Sale—Purchase by executor—Beneficial ownership in decree, determination of—Family arrangement, effect of

K. died leaving four sons and a widow. He left a Will appointing his widow as his executrix. The latter in execution of a rent-decree purchased the property in arrears. Prior to the decree one of the sons having died unmarried, his share had devolved upon the executrix as his mother and a family arrangement had been executed between the members of the family before the auction-purchase of the property, by which the executrix released all her interest in the estate of her deceased son in favour of another son. The plaintiff acquired the entire interest of that son and the other co-sharers in the property:

Held, (1) that under the terms of the family arrangement the executrix had no interest in the property that she purchased *qua* executrix in execution of the decree she obtained as executrix and that the plaintiff was, therefore, entitled to the property; [p. 732, col. 1.]

(2) that though the decree was obtained by the executrix, the beneficial owners of the estate were the real owners of the decree. [p 732, col 2.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 2nd May 1914, modifying that of the Munsif, Khulna, dated the 10th February 19 3.

Babu *Provash Chandra Mitter* (with him Babu *Surendra Madhab Mollik*), for the Appellant.

Babu *Haripada Chatterjee*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff from a judgment of the learned Subordinate Judge of Khulna, dated the 2nd May 1914, modifying the decision of the Munsif of the same place. The plaintiff brought the suit to recover possession of a plot of land. The facts found by the learned Judge of the lower Appellate Court are wholly in favour of the plaintiff-appellant, except as regards one particular matter. One Krishna Kishore Ghose died leaving four sons and a widow. He left a Will appointing his widow, the defendant No. 4 in this case, as his executrix. The defendants Nos. 1 and 2 held the disputed land as tenants under the estate of Krishna Kishore Ghose. The defendant No. 4 as executrix brought a suit to recover the rent in arrear against the present defendants Nos. 1 and 2 and obtained a decree Prior to the decree, one of the sons of Krishna Kishore Ghose by name Jatindra died and the defendant No. 4 succeeded to his share. After the decree had been obtained the property was brought to sale in execution and purchased by the defendant No. 4, the executrix. In the meantime, disputes having arisen in the family, a deed of family arrangement had been executed between the members thereof and, under the terms of that deed, the mother, that is, the defendant No. 4, the executrix, released all her interest in the estate of the deceased Jatindra to one of the other sons, namely, Upendra. The plaintiff has got the entire interest of Upendra and the other co-sharers in the property. The only point that has been decided in this case against the plaintiff is this. That under the terms of the deed of family arrangement, Upendra did not acquire the interest of Jatindra in the land purchased by the executrix in execution of the rent-decree and that, therefore, the plaintiff has got no interest in it. The view of the learned Judge was that that was an interest that accrued to the executrix after the date of the deed of release and could not be affected by the terms of the deed. I do not agree in the view of the learned Judge. His finding that the decree was obtained by the defendant No. 4 as executrix and that the beneficial owners of the estate were the real owners of the decree seems to be right. The question is, "who were the beneficial owners? It may be noticed that the defendant No. 4 is a party to this suit and she does not set up any claim to this land, a share in which has been awarded to her by the decree of the learned Subordinate Judge. But it is manifest that the deed of release passed any interest that the defendant No. 4 had in the estate of Jatindra. The document is in the form of an English deed. The defendant No. 4 the widow of Krishna Kishore Ghose and his executrix released and surrendered "all that undivided one-fourth share which was of the said Jatindra Mohan Ghose of, in and to the estate of the said Krishna Kishore

Ghose except as aforesaid," the exception being certain chattel or moveable property; and the property was described as consisting of the particulars set out in Schedule A thereunder "written or howsoever otherwise the said property as is or was situated, tenanted, bounded, called, known, mentioned, described or distinguished." Then followed the ordinary clause as in an English deed, "together with all the estate, right, title, interest, claim and demand whatsoever of the said Srimati Sarnamoyi Dasi, the defendant No. 4, into or upon the said previous or any part thereof". It is impossible to imagine that the document did not pass clearly the interest that Jatindra had in the rent decree and it is found as a fact that this property was purchased in execution of that decree, though the purchase price was satisfied by the money that was due to the decree-holder on the decree. It is quite clear, therefore, that the defendant No. 4 had no interest in the property that she purchased *qua* executrix in execution of the decree she obtained as executrix. I think the learned Subordinate Judge came to a wrong conclusion when he held that the defendant No. 4 had an interest in the property which she did not claim and apparently did not want. In my opinion, we ought to set aside the decree of the learned Subordinate Judge and restore the decree of the Munsif with costs both in this Court and in the lower Appellate Courts.

SMITHER, J.—I agree.

Decree set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 450 OF 1913.

February 13, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

KALI CHARAN SHAHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOBINDA SUNDAR SANYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Suit for rent—Persons acquiring interest in tenancy prior to suit, position of—Parties, non-joinder of, in rent suit, effect of—Validation Act (I B. C. of 1903), effect of.

In a suit for arrears of rent of a tenure, the plaintiff if he desires to affect or override the interest of a person in the tenure acquired prior to the institution of the suit must, if he becomes aware of such interest subsequent to the institution of his suit, join such person as a party to the suit. [p. 734, col. 1.]

A landlord brought a suit for arrears of rent of a tenure against the tenure-holder, whose interest in a part of the tenure had been purchased by the defendants before the institution of the suit at a sale in execution of a money-decree against the tenure-holder but the landlord's fee was not deposited till after the confirmation of the sale. After the institution of the suit the landlord became aware of the defendants' interest in the tenure but did not make them parties to the rent suit and got a decree against the tenure-holder. In execution of that decree the landlord purchased the tenure:

Held, that having regard to the terms of the Validation Act (I B. C. of 1903) the defendants acquired an interest in the tenure before the plaintiff instituted his suit for rent and as he did not make the defendants a party to that suit when he became aware of that interest subsequent to the institution of the suit, he could not affect or override that interest of the defendants by his purchase of the tenure in execution of his decree for rent against the original tenure-holder. [p. 734, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, Rajshahye, dated the 15th April 1913.

Babu *Dwarka Nath Chakravarty* (with him Babu *Jatindra Nath Lahiri*), for the Appellants.

Babu *Hiralal Sanyal* (with him Babu *Bireswar Bagchi*), for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs from the judgment of the learned Subordinate Judge of Rajshahye, dated the 16th April 1913.

The facts so far as they are relevant to the present appeal are as follows:—One Khormannessa on the 27th March 1897 created a permanent tenure in favour of persons who have been called the Kundus in the present case in certain property. The property consisted of shares in certain *bujis* as well as the whole of the *mokarari* interest of portions of the same lands.

On the 17th of July 1902 the plaintiffs purchased the interest of Khormannessa in all the lands leased out to the Kundus. The plaintiffs on the 6th of June 1904 brought a suit for rent against the Kundus and obtained a decree on the 21st of November 1904. The tenure was put up for sale in execution and purchased by the plaintiffs on the 21st of May 1906. In the meantime on the 18th of January 1904, the defendants purchased at a sale in execution of a

money-decree the interest of the Kundus in a portion of the property. This sale was confirmed on the 21st of May 1904 but the Court, before confirming the sale, did not require the deposit of the landlord's fee as required by section 1 3 of the Bengal Tenancy Act. The deposit was, however, made on the 12th of July 1904. The plaintiffs had instituted their suit against the Kundus on the 6th of June 1904, and they did not, even after they became aware of the defendants' purchase, apply to add the defendants as defendants to the suit they had brought against the Kundus for rent. It has been argued on this appeal that as the plaintiffs were not aware at the date of the institution of their suit against the Kundus of the interest acquired by the present defendants, they were entitled to neglect the interest acquired by the present defendants when they came to hear of it after the institution of their suit. That argument does not appear to be well founded. Having regard to the terms of the Validation Act (Act I of 1903 B. C.) it is clear that the defendants acquired an interest in the property before the plaintiffs instituted their suit for rent against the Kundus. Many cases have been cited on both sides to show that in such a case the plaintiff in a suit can or cannot neglect an interest, he first comes to hear of after the institution of his suit. These cases seem to me to have little, if any, bearing on the point in debate. The real question is whether a plaintiff desiring to affect or override the interest of a person acquired prior to the institution must, if he becomes aware of such interest subsequent to the institution of his suit, join such persons as a party to his suit before he can affect or override such interest. On general legal principles I think he is so bound and if he fails to do so, the interest acquired prior to suit will not be affected. The defendants having acquired an interest in the property it cannot be that such interest known to the plaintiffs before decree is liable to be sold in a suit brought against another person and to be determined without the defendants having an opportunity of paying the rent and saving their property. I agree, therefore, with the conclusion of the learned Subordinate Judge in this respect.

One other matter was raised on the hearing of this appeal, *viz*, that the learned Judge had dismissed the suit as regards the land mentioned in schedule *una* to the plaint. The defendants, save as hereinafter mentioned, do not claim that the land mentioned in schedule *una* was included in their sale-certificate, but say that the lands in schedule *gha* to the plaint are also included in schedule *una*.

The parties are agreed that the decree passed by the learned Judge should be amended by awarding possession to the defendants of the land mentioned in schedule *una* to the plaint, but that this shall not prejudice or affect the right of the defendants declared by the judgment in the lands mentioned in schedule *gha* to the plaint. Subject to this amendment the judgment appealed from must be affirmed and the appeal dismissed with costs, one hundred rupees.

The parties have to day put in the terms on which the decree in this case should be drawn up. Let the decree be prepared in those terms.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL REFERENCE No. 16 OF 1917.

June 29, 1917.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

Maharaja Sir RAMESHWAR SINGH BAHADUR—PLAINTIFF

versus

Sheikh MUHAMMAD WÀIZ AND OTHERS—DEFENDANTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 169—Sale-proceeds, disposal of—Application made two months after confirmation of sale, maintainability of—Interest, rate of, to be allowed to decree-holder—Costs, whether can be recovered out of surplus sale-proceeds.

An application under section 169 of the Bengal Tenancy Act made more than two months after the date of confirmation of sale is maintainable. [p. 735, col 1.]

Where the judgment-debtor disputes the landlord's right to receive interest as part of the sum due on account of rent out of the surplus sale-proceeds under section 169 (*c*), Bengal Tenancy Act, the Court will determine the dispute and the determination shall have the force of a decree. Interest may be added to the sum due as rent at the statutory rate of 12½ per cent. per annum. [p. 735, cols. 1 & 2.]

AMRITA LAL MANDAL *v.* BHUTNATH MANDAL.

The costs of an application under section 169 (*c*) of the Bengal Tenancy Act cannot be added to the sum to be deducted from the surplus sale-proceeds. [p. 735, col. 2.]

Civil Reference made by the Munsif, Madhubani, District Darbhanga, dated the 24th February 1917.

Messrs. *Purendra Narayan Sinha* and *Murari Prasad*, for the Plaintiff.

JUDGMENT.– This is a reference made by the Munsif of the 2nd Court, Madhubani, asking for an expression of opinion on three points of law:—

(1) Is an application under section 169 (*c*) of the Bengal Tenancy Act filed more than two months after the date of confirmation of sale maintainable?

(2) Is an applicant under section 169 (*c*) of the Bengal Tenancy Act entitled to get out of the surplus sale-proceeds (*a*) interest on the rent due to him between the institution of the suit and the date of the completion of the sale, and (*b*) costs of the application under section 169? (*c*) If interest is allowable, then at what rate?

We can see no reason for the reference on the first point. There is nothing in the Code to suggest that the application is not maintainable if made after two months. All that the Code indicates is that the Legislature is of opinion that two months is a sufficient time to give the landlord a reasonable opportunity of exercising his rights and if he fails to exercise them within that time, he runs the risk of losing his money by being anticipated by the judgment-debtor. The answer to the first question is, therefore, that the application is maintainable.

The answer to the second question will depend in each case upon the application of section 169, clause (*c*). Where the judgment-debtor disputes the landlord's right to receive interest as part of the sum due on account of rent, the Court will determine the dispute and the determination shall have the force of a decree. The section does not say that the sum must be due as rent. It says that it must be due on account of rent and undoubtedly interest accruing year by year is due on account of the rent being due. The answer to the second question is, therefore, that interest may be added to the sum due as rent at the statutory rate of $12\frac{1}{2}$ per cent. per annum.

There is no reason to suppose that costs are leviable in summary fashion out of the sale-proceeds. The answer to this question is that the costs of the application under section 169 (*c*) cannot be added to the sum to be deducted from the surplus sale-proceeds.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 585 OF 1914.

July 18, 1917.

Present:—Mr. Justice Walmsley and Mr. Justice Greaves.

AMRITA LAL MANDAL AND OTHERS—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

BHUTNATH MANDAL AND OTHERS—PLAINTIFFS, AUKHOY KUMAR MANDAL AND ANOTHER—DEFENDANTS NOS. 3 AND 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 25—Suit for declaration of title and possession—Title not proved in Trial Court—Appellate Court holding title proved, whether can remand case—Remand, legality of.

A suit for recovery of possession of land on declaration of plaintiff's title was dismissed by the Trial Court on the ground that the plaintiff's title to and possession of the land were not established. On appeal the Subordinate Judge, coming to the conclusion that the plaintiff had proved his title, remanded the case to the first Court for decision of five issues after recording such evidence as the parties might think fit to adduce:

Held, that the remand was not in accordance with the procedure laid down in the Code and was wholly unnecessary and that the Subordinate Judge ought to have considered the evidence himself in coming to a conclusion upon the question of possession and limitation raised in the issues sent down for decision. [p. 736, col. 1.]

Appeal against the order of the Subordinate Judge, Hooghly, dated the 31st August 1914, reversing that of the Munsif, Amta, dated the 28th February 1913.

Babu *Manmatha Nath Roy*, for the Appellants.

Babu *Debendra Nath Mandal* (for Babu *Baikuntha Nath Mitter*), for the Respondents.

BADAL MIRZA *v.* TINKORI KOLEY.

JUDGMENT.

WALMSLEY, J.—The plaintiffs in this suit sought for a declaration of title to and recovery of possession of a certain land.

The Court of first instance found that the plaintiffs had failed to establish their title to the land. It also found that the defendants Nos. 1 and 2 had been in possession of the land for a long time and that the plaintiffs had never been in possession. The plaintiffs preferred an appeal and the learned Subordinate Judge came to the conclusion that the plaintiffs had proved their title. After stating this decision he went on to say that the judgment of the first Court had not dealt with the matter of limitation and possession, and accordingly he sent the case back to the first Court for decision of five issues after recording such evidence as the parties might think fit to adduce. Of the five issues mentioned, 1st and 10th are merely formal, 9th depends upon the decision of the main issues and 2nd and 4th are technical. We have not been shown any reason for supposing that any importance is attached to them. It appears to me that the learned Subordinate Judge ought to have considered the evidence himself and come to a conclusion upon the question of possession and limitation and that it was not only wholly unnecessary but not in accordance with the procedure laid down in the Code for him to remand the case to the first Court. I think, therefore, that this appeal should be allowed and the appeal preferred by the plaintiffs against the judgment of the Munsif should be sent back to the lower Appellate Court for decision in accordance with law.

The appellants will get their costs of this appeal. We assess the hearing fee at one gold *mohur*.

GREAVES, J.—I agree.

Appeal allowed : Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 431 OF 1913.

June 29, 1917.

Present:—Mr. Justice Walmsley and Mr. Justice Greaves.

BADAL MIRZA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TINKORI KOLEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Wakf—Mutawalli, *power of, to grant permanent lease of* wakf *property—Consideration spent in improving endowment—Lessee, position of—Refund.*

A *mutawalli* granted a *mokarari maurusi* lease of *wakf* property and out of the *selami* paid for the lease spent Rs. 400 in building a *pucca* house for the endowment:

Held, that the lease was void as there was no urgent necessity for granting it, but that the lessee was entitled to a refund of Rs. 400 spent by the *mutawalli* in building the *pucca* house, and that for this amount the lessee would have a charge upon the *wakf* property, but no personal claim against the *mutawalli*. [p. 737, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Hooghly, dated the 21st December 1912, reversing that of the Munsif, 1st Court, Howrah, dated the 6th November 1911.

Babu *Satish Chander Ghose* (with him Babu *Bhupendra Coomar Ghose*), for the Appellants.

Dr. *Dwarkanath Mitter* (with him Babu *Jatindranath Bose* and *Biraj Mohan Mojumdar*), for the Respondents.

JUDGMENT.

WALMSLEY, J.—The plaintiffs as *mutawalis* of certain *waqf* property brought this suit to recover possession of land belonging to the *waqf* and for a declaration that a *mokarari maurusi* lease, dated the 30th *Aswin* 1313, executed by a previous *mutawalli*, their father Jamir-ud-din, in favour of the defendants Nos. 1, 2 and 3 was void. The first Court decreed the suit on the ground that the *maurusi* lease was void. On appeal it was held that the lease was not void if it could be shown that there was urgent necessity for granting it and the case was remanded to the first Court for a finding on that question. This remand was based on the authority of the case of *Nemai Chand Adhya* v. *Mir Golam Hossein* (1). On remand, the first Court found that there

(1) 3 Ind. Cas. 353; 11 C. L. J. 317; 14 C. W. N. 535; 37 C. 179 at p. 187.

was no urgent necessity for the lease and, in consequence, it decreed the plaintiffs' suit. The lower Appellate Court, however, has reversed this finding and dismissed the suit and, in consequence, the plaintiffs have preferred this appeal. As already observed, when the case first went before the lower Appellate Court it was remanded on the authority of the case of *Nem i Chand Adhya* v. *Mir Golam Hossein* (1) and the learned Vakil on behalf of the respondents has urged in this Court, *first*, that that case is an authority which we should follow in this appeal and *secondly*, that there is a finding of fact by the learned Subordinate Judge to the effect that there was urgent necessity for the granting of this lease. I think, however, that the circumstances of this case are so very different from those of *Nemai Chand Adhya's* case ( ) that the principles there enunciated have no application whatever here, and with regard to the suggestion that there is a finding of fact by the Appellate Court to the effect stated, I cannot agree because it appears to me that the words of the Subordinate Judge simply came to this that he regarded the substitution of a *pucca durga* for the thatched hut as desirable and prudent. That is not a finding that there was any urgent necessity. Now, if the rule already mentioned is not applicable in the present case, then it appears to me clear on the authorities that this lease is void. It is not necessary to do more than to refer to the cases of *Jewun Doss Sahoo* v. *Shah Kubeer ood-deen* (2) and *Shoojat Ali* v. *Zumeeroodeen* (3). On the authority of these two cases, I am satisfied that this *maurusi* lease is void. It is contended, however, on behalf of the respondents that the finding of the lower Appellate Court operates as a retrospective sanction, as effective as a previous sanction by the District Judge, and in support of that suggestion the learned Vakil refers to a passage in the case of *Nemai Chand Adhya* v. *Mir Golam Hossein* (1). Again the circumstances are so entirely different that I do not think the remarks there made have any application in the present case.

The third point which is raised is this, that as the then *mutawalli* Jamiruddin actually received Rs. 400 by way of *selami*, the present *mutawallis* cannot have the lease set aside without refunding that sum. I take it that the learned Judge of the lower Appellate Court found that, as a matter of fact, the sum of Rs. 400 out of the *selami* was spent by the then *mutawalli* in building a *pucca* house and I think the present plaintiffs ought to refund that sum. The plaintiffs as *mutawallis* of the *waqf* property should refund that sum *minus* such sum as may be due by the lessees for rent in respect of the leased property and also *minus* the sum due to the plaintiffs by the defendants Nos. 1, 2 and 3 by way of the costs of this litigation in all Courts. An account of this sum will be taken by the Munsif and the *mutawallis* will be entitled to raise such sum by mortgage of the *waqf* property and pay the amount so raised to defendants Nos. 1, 2 and 3, or they can mortgage the property to defendants Nos. 1, 2 and 3 to secure the sum found due the Munsif will fix the rate of interest under the mortgage. This order does not impose any personal liability on the plaintiffs or on the *mutawallis* of the *waqf* property in respect of the sum found due. The Munsif after taking the account and determining the sum payable by the plaintiffs will fix a date within which the sum so found due is to be paid or a mortgage to secure the same executed by the *mutawallis* in favour of defendants Nos. 1, 2 and 3. If the sum so found due is not paid within the time fixed or secured by mortgage the defendants Nos. 1, 2 and 3 will have a charge for that amount on the *waqf* property.

GREAVES, J.—I agree.

Appeal allowed.

(2) 2 M. I. A. 390; 6 W. R. (P. C) 3; 1 Suth. P. C. J. 100; 1 Sar. P. C. J. 206; 18 E. R. 348.

(3) 5 W. R. 158.

YEGNARAMA DIKSHITAR *v.* GOPALA PATTAR

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 273 OF 1915.

May 1, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

YEGNARAMA DIKSHITAR AND OTHERS—PLAINTIFFS Nos. 1, 2, 4 AND 5—APPELLANTS

versus

GOPALA PATTAR AND OTHERS—PLAINTIFFS Nos. 6, 3, 7 AND 8 AND DEFENDANTS Nos. 2, 3, 5 TO 11 AND 13 TO 19 AND 21—RESPONDENTS.

Temple properties, owned and managed by villagers—Grama janam—*Award laying down scheme of management—Decree, whether can be altered by majority—Managers, position of—Corporation.*

The relationship of the inhabitants of a village in respect of a temple and its properties owned and managed by them in common is more in the nature of a corporation than that which exists among the members of a club, and the law regulating the latter does not apply to them. [p. 739, col. 2; p. 742, col. 2.]

Harrington v. *Sendall*, (1903) 1 Ch. 921; 72 L. J Ch. 596; 51 W. R. 463; 88 L. T. 323; 19 T. L. R. 302, followed.

Where a corporation consists of an indefinite number, a major part of the members present at a meeting is competent to bind the minority but where the body is definite, there must be a major part of the whole number. [p. 739, col. 2.]

Rex v. *Bellringer*, (1792) 2 T. R. 810; 100 E. R. 1315; *Cooper* v. *Gordon*, (1869) 8 Eq. 249; 38 L. J. Ch. 489; 20 L. T. 732; 17 W. R. 908, followed.

This rule applies to India which recognises fluctuating communities as legal *personæ* owning property, for instance, the caste and the village, and in matters relating to the management of caste property and the administration of its affairs, though not the disposal of it, the majority of the caste has authority to control the minority. [p. 740, col. 1; p. 743, col. 1.]

Per *Abdur Rahim, J.*—A decree passed on an award cannot be treated as standing on a different footing from a contract, and a decree passed on the basis of such a contract must not be construed as laying down that the mode of management laid down therein is intended to be incapable of being altered afterwards. [p. 740, col. 1.]

Nagappa v. *Venkat Rao*, 24 M. 265; *Bheema Venkataramana* v. *Bhommini Gurappa*, 28 Ind. Cas. 970; 28 M. L. J. 488; 2 L. W. 537, followed.

Per *Napier, J.*—Where the majority of the inhabitants of a village are parties to a decree relating to the management of trust properties, they cannot subsequently alter the mode of management laid down by the decree by a majority vote. [p. 743, col. 2.]

Bunwaree Chand Thakoor v. *Mudden Mohun Chuttoraj*, 21 W. R. 41 at p. 42, followed.

The inhabitants of a certain village owned a temple in common, and the temple owned both moveable and immoveable properties. Disputes as to the management of the temple's properties were referred to arbitrators who passed an award, upon which a decree was passed entrusting the management of the temple and its properties to two persons selected by the residents of particular streets. The scheme worked for two years, but disagreements subsequently arose and at a meeting the majority of the members present, resolved to increase the number of trustees to 5:

Held, (*Napier, J.*, dissenting) that the majority of the members present had power to alter the scheme fixed by the decree and increase the number of trustees to 5, and that their decision was binding on the minority. [p. 740, col. 2.]

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 184 of 1913, preferred against that of the Temporary Subordinate Judge, South Malabar at Palghat, in Original Suit No. 48 of 1911.

Messrs. *J L. Rosario* and *A. Sivarama Menon*, for the Appellants.

Messrs. *C. V. Ananthakrishna Aiyar* and *T. Eroman Unni*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The inhabitants of the village of Koduvayur, who form a *grama janam*, own in common certain temples and moveable and immoveable properties in connection with those temples. The villagers, sometime in 1898 wanting to have the disputes which then arose, with regard to the management of these properties, settled by arbitrators, submitted to them the questions at issue. The arbitrators made an award in April 1898 and the award was filed and made a decree of Court in October 1898. By that award, it was laid down that there should be two managers to be selected, each of them from particular streets in the village, by the majority of the villagers residing in these streets. This was provided for by the decision of the arbitrators on the 6th issue. Under the 9th issue the award provided under what circumstances the managers were liable to be dismissed. It appears that in 1910 a number of villagers were dissatisfied with the management of the managers for the time being, and they issued a notice for a meeting to which all the villagers were invited to be present to consider the conduct of Rama Vadhyar, one of the managers, inasmuch as it was apprehended that if he were allowed to continue in the management, harm and loss would result to the *devaswom*, and "for the purpose of making arrangements to conduct the affairs of the *devaswom* in future properly without neglect, and in a manner conducive to the well

being of the *devaswom*?" The meeting was held accordingly on the appointed date and it was resolved among other things that the future management of the village *devaswom* should be entrusted to a committee of five villagers. The plaintiffs in the suit, who are some of the villagers interested in the communal properties, want to have it declared that the proceedings in question were not valid and binding, and the principal ground on which the contention is sought to be upheld in second appeal is that since the award, Exhibit B, which was embodied in a decree, did not provide for any change as regards the number of managers, the community had no power except by the consent of all the members for the time being to change the method of management by increasing the number of managers from two to five. It appears that the total number of villagers at the date of the proceedings in question amounted to 164, of whom about 140 were present at the meeting and supported the resolution in question. Only 19 men opposed, they came to the meeting, but having made a formal objection, left, and the remaining members passed the resolution which is sought to be impeached in this suit. So far as this point is concerned, Mr. Rozario, the learned Vakil for the appellants, argued that the villagers were the owners of the communal properties and they were not in the position of trustees and, therefore, unless all of them consented to alter the mode of management as laid down in the award, there being no provision in the award itself for effecting any change in this respect, the majority had no power to bind the minority in such a matter by any resolution. Mr. Ananthakrishna Aiyar on behalf of the respondents on the other hand contended first of all that the villagers in this case were in fact trustees and, therefore, the rule regarding the conduct of business by trustees applied. It is difficult in this case to hold that this contention of Mr. Ananthakrishna Aiyar is sound, because side by side with the word "urrallers" which is freely used in the pleadings as well as in the documentary evidence in the case, the parties describe themselves as 'owners'. Apparently none of the parties were inclined to admit that the temples were public temples and the properties belonging to those temples were public and charitable trusts. The question before us has to be decided, therefore, on the basis that the parties, namely, the villagers, are co-owners of the temples and their properties.

Mr. Rozario strongly relied on the case of *Harrington* v. *Sendall* (1), in which it was held by Joyce, J., that where the rules of a club did not provide for increasing the subscription payable by the members, a general meeting of the club had no power to increase the subscription so far as to bind the members who had joined the club before the date of such meeting and objected to the subscription being raised. In my opinion, this class of cases has no application to the present case. The membership of a club is constituted by contract by which a member obtains a right to the enjoyment of certain privileges in consideration of his paying a certain subscription and, therefore, he may have a right to insist that no essential change shall be made in his rights unless it is warranted by the rules and regulations which existed at the time when he became member. In the present case, there is no question of any contractual rights of the plaintiffs being affected. The dispute is as regards the mode of management of certain properties which are owned in common by an indefinite body of persons. Some of them may not have contributed at all to the acquisition of the properties but derived their interest by inheritance. It could not be said that any villager has a contractual right to the enjoyment of any particular benefit or privilege with respect to the communal properties. The case is more analogous to the case of a corporation which owns properties, and the principle which governs is that laid down in the cases of *Rex* v. *Bellringer* (2) and *Cooper* v. *Gordon* (3). In the former case, the rule enunciated by Lord Mansfield was followed, namely, "that where a corporation consists of an indefinite number, a major part of those who are existing at the time is competent to do the act but where the body is definite, there must be a major

(1) (1903) 1 Ch. 921; 72 L. J. Ch. 396; 51 W. R. 463; 88 L. T. 323; 19 T. L. R. 302.

(2) (1792) 4 T. R. 810; 100 E. R. 1315.

(3) (1869) 8 Eq. 249; 38 L. J. Ch. 489; 20 L. T. 732; 17 W. R. 908.

part of the whole number." And as observed by Lord Kenyon, "It is in the nature of all corporations to do corporate acts; and where the power of doing them is not specially delegated to a particular number, the general mode is for the members to meet on the charter days, and the major part who are present to do the act (page 1322)." In *Cooper* v *Gordon* (3) it is generally laid down that "in such bodies (meaning congregations) the decision of the majority of the trustees binds the minority. Indeed unless the law were so settled nothing could follow but confusion and defeat of the very purposes for which these congregations are formed. The submission of the minority is the principle on which civil society is founded. It is a principle essential for that reasonable harmony which is necessary for the coherence of all societies, great or small, civil or religious" (page 258). This principle has been adopted by this Court in a very recent case—a decision of Ayling and Seshagiri Aiyar, JJ., *Hasan Raza Sahib* v. *Hasan Ali Sahib* (4).

It was observed by Chief Justice Jenkins in *Secretary of State* v. *Haibatrao Hari* (5), "The law of the country recognized fluctuating communities as legal *personæ* capable of owning property; as for instance, the caste, and the village, and in our opinion the *hukdars* here were communities composed of the religious elements their names indicate." There are many instances of castes and villages owning properties in this Presidency. If such an indefinite and fluctuating body had not the inherent power to provide for the management of their property by means of resolutions which had the approval of the majority and passed at a meeting properly and regularly convened, the business of such communities could not be conducted at all. It is justly observed by Justice Farran in *Lalji Shamji* v. *Walji Wardhman* (6) that "It is clear upon the authorities that in matters relating to management of caste property and the administration of its affairs the majority of the caste has authority to control the minority," and then after referring to a number of decided cases, the learned Judge further remarks: "But in the absence of a written or proved customary constitution I know not how the affairs of a caste could be administered if the decision of the majority duly arrived at and notified were not held binding upon the minority." He relies upon *Cooper* v. *Gordon* (3), which has already been noticed.

It was next argued that since the award was made a decree of the Court, it could not be modified by the majority of members without the consent of the Court. The answer to my mind is best furnished in the words of Markby, J., in *Bunwaree Chand Thakoor* v. *Mudden Mohun Chuttoraj* (7): "Joint owners of a property may make any arrangement they please as to the mode in which their property should be enjoyed by themselves, ...but as far as I am aware, they cannot make an arrangement of this kind binding for ever upon all the successors. Therefore, we must put a reasonable construction upon that decree, and we think, upon the whole, that it was intended only as a present arrangement for the management of the property, and not one binding on persons who were not parties to the decree." So far as the construction of the award in this case is concerned, I am inclined to hold that the mode of management laid down therein was not intended to be incapable of being altered afterwards by the villagers themselves. For the purpose of questions like the present, a decree passed on an award cannot be treated as standing on a different footing from a contract, just as it has been ruled with reference to the question of relieving against forfeiture [see *Nagappa* v. *Venkat Rao* (8), *Bheema Venkataramana* v. *Bommini Guraxpa* (9)].

In fact Mr. Rozario himself conceded that all the villagers for the time being if agreed could change the mode of management in spite of the decree. Thus we revert to the original question, whether the majority could exercise such powers in the absence of any express prohibition in the decree made upon the award and I have already pointed out that the answer to that must be in the affirmative.

The second point argued before us was that

(4) 38 Ind. Cas. 528; 5 L. W. 419; (1917) 1 M. W. N. 389; 33 M. L. J. 348.
(5) 28 B. 276 at 286; 6 Bom. L. R. 43.
(6) 19 B. 507 at p. 522; 10 Ind. Dec. (N. S.) 359.
(7) 21 W. R. 41 at p. 42.
(8) 24 M. 265.
(9) 28 Ind. Cas. 970; 28 M. L. J. 488; 2 L. W. 537.

the notice calling the meeting, that is, Exhibit II, did not sufficiently indicate that the proposal to increase the number of managers would be considered. This objection is not taken in the grounds of the second appeal, for it cannot be said that it is covered by grounds 7 and 8. It appears even doubtful if the objection was urged before the District Judge or before the Trial Court and it is too late now to take an objection of this character for the first time. But I may say that, as I read Exhibit II, I think the question of increasing the number of managers is covered by the words "for the purpose of making arrangements to conduct the affairs of the *devaswom* in future properly without neglect and in a manner conducive to the well being of the *devaswom*." As for the objection that the requisite number of members did not sign the notice, this was also taken for the first time at the hearing of the second appeal and cannot be entertained.

It was also pointed out that there were six strangers (that is, men who did not belong to the village community) who were present at the meeting and signed the resolution. But that cannot make any difference as to the validity and binding character of the resolution, for even eliminating these six men, the others who signed it formed a decided majority. The decree of the lower Court will be confirmed and the second appeal dismissed with costs.

NAPIER, J.—This second appeal arises out of a representative suit by eight persons, inhabitants of the village of Keralapuram, against 19 other inhabitants, to declare that a resolution passed by a majority of the villagers at a meeting held in the village on the 25th September 1910 is not valid and binding. It appears that the householders of the village constitute a *grama janam* and as such own a *devaswom* and certain properties to be utilised for its support. There had been disputes in connection with the management of these properties, which terminated in a reference to arbitration and an award by the arbitrators. This award provided that there should be two managers, one selected from the party residing in two specified streets and the other selected by the party residing in two other streets. Provision was made for the dismissal of the managers on a requisition signed by more than half of the householders, and other provisions in the award laid down a scheme for the management of the property. This award was issued on the 5th April 1908 and was made a decree of Court under the provisions of the Civil Procedure Code on the 15th October 1908. The resolution, the subject of this suit, passed nearly two years later, dismissed one of the managers, appointed five instead of two, and made other alterations in the system of management.

Mr. Rozario for the appellants attacks the validity of the resolution in two ways. He urges, *first*, that the notice calling the meeting was bad, in that, first, it was not signed by a majority as required by the award, and secondly, that it did not give notice of the matters which were dealt with at the meeting. His *other* objection goes more to the root of the matter, for he contends that the award was final and had been made a decree of Court: and as it contained no provision for alteration, there was no power in a majority to compel a minority to agree to any alteration. The first objection can be dismissed very shortly. The point of non-signature by a majority was never raised in the plaint nor has it been discussed in either of the judgments, nor is to be found in the grounds of appeal. The second objection to the notice does appear to have been considered in the course of the judgments, but I can find no direct issue on the point. The attack on the validity of the proceedings all through the trial of the suit turned on the question whether there had been proper publication of the notice and whether the meeting was held at the advertised time and at the advertised place, but nothing was said about the contents of the notice. Even if the point had been taken, I think the language in Exhibit II is wide enough to cover the matters dealt with in the resolution, bearing in mind that the notice is not a statutory requirement.

There remains the really important question in the case. Mr. Rozario contends that these villagers, 164 in number, are co-owners of the *devaswom* and its properties and as such co-owners, in the absence of any agreement between themselves, have equal rights over the whole of the properties and no one

co-owner can be bound by the action or wishes of any other or others. He contends that it makes no difference whether there are 164 co-owners or three, that as long as they are joint owners, the majority cannot bind the minority. He relies on the award as being the joint agreement of the co-owners and binding on them all and as the award contains no provision for alteration it is still binding on all the owners. I have come to the conclusion, for reasons which I will state later, that this award having been converted into a decree is for the present binding on the parties, but as I am in entire accord with the view taken by my learned brother as to the power of a majority to bind a minority, I will state my reasons on those points. Mr. Rozario asks us to apply the analogy of club law as laid down in the case of *Harrington* v. *Sendall* (1), the well known leading case on the subject. The proposition there stated is that a club governed by rules which did not contain any provision for amendment or alteration, cannot, by a resolution passed by a majority of the members, raise the amount of the subscription provided in the rules, so as to bind existing members. The question we have to decide is whether the conditions of associations of the nature of this *grama janam* differentiate them from ordinary joint owners or members of a club.

There is certainly this difference between a body like this and voluntary associations, such as members' clubs, corps of volunteers, etc., that membership arises not from agreement but from status. In this respect this *grama janam* has more analogy with caste and it has certainly been decided in a case reported as *Lalji Shamji* v. *Walji Wardhman* (6) that in matters relating to the management of caste property and the administration of its affairs a majority of the caste has authority to control the minority. This is the decision of a single Judge but the case was elaborately argued before him and he relies on certain unreported and reported cases of the High Court of Bombay. The same view seems to have been taken in this Court in *Krishnasami Chetti* v. *Virasami Chetti* (10). The plaintiff in that case had been expelled from the caste by a resolution of the majority. He took several objections to the resolution, but it was not urged that if the matter was properly considered and a decision arrived at *bona fide* by a majority, it would not be in their power to expel. It is hardly necessary to say that there can be no existing agreement laying down rules for the management of castes. A very instructive case is one reported as *Jagannath Churn* v. *Akali Dassia* (11). The plaintiffs were members of a villagers' fraternity and in their suit they claimed a right to enter the prayer hall and perform their prayers and other rights therein. The defendants were the majority of the whole body of the community and they had excluded the plaintiffs from the exercise of the rights claimed on the ground of their misconduct. The plaintiffs' suit was for an injunction to restrain the defendants from interfering with their rights. The Court held that it had power to go behind the resolution where the matter was one of expulsion and that English cases which decided that rules authorising a majority to expel were conclusive of the question, did not necessarily apply to cases of sects and castes where expulsion had serious results, and it further held that where an existing rule was contrary to natural justice or the decision had not been come to *bona fide* the Court could interfere with it. The importance of this case lies in the view taken by the Judges that associations in this country of which membership arises out of status must be viewed differently to associations in England founded on agreement, though the actual questions decided in the case do not arise here. In England it has been decided in *Rex* v. *Varlo* (12) and *Rex* v. *Bellringer* (2) that where a corporation consists of a varying number of persons, the decision of a majority on the question of administration binds the minority; and in the case of congregation of a church it was decided in *Cooper* v. *Gordon* (3), following *Perry* v. *Shipway* (13), that so far as the administration

(10) 10 M. 133; 3 Ind. Dec. (N. S.) 843.

(11) 21 C. 463; 10 Ind. Dec. (N. S.) 938.

(12) (1775) 1 Cowp. 248; 98 E. R. 1068.

(13) (1859) 4 De G. & J. 353; 1 Giff. 1; 28 L. J. Ch. 660; 5 Jur. (N. S.) 1015; 45 E. R. 136; 7 W. R. 574; 124 R. R. 286.

of the affairs of a church was concerned, the appointment of a minister by the majority bound the minority. It is true that the congregation were not the owners of the church property and, therefore, they differed in that respect from this *grama janam*. But as the question before us is not as to the right to dispose of any property of the *grama janam*, I think we can properly apply the same principle. I do not say that if a majority sought to dispose of the property jointly owned by them the decision of the majority would be binding. I reserve my opinion on that point. But the question in this case being only the formation of a scheme and the appointment of managers, in my opinion, the opinion of the majority must be held to bind the minority.

A further difficulty, however, arises from the fact that the award of the arbitrators, which formulated the scheme sought to be varied by the resolution, has been made a decree of Court. On the one hand, it may be urged that it is idle to make a scheme a decree of Court if there is power in the majority to set it at rought the next day. On the other hand it is difficult to see how an arrangement which has been made a decree of Court and has subsequently been found to be unworkable can ever be altered if a majority have not that power This question came up for decision before the High Court of Calcutta in a case reported as *Bunwaree Chand Thakoor* v. *Mudden Mohun Chuttoraj* (7). There a decree was passed between persons through one of whom the plaintiff was claiming with regard to the use of property dedicated to an idol. Under that decree the property was to be placed in possession of a *gumastah* appointed by the persons interested, who were to be entitled to the surplus proceeds after the necessary expenses of worship had been provided for. That decree had been passed in 1829. In 1870 a new arrangement was made to which the defendants obviously took objection, under which the plaintiff in that suit was to be given possession. The Court held that the decree only gave effect to an arrangement made among the parties themselves for their convenience and was not binding upon any persons except the actual parties to the decree. There is no doubt that the award in this case falls within this language and that it was an arrangement made among the parties themselves for their own convenience. The learned Judges in that case held that the decree could not bind in perpetuity all the successive owners of the property as to the mode in which the property should be managed, that joint owners could not bind their successors in the case of private property, but that successors were entitled to make any arrangement they pleased as to the mode in which their property should be enjoyed among themselves. Although, as I have held, a majority can bind the minority by resolution, I do not think that a majority the members of which have been parties to the decree can go behind it. It is only two years since this decree was passed. The plaintiffs in this case were parties to the award and decree and seek to have its provisions enforced. It seems to me that the defendants must bring themselves within the rule laid down in *Bunwaree Chand Thakoor* v. *Mudden Mohun Chuttoraj* (7) and show that that decree is not binding on them. No attempt has been made to do this and considering that, as I have already said, the decree was only passed two years ago, it is obvious that by far a greater majority of the present owners of the *grama janam* must have been parties to it. I am, therefore, of opinion that it was not open to the defendants at that time to ignore the decree and that for this reason the plaintiffs are entitled to succeed. I would, therefore, allow this appeal with costs throughout. As my learned brother takes a different view, the appeal will be dismissed with costs.

Appeal dismissed.

V R.P.

BROJA KRISHNA GHOSE *v.* BENIMADHAB GHOSE.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2294 OF 1915.

June 18, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

BROJA KRISHNA GHOSE SARDAR—PLAINTIFF—APPELLANT

versus

BENIMADHAB GHOSE SARDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 10 (1), (3)—Application stating date of birth of minor—Proceeding for appointment of guardian—Evidence—Admissibility of proceedings to prove age of minor in subsequent suit.

The proceedings for the appointment of a guardian of a minor and the cause title of such proceedings stating the age of the minor at the date of the proceedings are not admissible in evidence for the purpose of showing what the age of the minor was at that time. [p. 745, col. 1.]

Appeal against the decree of the District Judge, 24-Pergannahs, dated the 12th July 1915, reversing that of the Munsif, first Court, Basirhat, dated the 25th May 1914.

FACTS of the case appear from the judgment.

Dr. *Sarat Chander Basak* (with him Babu *Heramba Chander Guha*), for the Appellant.—The plaintiff is the appellant in this case and he wants to set aside some alienations which were made by his guardian appointed under the Guardians and Wards Act. The question in controversy in the present case is whether the minor instituted the suit within three years of his attaining majority. The plaintiff sought to put in evidence the proceedings in which the guardian was appointed. The lower Appellate Court was clearly wrong in not admitting and considering the aforesaid proceedings as evidence of the age of the minor. The evidence adduced was nothing but the certificate which was issued by the District Judge noting the age of the minor. Although under the circumstances, section 35 of the Evidence Act, regarding the relevancy of an entry in a public record made in performance of duty, may not be applicable, sections 7, 9 and 11 of the Evidence Act will certainly apply. The 'relevant fact' in the present case is the appointment of the guardian. Under the Guardians and Wards Act the age of the person is noted to show when guardianship would cease. Reads section 41, clause (*c*). To fix the time up to which guardianship would continue, the age of the person is noted. The age is given in the certificate. The certificate does come under section 11 of the Evidence Act. The statement as to age was made 15 years ago when nobody could foresee this litigation. It was accepted in 1890. The certificate was allowed to go in when tendered without objection. So I submit it was admissible to prove the age of the minor at the time of the appointment of his guardian.

Babu *Ram Chander Mojumdar* (with him Babu *Provash Chander Chatterji*), for the Respondents, was not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against a decision of the learned District Judge of the 24 Pergannahs, reversing the decision of the Munsif at Basirhat. The suit was brought by the plaintiff to set aside certain alienations made by his guardian appointed under the provisions of the Guardians and Wards Act. It is common ground in this case that a suit of this nature must be brought by the plaintiff within three years of attaining majority. The question is whether the present suit was brought within that period. The plaintiff wanted to give in evidence the proceedings in which the guardian was appointed and the cause title of which apparently stated the age of the plaintiff on that date. The learned Judge rejected that evidence, as far as I can see, on these grounds: *First* of all, that that statement in the cause title in the matter of the Guardians and Wards Act must have been founded upon a statement made by the proposed guardian; the proposed guardian ought to have been called, if he was alive and, if not, the statement made by the guardian to the Court asking for the appointment of the guardian ought to have been put in and, if that could not be produced, then the document now wished to be relied on might have been used for the purpose of showing what the age of the plaintiff was. One cannot, by this short cut, get rid of the formalities prescribed by the Indian Evidence Act. No doubt, in a large number of cases, the manner in which the evidence is let in is extremely

loose; but, in the case of an objection, the provisions of the law must be strictly observed and they should be as strictly observed in the Mofussil Courts as in any other Court. I think, on the whole, that the learned District Judge, in the circumstances of the case, rightly rejected this document. The present appeal, therefore, fails and must be dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL SUIT No. 44 OF 1916.

April 25, 1917.

Present:—Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

PANA LANA ANA ALAGAPPA CHETTIAR AND OTHERS—PLAINTIFFS NOS. 2 TO 4—APPELLANTS

versus

RAVANNA MANA PANA CHANA MUTHIAH CHETTIAR—DEFENDANT—RESPONDENT.

Religious Endowments Act (XX of 1863), ss. 14, 18—Suit under s. 14—Leave granted under s. 18 to several persons—Death of one, effect of—Abatement—Civil Procedure Code (Act V of 1908), s. 92, O I, r. 8—Criminal Procedure Code (Act V of 1898), s. 195.

A suit once instituted under section 14 of the Religious Endowments Act by the persons to whom leave is granted under section 18 of the Act does not abate merely on account of the subsequent death of one of the persons to whom leave was originally granted. [p. 746, col. 2; p. 747, col. 1.]

Maddala Bagavannarayana v. *Vadapalli Perumallacharyulu*, 31 Ind. Cas. 236; 29 M. L. J. 231; *Parameswaram Munpu* v. *Narayanan Namboodri*, 34 Ind. Cas. 384; 40 M. 110; 3 L. W. 305; (1916) 1 M. W. N. 402; 31 M. L. J. 279; *Varadayya Chetty* v. *Munusami Chetty*, 13 Ind. Cas. 232; 10 M. L. T. 514, distinguished.

Chhabila Ram v. *Durga Prasad*, 28 Ind. Cas. 681; 37 A. 296; 13 A. L. J. 379, dissented from.

Per *Ayling, J.*—The language of section 18 of the Religious Endowments Act is very similar to section 195 of the Code of Criminal Procedure and differs from section 92 of the Code of Civil Procedure. Under the former, a sanction granted by one person may be utilised by another, but under section 92 of the Code of Civil Procedure, the persons who institute the suit must be identical with those who obtained the sanction. But section 18 of the Religious Endowments Act merely interposes an independent condition, that the suit shall not be entertained unless leave has been previously granted on application, and does not indicate by whom the application should be made. That clearly indicates an intention that the suit need not be by the same person to whom leave was granted. [p. 746, cols. 1 & 2.]

Tathayya, In re, 12 M. 47; 2 Weir 164; 4 Ind. Dec. (N. S.) 382, followed.

Venkatesha Mallia v. *Bammampalli Ramayya Hegade*, 26 Ind. Cas. 202; 38 M. 1192; 27 M. L. J. 241, distinguished.

Per *Sadasiva Aiyar, J.*—A suit under section 14 of Act XX of 1863 is as much a representative suit as one brought under section 92 of the Civil Procedure Code or some of the suits under Order I, rule 8, of that Code, as it is equally brought in the name and as it affects the rights of all those interested in the religious endowment. All such interested persons become, in the eye of the law, parties to such a suit and the death of one or more of them cannot cause the suit to abate, nor would it prevent the suit from being heard till "its finish" after it has been once properly and legally instituted. [p. 747, col. 1.]

Appeal against the decree of the District Court, Ramnad at Madura, in Original Suit No. 22 of 1913.

Messrs. *S. T. Srinivasagopalachariar* and *G. S. Ramachandra Aiyar*, for the Appellants.

Messrs. *A. Krishnaswami Aiyar* and *M. Patanjali Sastri*, for the Respondent.

JUDGMENT.

AYLING, J.—The suit from which this appeal arises was instituted under section 14, Religious Endowments Act, XX of 1863, by four persons, who had obtained leave of the Court under section 18 of the same. Subsequent to its institution, one of these persons died; and the District Judge has dismissed the suit on the single ground that it is not competent to the three survivors to maintain it, "it being essential that all the donees of the power (to institute a suit) conferred by the Court should jointly exercise that power right up to the finish of the suit." The surviving plaintiffs appeal.

The chief authority relied on by the District Judge is that of *Venkatesha Mallia* v. *Bammampalli Ramayya Hegade* (1), in which it was held that where sanction was given under section 18 of the Religious Endowments Act to two men, it was not open to one of them alone to institute the suit under that section. It may be pointed out at once that this ruling does not necessarily cover the present case, in which the suit was validly instituted by all the persons who obtained leave to sue, but one

(1) 26 Ind. Cas. 202; 38 M. 1192; 27 M. L. J. 241.

of them subsequently died. It does not necessarily follow that a validly instituted suit abates for this reason. Another judgment of this Court quoted in support of the lower Court's decree, *Maddala Tugavannarayana* v. *Vadapalli Perumallacharyulu* (2), also deals with a case in which the institution was itself defective (in the above sense): and the only authority brought to our notice in support of the abatement is *Chhabila Ram* v. *Durga Prasad* (3), which was expressly dissented from in a recent case of this Court, *Parameswaram Munpu* v. *Narayanan Namboodri* (4). All the last three cases were of suits instituted under section 92, Civil Procedure Code, but as I shall endeavour to show presently the difference between the two sections is in the present appellants' favour.

Section 18 of the Religious Endowments Act is very similar to section 195 of the Code of Criminal Procedure. In each, the Courts are expressly forbidden to entertain a complaint or suit, unless express sanction or leave for its institution has been previously obtained. The grant of the sanction or leave in each case removes the bar to the Court taking cognizance of the matter; and once that bar is removed, it is not easy to see how either of the two sections can have further effect. In the case of section 195 of the Code of Criminal Procedure, the complaint may be filed by a different person altogether from the person who applied for the sanction, *vide Tathayya, In re* (5), and though it is not necessary for us to go so far in the present case, I do not see why the same should not hold good in the case of leave granted under section 18 of the Religious Endowments Act. With all respect to the learned Judges who decided *Venkatesha Mallia* v. *Bammampalli Ramayya Hegade* (1), the wording of section 18 of the Religious Endowments Act seems to afford no warrant for the consideration by the Court of the personality of the applicant. The duty of the Court is specifically defined as the determination of whether there are sufficient *prima facie* grounds for the institution of the suit. In dealing with applications under section 195 of the Code of Criminal Procedure, Courts do not uncommonly bear in mind the personality of the applicant and his probable motives, although section 195 is, in this respect, quite general in its terms, and does not attempt to define the matters for the Court's determination. Nevertheless, as already stated, a sanction granted to one person may be utilised by another Section 92 of the Code of Civil Procedure is different. It expressly authorises the institution of a suit by "two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General." This wording certainly supports the view that the persons who institute the suit must be identical with those who obtained the sanction.

Under section 14 of the Religious Endowments Act, on the contrary, any person or persons interested may sue; and section 18 merely interposes an independent condition, that the suit shall not be entertained unless leave has been previously granted on application, but without indicating in any way by whom the application should be made.

There seems to me, therefore, no need to adopt the District Judge's very narrow view of the section: and where the District Court has, on due consideration, decided that there are sufficient *prima facie* grounds for the institution of a suit against trustees of religious endowments, it is undesirable in the public interest that unnecessary obstacles should be thrown in the way of its prosecution.

I would set aside the decree of the District Court and remand the suit for disposal on its merits. Costs in this Court should be costs in the cause.

SADASIVA AIYAR, J.—I should like to reserve my opinion on the question whether when leave is granted to *A* under section 18 of Act XX of 1863 to institute a suit, *B* could institute that suit under section 14.

But I entirely agree with my learned brother that there is nothing in section 18 which can be construed as putting an end to the suit after it is once legally instituted,

(2) 31 Ind. Cas. 236; 29 M. L. J. 231.
(3) 28 Ind. Cas. 681; 37 A. 296; 13 A. L. J. 379.
(4) 34 Ind. Cas. 384; 40 M. 110; 3 L. W. 305; (1916) 1 M. W. N. 402; 31 M. L. J. 279.
(5) 12 M. 47; 2 Weir 164; 4 Ind. Dec. (N. S.) 382.

simply because one of several persons who obtained the leave under section 18 died during the pendency of the suit. I think that the general provisions of the Civil Procedure Code become applicable as much to a suit brought in the Special Court mentioned in section 14 of the Religious Endowments Act after the first step, namely, the institution of the suit, has taken place, as to a suit brought under section 92, Civil Procedure Code, except that a certain special or rather supplemental provision regarding reference to arbitration (see section 16 of the Religious Endowments Act) is also applicable to the former case and the Court is given express powers to award certain named reliefs in its decree to a suit under section 92, Civil Procedure Code. See *Parameswaram Munpu* v. *Narayanan Namboodri* (4) and *Varadayya Chetty* v. *Munusami Chetty* (6).

A suit under section 14 of Act XX of 1863 is, in my opinion, as much a representative suit as one brought under section 92 of the Civil Procedure Code or some of the suits under Order I, rule 8, of that Code, as it is equally brought in the name and as it affects the rights of all those interested in the Religious Endowment. All such interested persons become, in the eye of the law, parties to such a suit and the death of one or more of them cannot cause the suit to abate, nor would it prevent the suit from being heard till "its finish" after it has been once properly and legally instituted, unless perhaps in the almost impossible contingency of all the persons interested ceasing to exist in this world by death or by wholesale apostacy. I agree in the order proposed by my learned brother.

Appeal allowed;
Case remanded.

V.R.P.

(6) 13 Ind. Cas. 232; 10 M. L. T. 514.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 35 OF 1915.

June 8, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

ASITULLA—DEFENDANT No. 1—APPELLANT

versus

SADATULLA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Fraud—Plaintiff co-vendee's name omitted from conveyance—Suit for possession of share against co-vendees—Limitation—Suit for rectification barred—Specific Relief Act (I of 1877), s. 31.

A plaintiff who was a co-vendee of land along with the defendants but whose name was omitted from the conveyance by the fraud of the defendants, who were entrusted with the preparation and execution of the document, can by a suit recover possession of his share, even though the limitation period for rectification of the conveyance by insertion of his name, by a suit properly framed for the purpose, has elapsed. [p. 748, col. 2.]

Appeal against the decree of Mr. Justice Mullick, dated the 26th May 1914, in Appeal from Appellate Decree No. 1862 of 1911.

FACTS of the case appear from the following judgment of

MULLICK, J.—The case of the plaintiff No. 1 is that he and defendants Nos. 1 and 8 jointly purchased some land, the conveyance in respect of which was executed by the proprietors on the 19th *Chaitra* 1303 B.S., that on that day and the date of registration the plaintiff paid his share of the purchase money, that plaintiff's share in the land was partitioned subsequently by private arrangement, that he collected rent from some of the tenants but in 1306 the tenants refused to pay him rent as defendant No. 1 had got decrees against them for rent. He dates his cause of action, *firstly*, from *Kartick* 1304 when he first discovered that through the fraud of defendant No. 1 his name had been omitted as one of the purchasers in the conveyance of the 19th *Chaitra* 1303, and *secondly*, from the beginning of 1306 when the refusal of the tenants to pay him rent constituted a dispossession from the land. Plaintiff No. 2 is the brother of plaintiff No. 1. The suit was instituted on the 18th *Chaitra* 1315 B. S, and the

plaintiffs ask for a declaration of title and possession.

The Munsif finds that although there is not sufficient evidence of fraud on the part of defendants the plaintiff did in fact purchase the land in suit for consideration. He has accordingly decreed the suit. The Subordinate Judge agreeing with this view has dismissed the appeal. The present second appeal is preferred by defendant No. 1.

The first ground urged is that the only relief which the plaintiff could have sought, was a rectification of the *kobala* of the 19th *Chaitra* 1303 B. S., under section 31 of the Specific Relief Act, a relief which is now barred by limitation. Now upon the findings this is not a case either of fraud or mutual mistake and, therefore, section 31 does not seem to me to apply. Next, it is urged that the facts disclosed do not establish that the plaintiffs have been dispossessed and that a decree for rent obtained against a tenant is not an act dispossessing a rival proprietor. In my opinion both Courts have decided rightly in favour of the plaintiffs with regard to this part of the case. If a proprietor has been collecting rent from his tenants, and is prevented from doing so because a rival proprietor has successfully invoked the assistance of a Court of Justice, the injured proprietor is dispossessed from his property just as effectively as if he had been driven out by physical force. The case might be otherwise if the tenants in spite of the decrees obtained by a rival proprietor continue to pay the original claimant, but that question does not arise here. The case is clearly one of dispossession and the suit is saved by the 12 years' rule of limitation. Article 120 of the Schedule to the Limitation Act, therefore, has no application. No other point has been argued before me and the appeal is dismissed with costs.

Babu *Sasodhar Roy* for Babu *Berendro Chandra Das*, for the Appellant.

Babu *Hemendra Kumar Das*, for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Mullick in a suit for recovery of possession of land on declaration of title. The case for the plaintiffs is that on the 21st March 1897 they, along with defendants Nos. 1 and 8, purchased the disputed property from the proprietor, but that, by the fraud of the first defendant who was entrusted with the preparation and execution of the conveyance, the names of the plaintiffs were omitted from the document. The plaintiffs seek for a declaration of their title and for recovery of the lands from the defendants who have wrongfully kept them out of possession. The Courts below have concurrently found that the allegations of the plaintiffs are well founded and have decreed the claim. The decree has been affirmed by Mr. Justice Mullick. In the present appeal, this decision has been assailed as erroneous in law. It has been argued that the plaintiffs cannot establish their title till the conveyance is rectified by the insertion of their names, that the time to obtain rectification of the conveyance by a suit properly framed for the purpose has elapsed, and that they cannot by a suit for possession on declaration of title indirectly obtain relief to which their claim has been lost by lapse of time. In our opinion there is no foundation for this contention.

Section 31 of the Specific Relief Act, which has been pressed upon our notice, no doubt entitled the plaintiffs to obtain rectification of the conveyance. But the question remains, whether it is not open to them to establish their title by proof that although the conveyance was drawn up in favour of defendants Nos. 1 and 8, they were beneficial owners under the transaction. In our opinion, it was open to them to establish this case by oral evidence. This view is supported by the decision in *Mahendra Nath Mukherjee* v. *Jogendra Nath Roy Chaudhury* (1). Sir Francis Maclean, C. J., observed in that case that title may be established without rectification of an instrument, even though the time to secure a rectification of the instrument has elapsed, and that it is open to a party to give evidence to prove that his name has been omitted from the document by fraud or mistake. Mr. Justice Banerjee pointed out in the same case that section 92, proviso (1), of the Indian Evidence Act is not limited in its application to suits for rectification of instruments, but that in suits for possession, evidence of the same character would be admissible as in suits for rectifica-

(1) 2 C. W. N. 260.

tion. He further expressed the opinion that no advantage would be gained if the parties were driven to a separate suit for rectification to be followed by a suit for possession on the strength of the rectified instrument [*cf. Fife* v. *Clayton* (2), *Steel* v. *Haddock* (3)]. The identical principle had been previously laid down by this Court in *Mahomed Bhoy Puddumsee* v. *Chutterput Singh* (4) on the strength of the decision in *Mitchell* v. *Lapage* (5) and has subsequently been applied in *Madhavji* v. *Ramnath* (6), *Mahadeva Iyer* v. *Gopala Iyer* (7), *Rangasawmi Aiyangar* v. *Sowri Aiyangar* (8), *Kota Chinna Mellayya* v. *Kannekanti Veeriah* (9), *Karuppa Goundan* v. *Periathambi Goundan* (10), *Dagdu* v. *Bhaba* (11). We are of opinion that the view taken by Mr. Justice Mullick is correct and that his decree must be affirmed.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

(2) (1807) 13 Ves. (Jun.) 546; 33 E. R. 398; 9 R. R. 220.

(3) (1855) 10 Ex. 643 at p. 645; 24 L. J. Ex. 78; 3 C. L. R. 323; 3 W. R. 172; 156 E. R. 597; 102 R. R. 748.

(4) 20 C. 854; 10 Ind. Dec. (N. S.) 574.

(5) (1816) Holt N. P. 253; 17 R. R. 633.

(6) 30 B. 457; 8 Bom. L. R. 354.

(7) 8 Ind. Cas. 390; 34 M. 51; 8 M. L. T. 289; (1911) 1 M. W. N. 36.

(8) 29 Ind. Cas. 588; 29 M. L. J. 229; 39 M. 792; (1915) M. W. N. 448; 18 M. L. T. 75.

(9) 31 Ind. Cas. 671; 3 L. W. 551.

(10) 30 M. 397; 2 M. L. T. 336.

(11) 28 B. 420; 6 Bom. L. R. 126.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 100 OF 1916.

June 13, 1917.

Present:—Mr. Justice Maung Kin.

MAUNG THA SO AND ANOTHER—APPELLANTS

versus

MAUNG LU PE—RESPONDENT.

Buddhist Law—Adoption, kittima *and* apatittha, *form of—Civil Procedure Code* (*Act V of* 1908), *O VI, r.* 17—*Pleadings, amendment of—Alternative claim made for first time in appeal, whether permissible.*

Kittima and *apatittha* are two distinct forms of adoption to which totally different considerations apply. Therefore, where a claim is based on *kittima* adoption, it cannot be amended in appeal by advancing an alternative claim based on *apatittha*, inasmuch as the effect of the amendment would be to change the suit into one of a substantially different character. [p. 750, col. 2.]

Mr. *Sin Hla Aung*, for the Appellants

Mr. *Maung Thin*, for the Respondent.

JUDGMENT.—The plaintiff sued for inheritance as the *kittima* son and sole heir of the deceased. The Trial Court held that the alleged adoption was not proved. On appeal the lower Appellate Judge was of the same opinion and held that "the utmost that the evidence can be held to establish in favour of the plaintiff is that the deceased Ma Kayut used to speak of him as her son and sometimes even told people that he was her adopted son (*mwe za the thi*) and that it was generally understood that he was her adopted son". But there was another ground taken in the memorandum of appeal, *viz.*, that the lower Court should at least have held that the plaintiff was an *apatittha* son. The learned Judge considered the question whether the plaintiff should be allowed in appeal to put forward such an alternative claim and came to the conclusion that he should be, and then proceeded to hold that he was the *apatittha* son of the deceased and that the fact that at the time of the death of the deceased he was living separately from her was immaterial inasmuch as the plaintiff was a blood relation, a nephew of her. The case was accordingly remanded to the Trial Court with the direction that it be determined afresh. I understand this direction to be that the Trial Court should try the question as to what share the plaintiff would be entitled to as against the deceased's next of kin, as the learned Judge before giving the direction had come to the conclusion that "it is only necessary for me to decide as I do that he is entitled to some share".

Before me the defendant urges that the lower Appellate Court was wrong in allowing the plaintiff to make the alternative claim for the first time in appeal.

So far as I can see there is absolutely no authority to justify the permission granted by the lower Appellate Court.

In *Ma Sa Yi* v. *Ma Me Gale* (1),

(1) 7 Bur. L. R. 295; 2 L. C. 181.

which was a case of alleged *kittima* adoption, the question arose before this Court as to whether an alternative claim as an *apatittha* child should be allowed in appeal, inasmuch as the *apatittha* adoption was an adoption of a different character to that of the *kittima* form. Birks, J., pointed out that in *Maung Aing* v. *Ma Kin* (2) the Judicial Commissioner of Upper Burma expressed an opinion that such a procedure was questionable. The question, however, did not arise in that case. Without deciding the point Birks, J., said that assuming that there was sufficient evidence of an *apatittha* adoption, the fact that the claimant was living separately from the alleged adoptive mother for eleven years of her life before the latter's death was sufficient to debar her from claiming any share. But Fox, J., as the claimant made no alternative claim on the basis of her being an *apatittha* daughter, did not think it necessary to consider what her rights to share in the inheritance possibly might be, if she had made such a claim.

In *Ma Mya Me* v. *Maung Ba Dun* (3) it was held that an alternative claim may be made, but the point did not arise. The learned Judge held that the evidence justified the view that Ma Mya May was an adopted child but whether she was a *kittima* or *apatittha* it was unnecessary to determine, as the fact that she was an adopted child was sufficient for holding that it was preferable to grant her Letters of Administration to the estate than the opposite party who was adjudged to be unfit, though he was the natural and only son of the deceased. The case was not a regular suit but was one in which both the parties applied for Letters of Administration and the Court had to choose between the two to grant letters.

In my judgment the lower Appellate Court was wrong in allowing the alternative claim to be made in appeal. We are certain as to what a *kittima* adoption is, but as regards the *apatittha* form it is really difficult to say what it is exactly but, it is certain that it is different from the *kitttima* form. In section 16 of Kinwun Mingyi's Digest the term *apatittha* is described in various ways. In *Tet Tun* v. *Ma Chein* (4) Hartnoll, J., after noticing the section came to the conclusion that the principle underlying the definition of the term seems to be that an *apatittha* adoption is a compassionate one; which takes place in consequence of the child being destitute with no one to maintain it through abandonment by, or the decease of, its natural parents or some such similar cause. I have been referred to Mr. May Oung's book on Buddhist Law in which he submits that these views of Hartnoll, J., are not correct and gives his views at pages 122, 123 and 129 of the book.

Whichever view is correct, totally different considerations will have to be applied in the case of an *apatittha* adoption to those which have to be applied in the case of a *kittima* adoption. The two forms are entirely different. Therefore in allowing the alternative claim to be made the Court will be contravening the rule that an amendment should not be allowed where it would have the effect of converting the suit as originally laid into a suit of a different character. Although Order VI, rule 17, which relates to amendment of pleadings is very wide in its terms, it is clearly understood that an amendment would not in general be allowed, if it changes the suit into one of a substantially different character which would more conveniently be the subject of a fresh action.

I am, therefore, of opinion that the alternative claim should not have been allowed to be made. In this view it is unnecessary to decide whether on the evidence the plaintiff is an *apatittha* child of the deceased or not.

The appeal is allowed with costs throughout.

Appeal allowed.

(2) U. B. R. (1892-96) II Buddhist Law 22.
(3) 2 L. B. R. 224.
(4) 8 Ind. Cas. 978; 5 L. B. R. 216 at p. 218; 4 Bur. L. T. 7.

MANMOTHA NATH DEY *v.* GADADHAR MANNA.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 200 AND 201 OF 1915.

June 26, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Newbould.

MANMOTHA NATH DEY AND ANOTHER—PETITIONERS—APPELLANTS

versus

IN NO. 200

GADADHAR MANNA—OPPOSITE PARTY—RESPONDENT.

IN NO. 201

GADADHAR MANNA AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1, cl. (t), O. XLI, rr. 17, 19—Bengal Tenancy Act (VIII B. C. of 1885), s. 109 A (2)—Appeal to Special Judge dismissed for default—Application to re-hear, dismissal of—Appeal, whether lies.

An appeal lies to the High Court from an order refusing to re-hear an appeal dismissed for default, even though such appeal has been preferred to the Special Judge under section 109A, sub-section 2, of the Bengal Tenancy Act, in a suit under section 106 of the Act. [p. 752, cols. 1 & 2.]

Appeal against the orders of the District Judge, Midnapore, dated the 26th January 1915.

FACTS of the case appear from the judgment.

Babu *Probodh Chandra Ch tterjee* for Babu *Gour Chandra Pal*, for the Respondents, raised a preliminary objection that no appeal lay against an order of the Special Judge refusing to re-hear a settlement appeal (under section 109A, Bengal Tenancy Act) which was dismissed for default.

[MOOKERJEE, J.—Do you contend that the application to re-hear the appeal was incompetent?]

No. The order of the Special Judge on that application should be taken as final. In an appeal under section 109A, Bengal Tenancy Act, the Special Judge exercises a special jurisdiction under the Bengal Tenancy Act, and that Act does not provide for an appeal in such a case.

[MOOKERJEE, J.—But the appeal was obviously dismissed under Order XLI, rule 17, Civil Procedure Code.

Then the appellant made an application for re-hearing the appeal under Order XLI, rule 19, Civil Procedure Code. Against an order passed on such an application an appeal lies under Order XLIII, rule 1, clause (*t*)].

I submit all those rules of the Civil Procedure Code will not apply in a case of this nature. Refers to *Mothur Chandra Majumdar* v. *Tara Sunkar Ghose* (1) and section 109A, sub section (2), Bengal Tenancy Act.

Babu *Provash Chandra Mitter* (with him Babu *Tarakeswar Pal Chowdhry*), for the Appellants.—The preliminary objection raised against the maintainability of this appeal has no substance. The point has been settled already by two decisions of this Court reported as *Sambhu Chandra Hazra* v. *Purna Chandra Pal* (2) and *W. M. Grant* v. *Ram Rakhar Bhagat* (3) respectively. Of course in sttlement appeals under the Bengal Tenancy Act, the Special Judge exercises a special jurisdiction under that Act, still he is to follow the procedure laid down in the Civil Procedure Code.

On the merits, my submission is that under the circumstances of the case the learned Judge should have allowed the application to re-hear the case.

Babu *Probodh Chandra Chatterjee* replied.

JUDGMENT.—This appeal is directed against an order whereby the Court below has refused to set aside an order of dismissal of an appeal for default. A preliminary objection has been taken to the competence of the appeal.

The suit was instituted under section 106 of the Bengal Tenancy Act and was dismissed by the Court of first instance. An appeal was thereupon preferred to the Special Judge under sub-section 2 of section 109 A. When the appeal was taken up for disposal, neither the appellant nor his Pleader appeared and it was consequently dismissed for default. An application was thereupon made to re-hear the appeal. That application has been refused and the present appeal is directed against this last order. On behalf of the respondent, it is contended that the appeal is incompetent and reliance is placed upon the decision of this Court in *Mothur Chandra Majumdar* v. *Tara Sunkar Ghose* (1). In our opinion, that case is clearly distinguishable and has no application to the circumstances of this appeal. There, an order of remand was made in an appeal preferred under section 109A, against the decision in a suit

(1) 7 C. W. N. 440.
(2) 7 C. L. J. 103; 12 C. W. N. 122; 35 C. 176.
(3) 6 Ind. Cas. 501; 14 C. L. J. 110.

under section 106. An appeal was thereupon preferred to this Court against the order of remand. A preliminary objection was taken that the appeal was incompetent and this contention prevailed. Mr. Justice Banerjee observed that an appeal lay to the High Court from an appellate decision of the Special Judge, only under Chapter XLII of the Code of Civil Procedure of 1882, which has now been replaced by sections 100 to 103 of the Code of 1908. An appeal against the order of remand, if it lay at all, would lie to this Court not under Chapter XLII of the Code of 1882 but under section 588 which found a place in Chapter XLIII of the Code. As Chapter XLIII was nowhere mentioned in section 109A, the inference was drawn that an appeal did not lie to this Court from an order of remand made by a Special Judge in the exercise of his appellate powers under sub-section 2 of section 109A. In the present case section 109A, sub-section 2, made the provisions of the Civil Procedure Code relating to appeals applicable to the appeal before the Special Judge. One of these provisions is embodied in Order XLI, rule 17, which provides as follows: "Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed." The Special Judge in the exercise of the power thus vested in him did dismiss the appeal. Thereupon rule 19 became applicable. That rule provides that where an appeal is dismissed under rule 17, the appellant may apply to the Appellate Court for the re-admission of the appeal. This attracts the operation of Order XLIII, rule 1, clause (*t*), which provides that an appeal shall lie under the provisions of section 104 from an order of refusal under rule 19 of Order XLI to re-admit an appeal. No question arises as to the applicability of Chapter XLII of the Code of 1882 or of the corresponding provisions of the Code of 1908, as under section 2 of the latter Code, an order of dismissal for default is not a decree. There is no escape from the position that this appeal is competent under Order XLIII, rule 1, clause (*t*); in other words, an appeal lies from an order refusing to re-hear an appeal dismissed for default, even though such appeal has been preferred under section 109A, sub section 2, in a suit under section 106 of the Bengal Tenancy Act.

As regards the merits, we are of opinion that this appeal should be allowed and the appeal preferred under section 109A, which was dismissed for default, restored. This order, however, is made on terms. The appellant will pay to the respondent two gold *mohurs* as costs here and in the Court below. This sum must be deposited within one month of the arrival of the record in that Court. If the deposit is made, as directed, the appeal will stand restored and heard on the merits. If it is not so deposited, this appeal will stand dismissed with costs, one gold *mohur*.

It is conceded that this judgment will govern the other appeal (M. A. No. 201 of 1915). In that appeal, however, there will be no separate order for costs

Appeals allowed.

PUNJAB CHIEF COURT.

MISCELLANEOUS APPLICATION IN FIRST APPEAL No. 1778 OF 1916.

July 27, 1916.

Present:—Mr. Justice Broadway.

KAHAN CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat JAWANDI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 36, O. XLI, r. 5—Execution, stay of, by Appellate Court—Ad interim order, date of operation of—Subsequent proceedings—Jurisdiction—Failure to comply with provisions of O. XXI, r. 36, effect of—Practice.

An *ad interim* order issued by an Appellate Court for stay of execution of a decree under appeal takes effect from the time it is pronounced, and not from the time it is officially communicated to the lower Court; and the proceedings subsequent to and contrary to such order are liable to be set aside as having been taken without jurisdiction. So where possession of immoveable property is delivered after pronouncement of the order, the property should be returned to the appellant on his giving the necessary security for restoring it to the decree-holder in the event of the latter succeeding in appeal. [p. 753, col. 1.]

Where the provisions of rule 36 of Order XXI, Civil Procedure Code, have not been complied with and the property is in possession of the tenants, the possession is not legally transferred. [p. 753, col. 1.]

The practice of the Chief Court is not to stay execution for mere costs. [p. 753, col. 1.]

Miscellaneous application for stay of execution of decree in First Appeal No. 1778 of 1916 from the decree of the Senior Sub-Judge, Amritsar, dated 31st May 1916, decreeing plaintiff's claim.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Ram Lal*, for the Respondent.

JUDGMENT.—In this case I issued an *ad interim* order staying execution proceedings on the 14th of June 1916. The order was issued by the office on the 15th of June, 1916 and apparently reached Amritsar and then the Court concerned on the 16th of June 1916 which on the 17th June issued orders complying with this Court's directions. It appears, however, that possession of the property in suit was actually given to the decree-holder on the 14th June 1916. At any rate that is the report of the *Nazir* found on the record. The endorsement upon this report shows that it reached the Court on that date. Mr. Tek Chand, however, points out that the actual possession of the house was with the tenants other than the parties and that the provisions of Order XXI, rule 36, Civil Procedure Code, have not been complied with. The possession given is not a legal possession and should be declared void. Mr. Ram Lal for the other party contends that as possession has been given it should be maintained and that they are entitled to execute for costs as they are quite willing to furnish security for repayment.

Mr. Tek Chand referred me to *Ramanathan Chetty* v. *Arunachalam Chetty* (1) in which it was held that an order issued staying proceedings takes effect from the time it is pronounced and not from the time it is officialy communicated to the lower Court, and that proceedings, contrary to such an order, whether with or without knowledge of it, are liable to be set aside as having been taken without jurisdiction. In the present case it is not clear as to whether this order was announced by me before the possession was actually given, but inasmuch as the provisions of Order XXI, rule 36, have undoubtedly not been carried out it seems to me that having regard to the authority cited and the circumstances of this case, I should be justified in directing that possession be restored to the present petitioner, who will, of course, give security for its subsequent restoration in the event of his appeal failing. With regard to costs the practice of this Court has been not to stay execution.

I, accordingly, confirm the *ad interim* order *qua* the immoveable property and setting aside the proceedings taken in the lower Court under which possession was given to the opposite party I direct that the immoveable property be returned to the petitioner upon his giving security for its return if it be necessary. The other side can, however, execute the decree in so far as the costs are concerned. They will, however, give the usual security to the satisfaction of the lower Court.

No order as to costs of this petition.

Petition allowed.

(1) 22 Ind. Cas 99; 38 M. 766; (1914) M. W. N. 46; 15 M. L. T. 151; 26 M. L. J. 275; 1 L. W. 22.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 136 OF 1916.

June 1, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

Pundit RAKHAL CHANDRA TEWARI NAYARATNA—JUDGMENT-DEBTOR—PETITIONER—APPELLANT

versus

MANARANJAN DAS—AUCTION-PURCHASER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104, O. XXI, r. 92—Appeal, second, whether lies from appellate order reversing order of first Court under O. XXI, r. 92.

Under the present Code of Civil Procedure no second appeal lies from an appellate order reversing an order of the first Court setting aside an execution sale under Order XXI, rule 92. [p. 754, col. 2.]

Appeal against the order of the District Judge, 24 Pergannahs, dated the 28th January 1916, reversing that of the Munsif, 1st Court, Alipur, dated the 30th September 1915.

FACTS of the case appear from the judgment.

Babu *Brojolal Chakerbutty* (with him Babu *Susil Chandra Bose*), for the Respondents.—There is a preliminary objection as regards the maintainability of this second appeal. The case was one under Order XXI, rule 90 for setting aside a sale on the ground of material irregularity. The Munsif set aside the sale. There was an appeal. The order refusing to set aside the sale was made by the Appellate Court under Order XXI, rule 92, and under section 104, sub section (2) no second appeal lies against such an order passed in appeal, when the first appeal has been heard against an order made under rule 92, section 104 comes in and a second appeal is shut out by sub-section (2) of that section,

I rely on *Raj Mohan Pal* v. *Gobinda Chandra Pal* (1).

Babu *Nundalal Sirkar* (with him Babu *Hitlal Guha*), for the Appellant.—Section 104 of the Civil Procedure Code has no applicability to the present case. The case was under section 47 of the new Civil Procedure Code, of 1908 corresponding to section 244 of the old Code, 1882. The first Court set aside the sale; then on appeal the lower Appellate Court confirmed the sale. Hence this second appeal. It is, I submit, maintainable as the order made in a case under section 47 has the force of a decree. I rely on *Paresh Nath Mallik* v. *Hari Charan Dey* (2).

[FLETCHER, J.—Under the present Code of 1908 the High Court is not competent to hear a second appeal against an order made under Order XXI, rule 92, and the case in *Paresh Nath Mallik* v. *Hari Charan Dey* (2) is distinguishable. It does not apply to this case.]

The case of *Surendra Mohini Debi* v. *Loharam Chattopadhya* (3) also supports my contention. If the case comes under section 244 of the old, it would come under section 47 of the present Code and then a second appeal would lie against any order passed in this case by the lower Appellate Court. Even assuming for the sake of argument that no second appeal lies in this case, your Lordships have ample powers to treat this memo. of appeal as an application under section 115, Civil Procedure Code. I submit your Lordships will be pleased to deal with the case under section 115 Civil Procedure Code, if you hold that the second appeal is incompetent.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the judgment-debtor against an order of the learned District Judge of the 24-Pergannahs, dated the 28th January 1916, reversing the decision of the Munsif at Alipur. A preliminary objection has been taken that no second appeal lies to this Court from the order of the learned District Judge having regard to the terms of section 104 (2), Code of Civil Procedure. I think that that objection is well founded. The matter is not *res integra*. It has been held in the case of *Raj Mohan Pal* v. *Gobinda Chandra Pal* (1), and also in the case of *Bhadreswar Goloi* v. *Bishnu Charan Sen* (4) reported in the footnote* of the same case that no second appeal lies to this Court under the present Code against an order of this nature. Against that the learned Vakil for the appellant has referred to the decision of this Court in the case of *Paresh Nath Mallik* v. *Hara Charan Dey* (2). So far from that case being in any way opposed to the case reported as *Raj Mohan Pal* v. *Gobinda Chandra Pal* (1), it is quite clear that in the case reported as *Paresh Nath Mallik* v. *Hara Charan Dey* (2) the sale took place at a time when the provisions of the Code of Civil Procedure of 1882 were applicable and there are no authorities for saying that a second appeal lies under the provisions of the new Code of Civil Procedure in a case of this sort. The old Code did permit a second appeal of this nature, but under the terms of the new Code, it is quite clear that no second appeal lies. I agree in the preliminary objection that the present appeal is incompetent, and must, therefore, fail.

The learned Vakil for the appellant has next asked us to treat the memo. of appeal to this Court as an application for revision under the provisions of section 115, Code of Civil Procedure. That may be done in some cases and the Court may adopt that course in order to prevent a miscarriage of justice. But that course ought not to be adopted as a matter of practice because different considerations arise in dealing with an appeal than with dealing with matters which come within the limited scope of section 115, Code of Civil Procedure. I have heard nothing in this case which would lead us to the conclusion that this is a case where we can or ought to interfere with the decision of the learned District Judge under the provisions of section 115. That being so, the present appeal fails and must be dismissed with costs one gold *mohur*.

NEWBOULD, J.—I agree.

Appeal dismissed.

(1) 14 Ind. Cas. 53; 17 C. W. N. 524.

(2) 10 Ind. Cas. 361; 38 C. 622; 15 C. W. N. 875; 14 C. L. J. 300.

(3) 14 Ind. Cas. 67; 39 C. 687; 16 C. W. N. 570.

(4) 8 Ind. Cas. 3; 17 C. W. N. 525 *note*.

*Refers to 17 C. W. N. 524.—*Ed.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2260 OF 1913.

March 21, 1917.

Present:—Mr. Justice Chevis and Mr. Justice Leslie Jones.

SANT SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

FRANGU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Land Revenue Act (*XVII of* 1887), *s.* 44—*Settlement Records of* 1868 *and* 1892, *entries in, value of—Presumption—Rebuttal—Ownership, grazing cattle and cutting grass from time to time, whether constitutes —Punjab Courts Act* (*III of* 1914), *s.* 41—*Appeal, second* —Wajib-ul-arz, *finding of fact based on interpretation of, interference with.*

After the Settlement of 1852, the Settlement Records of 1868 and 1892 have been prepared with much greater care and accuracy, consequently the presumption to be attached under section 44 of Act XVII of 1887, to the correctness of the entries made therein cannot be rebutted by the provisions of the *Rewaj-i-am* prepared in the Settlement of 1852. [p. 757, col. 1.]

The fact that the plaintiffs have been grazing their cattle and cutting grass from time to time on the land in dispute is not enough to prove their ownership. [p. 757, col. 1.]

A finding of fact based on a totally unwarranted reading of a passage in the *Wajib-ul-arz* of a village is liable to be set aside in second appeal. [p. 757, col. 1.]

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 30th of June 1913, varying that of the District Judge, Kangra, dated the 30th of June 1911, dismissing the suit.

Bakhshi *Sohan Lal*, R. B., for the Appellants.

Mr. *Badr-ud-din Kureshi*, and Lalas *Durga Das* and *Balwant Rai*, for the Respondents.

JUDGMENT.—This is a suit relating to 7575 *kanals* of land situated in village Andaura, Tahsil Nurpur. In this village there are five *pattis*, one of which is called *patti* van *chaudhrian*. The leading *chaudhri* is the sole *lambardar* of the village. In the Settlements of 1868 and 1892 the *chaudhris* were recorded as the owners of the land in suit. In 1907 the *chaudhris* brought a suit and obtained a decree for Rs. 18, price of grass cut from the land in suit. The plaintiffs, proprietors of the other 4 *pattis*, brought this suit in 1909, asking for a declaration that the land in suit is *shamilat deh*. The contesting defendants (defendants Nos. 26-45) are the *chaudhris*, who rely on the entries in the revenue records and assert that the land in suit is their private property.

The first Court dismissed the suit, holding that the plaintiffs had failed to rebut the presumption as to the correctness of the entries in the revenue records (see section 44, Punjab Land Revenue Act). The lower Appellate Court, after two remands, held, on the strength of an entry in the *riwaj-i-am* of the 1852 Settlement, that the land in suit, excluding certain cultivated areas with regard to which it held that the *chaudhris* had established an exclusive title by reason of long adverse possession, was *shamilat deh* and gave a decree accordingly.

The entry in question begins as follows:—

"*Kul zamin is ghaon ki bamujib paimud ykdigar bahisab Ghumaon hasab tafsil paimud men ai.*

"*Abi*	...	172 *ghumaons*	¼	*kanal.*"
"*Ghair abi*	...	820 ,,	¾	,,
"*Mizan Mazrua*		992 ,,	4	*kanals.*"
"*Mumkin*	...	50 ,,	4	,,
"*Muafi*	...	34 ,,	4	,,
"*Baghat*	...	8 ,,	4	,,
"*Mizan*	...	1084 ,,	4	,,

So far there is no difficulty in interpretation. What follows is the ambiguous part. The entry continues thus:—

"*So mazrua sabik se mutabik mandarja khewat makbuza har ek malik, aur* 50 *ghumaon banjar mumkin aur ghair mumkin jo bila paimud aur kharij az parta raha—wuh shamlat tamam deh maweshi sub malikan wa ghair malikan ke us men charti rahengi aur lakri ghas bakader-i-zarurat sab sakinan kasba lewenge.*"

The entry goes on to speak of a separate portion of land called *ban kalan*, of estimated area of 250 *ghumaons*, but it is admitted that this latter part of the entry does not relate to the land in suit.

The learned Divisional Judge, noting that 50 *ghumaons* of *mumkin* (culturable) land is twice mentioned, holds that the *ghair mumkin* (unculturable land) referred to is land different from the 50 *ghumaons*, and that the entry means that excluding the culturable land, (*i. e.*, the *abi* and *ghair abi* land) the whole of the rest of the land

belonging to the village is *shamilat deh*, in which cattle of proprietors and non-proprietors can graze and from which all the residents of the village can take grass and wood according to their necessities.

The passage is undoubtedly a most ambiguous one. It is clear that the *abi* and *ghair abi* land, *i. e.*, the two kinds of cultivated land were measured with a certain amount of accuracy. And these were the only lands which seem to have been assessed to revenue in 1852. In the case of these lands we find measurements down to a quarter of a *kanal*. Then come details of the other land, not assessed to revenue, and here we find nothing smaller than a *ghumaon* mentioned so many *ghumaons* for *mumkin*, so many for *muafi* and so many for *baghat*. We can only conclude that the last three kindswere never measured at all, and that the revenue officers were content to measure what was assessed to revenue and made a rough guess at the rest. The passage about which the real dispute arises is the following, "*aur* 50 *ghumaon banjir mumkin aur ghair mumkin jo bila paimud aur kharij az parta raha wuh shamilat tamam deh* (*hai*). The Divisional Judge holds that this lays down that whatever was not measured and assessed to land revenue was *shamilat deh*, and that as it is admitted that the land in suit was not measured in 1852, it necessarily followed that it must be *shamilat deh*. This seems to us a totally wrong rendering of the passage. We do not believe that the gardens (*baghat*) and *muafi* lands were ever measured. It would, indeed, be curious if they should, like the *mumkin* land, all come to round *ghumaons*, while the *abi* and *ghair abi* lands are worked out to a quarter of a *kanal*. And they were not assessed to revenue in 1952.. So it seems totally wrong to say that whatever was not assessed to revenue in 1852 was *shamilat deh*, for otherwise the gardens too would be *shamilat*, and nobody contends that this is so. The Divisional Judge reads the disputed passage as referring to, (1) 50 *ghumaons banjar mumkin*, and (2) unmeasured and unassessed *ghair mumkin* land.

We, however, are strongly of opinion that the real reading is "50 *ghumaons* of uncultivated land, both culturable and unculturable;" we think the earlier entry of 50 *ghumaons mumkin* is really a mistake for "50 *ghumaons banjar*." If the *ghair mumkin* land were separate from the 50 *ghumaons mumkin* then we should have expected the entry to read somewhat as follows:—"*Aur* 50 *ghumaons banjar mumkin*," *aur digar zamin ghair mumkin*, etc. Still it must be admitted that the passage is ambiguous, and that it is difficult to say with any certainty what the precise meaning really is. But in any case the Divisional Judge is clearly not justified in saying that in this entry it is "most clearly stated" that everything except the excess of the present area of the village over the 1084 *ghumaons*, 4 *kanals*, cultivated in 1852 was *shamilat deh*. It is urged that his finding is one of fact, but when this finding is based on what we regard as a totally unwarranted reading of the passage in the *wajib ul-arz*, we consider that there is good ground for a second appeal.

The arrears of various holdings have largely increased since 1852, and what apparently happened was that in that year the Revenue Authorities measured only a small portion of the village including the parts then cultivated, which naturally in those early days must have been near the village site. Whether they knew then the exact limits of the village we doubt. Their estimate of the uncultivated area of the land belonging to the village we take to be extremely vague. The land which it was proposed to assess was accurately measured; the area of the rest was, we think, merely estimated roughly. Reference to the *Nakl tashrih asamiwar* seems to throw further light on the rough and ready methods followed in 1852, for there we learn that 445 *ghumaons*, 3 *kanals*, which were a part of the 997 *ghumaons*, 4 *kanals*, spoken of in the *wajb-ul-arz* as *mazrua*, were really *banjar*. Where the 50 *ghumaons* spoken of in the disputed entry have gone, nobody has been able to trace, and we doubt if there ever was a definite area of 50 *ghumaons*. River action, no doubt, would account for considerable differences in area, but we are quite unable to understand how the approach of the river nearer to the village *abadi*, spoken of in the District Judge's report (see page 12 of the paper-book), would strengthen the view that whatever escaped measurement in 1852 must be regarded as *shamilat deh*. It certainly appears most probable that all the cultivated land was

measured in 1852, but it does not seem at all certain that there was no uncultivated proprietary land in 1852. It is a significant fact that the *poturari* in the last Settlement of 1892 was a brother of two of the principal plaintiffs in this case, and so it is most unlikely that the plaintiffs would have been unaware of the fact that this large area of land was entered as owned by the *chaudhris*, or that the plaintiffs, if aware of this, would have taken no steps to contest the entry till 1909. The view then that the *chaudhris* by reason of their great local influence deceived the Revenue Authorities and got them to make wrong entries in the Settlements of 1868 and 1892 seems to us quite untenable. And seeing the presumption which attaches by law to the correctness of the entries in the Settlement records of 1868 and 1892, we are quite unable to hold that this presumption is in the least upset by the ambiguous passage in the *riwaj-i-am* of 1852. The latter Settlement records were undoubtedly prepared with much greater care and accuracy, and we are not prepared to discard the records of the two later Settlements in favour of an ambiguous entry in the first settlement.

That the plaintiffs have been grazing their cattle and cutting grass from time to time on the land in suit is not enough to prove ownership. For the plaintiffs it has been urged that there is a finding of the lower Appellate Court that the plaintiffs have been doing so as of right. This, however, is totally incorrect. All that the Divisional Judge has held is that, as the plaintiffs were at the date of institution of suit grazing cattle and cutting reeds and grass from the uncultivated land, they must be regarded as in possession and so entitled to bring a suit for declaration; he does *not* find that they were grazing their cattle and cutting grass as of right.

We accept this appeal and reversing the decree of the learned Divisional Judge we dismiss the suit with costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 76 OF 1915.

July 4, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

ABDUL RAHMAN KAZI AND OTHERS—APPELLANTS

versus

BAIKUNTA NATH ROY CHOWDHURY AND OTHERS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI B. C. of 1859) *—Revenue sale of estate—Purchaser, right of, to revenue free lands within the estate.*

The purchaser of an estate at a revenue sale takes the estate as created at the time of the Permanent Settlement subject to certain well known qualifications. [p. 759, col. 2.]

A purchaser of an estate at a revenue sale (under Act XI of 1859) cannot claim lands, which have been described in the Record of Rights as revenue-free lands and in respect of which no rent was ever claimed or realised by any previous proprietor of the estate, merely because those lands are situate within the geographical limits of the estate purchased by him unless he establishes that those lands were included in the estate at the time of the Permanent Settlement or, in other words, that the revenue was assessed on the basis of the assets of those lands. [p. 759, cols 1 & 2.]

Appeal against the decree of Mr. Justice Mullick, dated the 26th April 1915, in Appeal from Appellate Decree No. 1424 of 1911 against that of the Subordinate Judge, Backergunge, dated the 23rd February 1911, affirming the decree of the Munsif, 6th Court at Barisal, dated the 11th of March 1910.

FACTS of the case appear from the following judgment of

MULLICK, J.—The plaintiffs as auction-purchasers of a revenue paying estate at a sale held under Act XI of 1859, sue the defendants for possession of certain lands which they have described by their cadastral survey plots. The defendants set up a *lakhiraj* right to these lands alleging that they are the property of a shrine called the Darga of Hazrat Shaher Cherag Alim Sahib. The Munsif found that the defendants had failed to prove any *lakhiraj* right in village Latimshah and that in village Sahangal they had proved their claim in respect of 34 *bighas* only.

The Subordinate Judge in appeal affirmed the findings of the Munsif and dismissed the appeal.

Two grounds have been taken before me in second appeal, *first*, that the burden of proof was wrongly placed upon the defendants, and *second*, that the *sanads* on which the defendants relied have been wrongly construed,

ABDUL RAHMAN KAZI *v.* BAIKUNTA NATH ROY.

With regard to the second point I observe that it was not urged before the learned Subordinate Judge and even before me it is not shown in what respect the learned lower Court has erred. I do not, therefore, think that there is any substance in this point.

With regard to the question of onus, I agree with the learned Vakil for the appellants that the burden of proof was upon the plaintiffs. The cases of *Arfunnessa* v. *Peary Mohun Mookerjee* (1) and *Koylashbashiny Dossee* v. *Gocoolmoni Dossee* (2) are authorities for the proposition that an auction-purchaser at a revenue sale suing for possession under section 37, Act XI of 1859, is in substance a plaintiff in a resumption suit and is bound by the rule laid down by the Privy Council in *Hurryhur Mookhopadhya* v. *Madhub Chunder Baboo* (3). The cases, which lay down that in respect of *mal* lands the person setting up an under-tenure as against the auction-purchaser has to prove such under-tenure, do not apply to *lakhiraj* claims, for there is no presumption that every inch of land within the ambit of an auction purchaser's estate was at the time of the Permanent Settlement assessed with revenue. I think, therefore, that the learned Munsif has wrongly framed issue No. 7 which runs as follows:—

"Have the contending defendants and their co-sharers their alleged *chiragi* rights to the lands in suit or any portion of them? If so, are the plaintiffs entitled to annul it."

But it appears that the defendants accepted the issue in this form and went to trial upon it and took upon themselves the burden of proving their *lakhiraj* rights. Further, they made no complaint on this ground before the learned Subordinate Judge, and I must decline in second appeal to set aside the decree especially as the Courts below have come to a decision after consideration of the evidence adduced by both sides. There may be some difficulty in executing the decree, but nothing has been said to me about that and I will merely direct that the appeal be dismissed with costs.

Babu *Abinash Chandra Guha*, for the Appellants.

Babu *Jogesh Chandra Roy*, for the Respondent.

(1) 1 C. 378; 25 W. R. 209; 1 Ind. Dec. (N. S.) 237.
(2) 8 C. 230; 10 C. L. R. 41; 4 Ind. Dec. (N. S.) 147.
(3) 14 M. I. A. 152; 8 B. L. R. 566; 20 W. R. 459; 2 Sar. P. C. J. 713; 2 Suth. P. C. J. 484; 20 E. R. 743.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent, from a judgment of Mr. Justice Mullick, in a suit for recovery of possession of land, upon declaration of title, by purchase of an entire estate sold for arrears of revenue. The case for the plaintiffs is that on the 25th March 1897, they purchased the estate at a sale for arrears for revenue, and that the disputed lands, though comprised therein, have been wrongfully retained by the defendants. The contending defendants disclaim title and possession in a large number of parcels set out in the ninth paragraph of their written statement filed on the 10th February 1909: the other plots, they allege, never constituted the *mal* lands of the estate purchased by the plaintiffs. They assert, on the other hand, that they have been in possession of those lands under a revenue free grant made in the year 1731. The suit was decreed in the Court of first instance, in respect of all lands other than 34 *bighas*, in which, it was held, the defendants had established their revenue free title. The Court, however, found it impossible to locate the exact situation of these 34 *bighas* and directed that the question be determined in the execution department. The Subordinate Judge confirmed this decree, and added that he could not find fault with the lower Court for leaving the question about the site of those 34 *bighas* undetermined till the execution of the decree, when each party would have the right to represent his case. The decree of the Subordinate Judge has been confirmed on appeal by Mr. Justice Mullick.

On the present appeal, the defendants have contended that the burden lay upon the plaintiffs to establish that the lands in dispute constituted the *mal* lands of the estate purchased by them, that there is no evidence on the record to show that the plaintiffs had discharged the burden which lay upon them, and, that, consequently the suit should have been dismissed. In support of this proposition, reference has been made to the decision of the Judicial Committee in *Hurryhur Mookhopadhya* v. *Madhub Chunder Baboo* (3), which was applied in the cases of *Arfunnessa* v. *Peary Mohun Mookerjee* (1) and *Koylashbashiny Dossee* v. *Gocoolmoni Dossee* (2), to reach the conclusion that in resumption suits, the *zemindar* must prove the *mal* character of the lands claimed by him. It is

not necessary for our present purpose to enter into a discussion of the abstract question of onus of proof in suits for resumption of revenue-free lands. It is sufficient to observe that in the present instance the lands are described in the Record of Rights as revenue-free lands. The burden, consequently, lies primarily upon the plaintiffs to establish that the entry in the Record of Rights is erroneous. The question thus arises whether the plaintiffs have adduced evidence to show that the disputed lands are *mal* lands of the estate purchased by them. It is conceded that there is no evidence on the record to show that rent had ever been claimed or realised by the proprietor of the estate in respect of the lands now in controversy. On the other hand, the defendants have produced a grant of 1731 which shows that an area of 63 *bighas* was granted to their predecessors to enable them "to burn lamps at the Durgah of Shah Amirullah". 34 *bighas* are said to have been situated in Kismat Sahangal, but as the document is in a tattered condition, it is impossible to state at this distance of time where the remaining 29 *bighas* were situated. The plaintiffs, it may be observed, claim in this suit lands situated in two villages, namely, Sahangal and Latimshah and the case for the defendants was that the lands in their possession were situated in those two villages and were held by them revenue-free. In these circumstances, it is plain that there was a grant of 63 *bighas* of land, a portion whereof, at any rate, was situated in village Sahangal. It is also clear that this grant was anterior not merely to the Permanent Settlement, but to the grant of the Dewany on the 12th August 1765. There is, on the other hand, no evidence to show that the plaintiffs or any previous proprietor ever claimed or realised rent in respect of those lands. In these circumstances, it is difficult to appreciate how the plaintiffs can possibly succeed. They are no doubt entitled to the privileges of a purchaser of an entire estate at a sale for arrears of revenue. But what are those privileges? Concisely stated (omitting well-known qualifications), the rule is that the purchaser takes the estate as created at the time of the Permanent Settlement. The question, accordingly, reduces to this :—Have the plaintiffs established that these lands were included in the estate at the time of the Permanent Settlement, in other words, was the revenue assessed on the basis of the assets of these lands? The answer must be in the negative. If there had been any indication that rent had been realised in respect of these lands, that would have furnished evidence that the lands were impressed with a *mal* character. In the total absence of such evidence, it is impossible to say that merely because the lands are situated within the geographical limits of the estate purchased by the plaintiffs, they were *mal* lands and formed part of the *zemindari* at the time of the Permanent Settlement. We are clearly of opinion that the decree made by the Courts below cannot be sustained.

The result is that this appeal is allowed, and the decrees of the Courts below set aside subject to the qualification presently to be stated. Our order will not affect the title of the plaintiffs to the parcels set out in the ninth paragraph of the written statement. The decree will declare the title of the plaintiffs to those plots and they will be placed in possession in execution of the decree of this Court. Subject to this reservation the suit will stand dismissed with costs in all the Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 112 AND 158 OF 1915.

May 3, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

SHIB CHANDRA BANERJEE—PLAINTIFF —APPELLANT

versus

IN NO. 112 OF 1915.

SURENDRA CHANDRA MONDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

IN NO. 158 OF 1915.

Sreemutty MAHAHARANNESSA BIBI, WIFE OF KARU MUJA—DEFENDANT—RESPONDENT.

Village Chowkidari Act (*VI B. C. of* 1870), *ss.* 50, 51—*Object and scope of s.* 51—Chowkidari chakran *lands*, zemindar's *title to*—*Settlement before resumption proceedings, validity of.*

SHIB CHANDRA *v.* SURENDRA CHANDRA.

Chowkidari chakran lands form part of the revenue paying estate within whose ambit they are situate, and the *zemindar* has a qualified title thereto. Therefore, when such lands being vacated by the *chowkidar* pass into the possession of the *zemindar*, before they are resumed and transferred by the Collector to the *zemindar* under the provisions of the Chowkidari Act, the latter does not become a trespasser and a settlement made by him of those lands prior to the resumption proceedings cannot be held to be invalid as against a person who obtains a permanent under-tenure in respect thereof from the *zemindar*, after the resumption proceedings. [p. 761, col. 1.]

The new estate which vests in the *zemindar* in respect of the *chowkidari chakran* lands transferred to him under the Chowkidari Act is in continuation and confirmation of his pre-existing interest in those lands. [p. 761, col. 1.]

The object of section 51 of the Chowkidari Act is to maintain the validity of contracts made by the *zemindar* in respect of *chowkidari chakran* lands and it is immaterial whether such contracts do or do not also include other lands which are in no way affected by the resumption proceedings. [p. 762, col. 2.]

The application of the section cannot be limited to cases where there has been a contract by the *zemindar* in respect of lands other than *chowkidari chakran* lands. [p. 761, col. 2.]

Appeals against the decrees of the Subordinate Judge, 2nd Court, Burdwan, dated the 18th November 1914, reversing the decree of the Munsif, 1st Court, Katwa, dated the 3rd December 1913.

FACTS of the case appear from the judgment.

Babu *Ram Chandra Majumdar*, for the Appellant.—The plaintiff is the appellant before your Lordships. The lands in dispute were originally *chowkidari chakran* lands included in a revenue paying estate. These lands were resumed by Government and were transferred to the *zemindar* who gave a permanent under tenure to the plaintiff. The defendants who came on the lands as tenants of the *zemindar* after the *chowkidars* had disappeared are no better than trespassers so far as the plaintiff is concerned and are liable to be ejected.

How could the *zemindar* have power to settle the lands with the defendants before the resumption proceedings? Obviously he could not have done so, and consequently the defendants have acquired no right from their transactions with the *zemindar*. They are trespassers. The plaintiff having obtained a permanent under-tenure from the *zemindar* after the lands were resumed by Government and transferred to the *zemindar* is entitled to eject the defendants from their occupation of the lands in dispute. Section 51 of Village Chowkidari Act has a limited scope and does not refer to contests in respect of *chowkidari chakran* lands.

Babu *Jogesh Chandra Roy* (with him Babu *Haradone Chatterjee*), for the Respondents.—The *chowkidari chakran* lands formed part of the revenue paying estate and the *zemindar* had title therein. See *Ranjit Singh* v. *Kali Dasi Debi* (1). This pre existing estate of the *zemindar* was merely continued when the lands were transferred to him by the Government after the resumption proceedings. It cannot be contended with any show of reason or under any law that the defendants who were inducted on the lands as tenants by the *zemindar* before the resumption proceedings are in the position of trespassers.

Section 51 of the Village Chowkidari Act cannot admit of any limited construction as the other side would like to put upon it.

The learned Subordinate Judge was quite right in not regarding the defendants as trespassers and disallowing the plaintiff the right to eject them.

Babu *Ram Chandra Majumdar* replied.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of possession of lands on declaration of title. The lands were originally *chowkidari chakran* lands included in a revenue paying estate situated within the jurisdiction of the Collector of Murshidabad. The *chowkidars* who were in occupation disappeared many years ago. The *zemindar* thereupon appropriated the lands, dealt with them as included in his estate, and settled them with the defendants as tenants. The Subordinate Judge has found that the defendants have been in occupation for many years as tenants, under the proprietor. On the 21st January 1909, the lands were resumed by the Government, and, on the day following, they were transferred to the *zemindar* in accordance with the provisions of the Village Chowkidars Act, 1870. On the 23rd December 1911, the plaintiff obtained a permanent under-tenure from the *zemindar* and, on the 3rd October 1912, he instituted this suit for ejectment of the defendants on the ground that they were trespassers, unlawfully

(1) 40 Ind. Cas. 981; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 25 C L. J. 499; 19 Bom. L. R. 462; 2 P. L. W. 1; (1917) M. W. N. 459; 6 L. W. 101 (P. C.).

in occupation of the disputed lands. The Court of first instance decreed the suit. Upon appeal that decision has been reversed by the Subordinate Judge. In this Court, the decision of the lower Appellate Court has been attacked on the ground that, on the facts found, the *zemindar* had no authority to settle the lands with the defendants before they had been resumed and transferred to him under the provisions of the Village Chowkidari Act and that the defendants must consequently be treated as trespassers. In our opinion, there is no foundation for this contention.

The decision of the Judicial Committee in the case of *Ranjit Singh* v. *Kali Dasi Debi* (1) leaves no room for doubt that these *chowkidari chakran* lands formed part of the revenue paying estate and that the *zemindar* had a qualified title therein. Consequently, when the lands were resumed under the Village Chowkidari Act and were transferred to the *zemindar* in accordance with its provisions the estate taken by the *zemindar* was in confirmation and by way of continuance of his existing estate. It is thus impossible to maintain the proposition that when the land vacated by a *chowkidar* passed into the possession of the *zemindar*, the latter became a trespasser. The *zemindar*, no doubt, incurred a liability to pay additional revenue to the Government in respect of this land. The amount of such revenue was determined by an appropriate proceeding under the Village Chowkidari Act when the lands were resumed and transferred to the *zemindar*. But, as explained by the Judicial Committee, the *zemindar* had a subsisting interest in the land, and the new estate vested in him was merely in continuation and confirmation of that pre-existing interest. What, then, is the true position? The *chowkidars* vacated the lands; the grantor of the plaintiff thereupon took possession of those lands and allowed the defendants to occupy the lands as his tenants possibly on the erroneous assumption that they formed *mal* lands of his *zemindari*; subsequently a transfer was effected in his favour under the provisions of the Village Chowkidari Act. The plaintiff is clearly not competent to contend that the defendants, who were brought upon the lands as tenants by his grantor, are trespassers. An argument has been based on section 51 of the Village Chowkidari Act, to the effect that the section applies only to cases where there has been a contract by the *zemindar* in respect of lands other than *chowkidari chakran* lands In our opinion, there is no foundation for this limi ed construction of section 51. The object of section 51 is to maintain the validity of contracts made in respect of *chowkidari chakran* lands, and it is immaterial whether such contracts do or do not also include other lands which are in no way affected by the resumption proceedings. We hold accordingly that the Subordinate Judge has taken a correct view of the relative rights of the parties and that the suit has been properly dismissed. It is not necessary for us to determine the precise status of the defendants as tenants under the plaintiff; for it is a sufficient answer to the claim for ejectment that the defendants are not trespassers but tenants. The decree of the Subordinate Judge is accordingly affirmed and this appeal dismissed with costs.

The judgment will govern the other appeal (Second Appeal No. 158 of 1915) which is also dismissed with costs.

Appeals dismissed.

BOMBAY HIGH COURT.

FULL BENCH.

LETTERS PATENT APPEAL NO. 41 OF 1915.

March 30, 1917.

Present:—Sir Basil Scott, KT., Chief Justice, Mr Justice Batchelor, Mr. Justice Beaman, Mr. Justice Heaton, Mr. Justice Macleod, Mr. Justice Shah and Mr. Justice Marten.

ISAP AHMAD MOGRARIA—DEFENDANT—APPELLANT

versus

ABHRAMJI AHMADJI MOGRARIA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I. Art. 127, applicability of, to Muhammadans and other non-Hindus—"Joint family property," meaning of—Stare decisis, *principle of, applicability of.*

By the Full Bench, (Shah, J., dissenting).—Article 127 of the first Schedule of the Limitation Act, 1908, does not apply to the property of a Muhammadan (or any other person not being a Hindu) not having been proved to have adopted as a custom the Hindu Law of the joint family. [p. 765, col. 1.]

Sayad Gulam Hussein v. *Bibi Anwarnisa*, (1885) P. J. 170 at p 171, dissented from.

The expression 'joint family" in Article 127 of the Limitation Act must be read as a compound adjective and the expression "joint family property" must be read as property appertaining to a joint family. [p 765, col. 1.]

ISAP AHMAD MOGRARIA v. ABHRAMJI AHMADJI MOGRARIA.

A long series of decisions based upon a clearly erroneous construction of an Act should not be followed, while a long series of decisions based upon a construction not free from doubt should not be disregarded. [p. 765, col. 2.]

Pate v. *Pate*, (1915) A. C. 1100; 84 L. J. P. C. 234; *Tricomdas Cooverji Bhoja* v. *Gopinathji Thakur*, 39 Ind. Cas. 156; 19 Bom. L. R. 450; 1 P. L. J. 262; 15 A. L. J. 217; 25 C. L. J. 279; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M. W. N. 363; 5 L. W. 654; 44 C. 759 (P. C.), relied upon.

Per *Beaman* and *Heaton, JJ.*—The "joint family" as a legal entity involving definite legal notions, incidents and consequences is unknown to any other great system of law prevailing in the Empire. So that where property is spoken of as belonging to a joint family, it must primarily be referred to a Hindu joint family, and only secondarily to such groups of non-Hindus as can prove that they have by custom adopted the Hindu Law of the joint family. [p. 766, col. 1.]

Per *Shah, J.*—Article 127 of the first Schedule to the Limitation Act can apply to Muhammadans even though they may not be proved to have adopted as a custom the Hindu Law of the joint family. [p. 766, col. 1.]

Sayad Gulam Hussein v. *Bibi Anvarnisa*, (1885) P. J. 170, followed.

Quære.—Whether the Article can apply to persons other than Hindus and Muhammadans, who are not proved to have adopted as a custom the Hindu Law of the joint family.

Letters Patent Appeal from the decision of Mr. Justice Batchelor in Second Appeal No. 474 of 1914, dated the 27th September 1915, preferred from that of the District Judge, Broach, in Appeal No. 23 of 1913, amending the decree passed by the Subordinate Judge of Ankleshwar, in Civil Suit No. 296 of 1912.

FACTS of the case appear from the following judgment of

BATCHELOR, J.—In this appeal it is candidly admitted by the learned Pleader, Mr. Thakor, that he has no prospect of success unless he can be allowed to show that Article 127 of the Indian Limitation Act is not applicable to Muhammadan parties. Unfortunately for the learned Pleader's contention there is a long series of decisions by Division Benches of this Court against that argument, and sitting as a single Judge, I am bound, it seems to me, to give effect to those decisions. If Mr. Thakor can carry the matter to a Division Bench on appeal and can induce a Division Bench to refer the point for reconsideration by a Full Bench, that is another matter. But all that I can do is to dismiss the appeal with costs, following the course of Division Bench decisions to which I have referred.

Cross-objections are dismissed with costs.

Against the above decision a Letters Patent Appeal was preferred when Mr. Justice Beaman and Mr. Justice Heaton made on 6th September 1916 the following

ORDER OF REFERENCE TO A FULL BENCH.

We refer the following question to a Full Bench:

"Whether Article 127 of the second Schedule of Act XV of 1877 can apply to the property of a Muhammadan (or any other person not being a Hindu), and not having been proved to have adopted as a custom the Hindu Law of the joint family."

It was held by a Division Bench (Sargent, C. J., and Birdwood, J.) in the case of *Sayad Gulam Hussein* v. *Bibi Anvarnisa*, (1) that it could. It does not appear from the report whether the parties were Khojas, or Cutchi Memons. We assume that they were not.

Sargent, C. J., in delivering judgment, said:

"It remains only to consider whether the claim of Gulam Hussein, as a residuary to one-ninth of the compensation awarded in respect of lots (A), (C), (E) and (G) and the claim of Najibunissa as one of the legal sharers, to one-sixth of such compensation, are barred by time. The property left by Bakar Ali became divisible, on his death, among those members of his family who were entitled to shares, according to the Muhammadan Law or were residuaries. Till it was divided, it was, we think, 'joint family property' within the meaning of Article 127 of Schedule II of the Limitation Act of 1877. A similar construction has been put on the same words, in clause 13 of section 1 of Act XIV of 1859, by the Calcutta High Court—See *Musammat Khyroonissa* v. *Salehoonissa Khatoon* (2) see also *Achina Bibee* v. *Ajeejoonissa Bibee* (3). And it is to be noted that, while Article 127 of Schedule II of Act IX of 1871 applies to suits 'by a Hindu, excluded from joint family property, to enforce a right to share therein' the corresponding Article of Act XV of 1877 substitutes the words

(1) (1885) P. J. 170 at p. 171.
(2) 5 W. R. 238.
(3) 11 W. R. 45.

'by a person' for the words 'by a Hindu.' It is not necessary, therefore, to restrict Article 127 of the present Limitation Act to suits by Hindus. And the question for consideration in the present case is, whether, before the institution of proceedings under Act X of 1870, the claimants...had been excluded to their own knowledge,etc."...

From the above statement it is clear that whether the parties were in fact Khojas or Cutchi Memons or not, the suit was not dealt with on that basis, as being governed by the special Customary Law which these Muhammadan sects at that time were generally believed to have adopted.

This decision with which we find ourselves unable to agree, was the starting point of a current of authority in this Court, the effect of which has been to extend the scope of Article 127 of the second Schedule of the Limitation Act to the property of all Muhammadans dying intestate in this Presidency. The foundation of this wide extension of the scope of the Article is the single sentence: "Till it was divided it was, we think, joint family property within the meaning of Article 127 of Schedule II of the Limitation Act of 1877." This opinion is supported by reference to two earlier Calcutta decisions under a previous Limitation Act. An examination of those cases will show, in our opinion, that they are a very insecure basis for the liberal interpretation thus put upon Article 127. While we agree that the substitution of the words "a person" for "a Hindu" enlarges the possible application of the Article we are wholly unable to agree with what seems almost to be implied in this judgment, that the change potentially brings every "person" within reach of the Article because the Article may now apply to the property of some persons who are not Hindus, it does not follow that it must apply to the property of every one who is a Muhammadan. And as to the sweeping generalization that property of the kind then in suit is "till it is divided, joint family property" we can discover no ground which appeals to our reason for such a conclusion. In our opinion, whatever else it may be, the one thing it cannot be is joint family property. No one has ever yet been found to contend that those entitled to share it take over each other by survivorship, which is the distinctive characteristic of joint family property. It would be hard indeed, in our opinion, to find a single important feature in common between the property left by a Muhammadan, governed by the Muhammadan Law, dying intestate, and "joint family property" in the sense of the Hindu Law. And that is absolutely the only sense in which the words "joint family property" have any definite legal connotation and meaning. The legal concept of "joint family property" is wholly unknown outside the Hindu Law. It is certainly unknown to the Muhammadan Law. We start then from this general proposition. Outside the Hindu Law the joint family, and, therefore, joint family property, is unknown to the law. It follows that, with a single exception to be mentioned immediately, no one but a Hindu can own joint family property, and Article 127 cannot apply to any one but a Hindu. Why then was the change made, and the words "a person" substituted for the words "a Hindu"? For a very obvious reason. Two whole sects of Muhammadans in this Presidency had by a series of judicial decisions been brought under the Hindu Law to this extent at any rate that they were held to have adopted so much of it by custom as included the law of the joint Hindu family, and as a corollary, of course, the existence of joint family property, under certain conditions. These persons were certainly not Hindus. Yet by way of custom they were judicially held to be subject in all matters of succession and inheritance to the Hindu Law. And although this may not in fact have been so, there can be no doubt but that it was the accepted opinion that they might hold property exactly as a joint Hindu family might, and doing so, that such property would be in all respects governed by the Hindu Law of the joint family. These people were numerous. They were rapidly growing in wealth and importance. Innumerable cases might arise in which they would be found in possession of great estates which could only be regarded as "joint family property" in the strict sense of the Hindu Law. Here was cause enough and an adequate explanation of the change. We now state the single exception to our first general proposition. Article 127 may apply to the property of

a person not being a Hindu, if it has been proved that that person has adopted as a custom and is, therefore, subject to the Hindu Law of the joint family. And to no other person whatever. Such is our conclusion. It is diametrically opposed to the current of authority in this Court starting from the decision we have cited. But it has the concurrence of the Calcutta, Madras and Allahabad High Courts. The Bombay High Court stands, as far as we are aware, alone in the interpretation it has placed upon the language of Article 127. And if only for the sake of judicial uniformity we think it highly desirable that the question should now be re opened and decided by a Full Bench We do not advert in detail to subsequent decisions which profess to follow *Sayad Gulam Hussein* v. *Bibi Anvarnisa* (1) because in none of those to which we have been referred or of which we are aware, has any reason been given for following the unreported decision of the Division Bench in 1885. On the other hand Batty, J., sitting alone went into the subject with great elaboration in *Abdul* v. *Mahomed* (4) and came to the conclusion that Article 127 was not susceptible of so wide an extension. And in a recent judgment Beaman, J., sitting alone on the Original Side of this Court, has gone critically over the whole ground: *Jan Mahomed* v. *Datu Jaffar* (5). Speaking generally we may say that we concur in the reasoning and conclusion there reached, and do not think it necessary to repeat it in detail. We would incorporate it (if necessary) by reference here.

Put in the shortest way, in our opinion, the dominant words of the Article are "joint family property." That property does not exist outside the Hindu Law. No one, therefore, not being a Hindu or having adopted by custom the Hindu Law of the joint family can own it. And it is only to the property of such persons that the Article can apply. In the case before us it is not contended that the parties are Hindus. They are admittedly Muhammadans governed by the Muhammadan Law. It is not contended that they have adopted by custom any part of the Hindu Law. In our opinion, therefore, Article 12 cannot in any view or upon any reasoned interpretation (apart from the authority we have brought in question) apply to them.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *Coyajee* (with him Mr. *B. F. Dastur*), for the Respondents.

JUDGMENT OF THE FULL BENCH.

SCOTT, C. J., (BATCHELOR, MACLEOD and MARTEN, JJ., concurring).—The following question has been referred to a Full Bench:—

Whether Article 127 of the second Schedule of Act XV of 1877 can apply to the property of a Muhammadan (or any other person not being a Hindu), and not having been proved to have adopted as a custom the Hindu Law of the joint family?

The question referred is expressed to relote to the application of Article 127 of the second Schedule of Act XV of 1877, the reference is, however, made in a suit brought when the Limitation Act of 1908 had come into operation. Therefore, we take the question as relating to Article 127 of the later Act.

The exact point for determination is whether the three words "joint family property" as occurring in Article 127 of the Act of 1908 mean anything but property of a joint family in the sense in which the expression "joint family" is understood amongst Hindus.

Of the three words so arranged two constructions are possible.

Either 'joint family' must be a compound adjective qualifying 'property' or 'family property' must be a compound substantive qualified by the adjective 'joint.'

The word 'joint' may be construed in a technical legal sense or in a loose popular sense. In India 'joint' in the Article if used in a technical legal sense would attract to itself the word 'family,' and form a compound adjective connoting "appertaining to a joint family" living as an undivided Mitakshara or an undivided Dayabhaga family lives. In a loose popular sense 'joint family property' might mean undivided property of a family.

(4) 5 Bom. L. R. 355.

(5) 22 Ind Cas 195; 15 Bom L. R. 1044 at pp. 1097, 1101; 38 B. 469.

The expression 'joint family property' is first to be found in the Indian Statute Book in clause 13 of section 1 of Act XIV of 1859. In Bengal [see *Musammat Khyroonissa* v. *Salehoonissa Khatoon* (2); *Achina Bibee* v. *Ajeejoonissa Bibee* (3) and *Chunder Monee Debia* v. *Mehar'n Bibee* (6)] and in Bombay [see *Bai Jannubbi* v. *Mithabhai* (7)] effect was given to the expression in the Act of 1859 as embracing undivided property of members of Muhammadan families not shown to be joint families in the Hindu sense. That construction was only possible if 'family property' was read as a compound substantive. In the Act of 1871 the Legislature not only confined the words to an Article expressly dealing with Hindus alone but coupled 'joint' to 'family' by the use of a hyphen. This hyphen appears in all copies and editions of the Act to which we have had access. In the Limitation Act of 1877 the expression 'joint family property' again appears in the same connection but the Article 127 is no longer confined to Hindus but applies to any 'person.' The intention to couple 'joint' with 'family' is again emphasised by a hyphen. This we have verified by reference to the first publication of the Act for general information in the Gazette of India for 21st July 1877 after it had received the Viceroy's assent and also by reference to the official copies issued from the Government Press in Calcutta in 1878. It follows we think that 'joint family' in Article 127 of the Act of 1877 must be read as a compound adjective and the expression 'joint family property' must be read as property appertaining to a joint family.

This being so, we think *Sayad Gulam Hussein* v. *Bibi Anvarnisa* (1) upon which a long series of Bombay cases is based was wrongly decided. There is good reason to believe that Sir Charles Sargent was misled by the Edition of West's Bombay Code then before him. That was the Edition of the Indian Statutes in general use by Judges of this Court in 1885. In West's Code Article 127 of the Act of 1871 is correctly printed with the hyphen but the corresponding Article of the Act of 1877 is incorrectly printed in that it omits the hyphen. The copy of the Act of 1877 then in Sir Charles Sargent's Court has the words 'joint family property' printed exactly as they were in the Act of 1859. Sir Charles Sargent's use of decisions under the Act of 1859 for the construction of the Act of 1877 is, therefore, quite intelligible; we do not think it would be intelligible if he had had the hyphened phrase before him.

In Article 127 of the Act of 1908 the wording is precisely the same as in the corresponding Article of the Act of 1877 but the hyphen is omitted. We have, however, for the period of thirty-one years from 1877 to 1908 the definite indication of the Legislature, as we understand it, that the words in the connection in which they appear should be used in a particular sense and we do not think the omission of the indicative hyphen after so many years should be taken as importing an intention that a changed construction should be adopted.

It only remains to consider the argument based on the working rule '*stare decisis*. On the application of this rule we have two recent decisions of the Judicial Committee to guide us, namely, *Pate* v. *Pate* (8) and *Tricomdas Cooverji Bhoja* v. *Gopinathji Thakur* (9), to the effect that a long series of decisions based upon a clearly erroneous construction of an Act is not to be followed, while a long series of decisions based upon a construction not free from doubt should not be disregarded. There is no substantial reason for thinking that Muhammadan co-sharers who have not yet sued to establish their right to share in family property relying upon the previous Bombay decisions under Article 127 of the Act of 1877 will be prejudiced by the narrower construction of the Act of 1908 now adopted, for Article 144 sets up for an excluding co-sharer practically the same period for prescription in the case of immoveable property as Article 127, while cases where undistributed moveable family property has existed since the death of the last owner for more than six years are so rare as to make the reduction of the pre-

(6) 22 W. R. 185.
(7) (1881) P. J. 150.

(8) (1915) A. C. 1109; 84 L. J. P. C. 234.
(9) 39 Ind. Cas. 156; 19 Bom. L. R. 450; 1 P. L. J. 232; 15 A. L. J. 217; 25 C. L. J. 279; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M. W. N. 263; 5 L. W. 654; 44 C. 759 (P. C.).

scriptive period of twelve years under Article 127 to six years under Article 120 a hardship which may safely be regarded as negligible.

We answer the question referred in the negative.

BEAMAN AND HEATON, JJ.—We only wish to add that certain passages in our referring judgment were written with special reference to the Mitakshara School which is predominant in this, as over the greater, part of India.

Under the Dayabhaga School of Bengal, rules, differing in some important points from those of the Mitakshara, regulate the constitution of the joint family, more particularly in its legal relations to property. But it is true that the joint Hindu family, as a definite legal entity is as well known and recognized under the Dayabhaga as under the Mitakshara School, and so generally under the Hindu, as contradistinguished from all other great systems of law. It is equally true, that the "joint family" as a legal entity involving definite legal notions, incidents and consequences is unknown to any other great system of law prevailing in the Empire. So that where property is spoken of as belonging to a joint family, it must primarily be referred to a Hindu joint family, and only secondarily to such groups of non-Hindus as can prove that they have by custom adopted the Hindu Law of the joint family.

SHAH, J.—Treating the question referred to the Full Bench as relating to the Limitation Act IX of 1908, I am of opinion that Article 127 of the first Schedule of the Act can apply to Muhammadans even though they may not be proved to have adopted as a custom the Hindu Law of the joint family. I express no opinion—as it is not necessary to express any opinion—as to whether the Article can apply to persons other than Hindus and Muhammadans, who are not proved to have adopted as a custom the Hindu Law of the joint family.

The Article in terms applies to a person excluded from joint family property to enforce a right to share therein. The answer to the question depends upon the construction to be placed upon the expression 'joint family property.'

This expression was used in the Limitation Act (XIV of 1859), section 1, clause 13; and the decisions under that clause show that it was held to apply to Muhammadans.

The corresponding Article in the Act of 1871 was in terms confined to Hindus.

In the Limitation Act of 1877 the word 'person' was substituted for the word 'Hindu' and the Article as thus altered was held applicable to Muhammadans by Sargent, C. J. and Birdwood, J., in the case of *Sayad Gulam Hussein* v. *Bibi Anvarnisa* (1). This view was followed in subsequent decisions; see *Bavasha* v. *Masumsha* (10), *Sayadalli* v. *Aminbi* (11) and *Fatma Boo* v. *Ghisan Boo* (12). The same view has been acted upon in other unreported cases in spite of the observations of Batty, J., in *Abdul* v. *Mahomed* (4) and of Beaman, J., in *Jan Mahomed* v. *Datu Jaffar* (5).

After a careful consideration of the arguments on both sides it seems to me that though there may be ground to prefer the view that the expression 'joint family property' in Article 127 is used in a technical and Hindu sense, as interpreted by the other Indian High Courts, and not in the broad and non-technical sense, in which it has been interpreted by different Judges of this Court, the construction hitherto put upon it by this Court is a reasonably possible construction of the expression. At any rate I am not satisfied that it is wrong. As this point relates to a rule of limitation affecting title to property, I am of opinion that the view taken by Sargent, C. J., in *Sayad Gulam Hussein's* case (1) should be adhered to. It seems to me that any departure from this long course of decisions is likely to result in injustice and hardship.

In the Act of 1859 there was no hyphen between the words 'joint' and 'family.' In the Act of 1871 there was a hyphen between these words. In 1877 though the Article was altered as already stated the hyphen was retained. In the Act of 1908 the hyphen is omitted. This account of the use of a hyphen is interesting; but, in my opinion, it is not safe to base any conclusion upon it. I see no sufficient reason to assume

(10) 14 B. 70; 7 Ind. Dec. (N. S.) 504.
(11) (1898) P. J. 393.
(12) 4 Ind. Cas. 242; 11 Bom. L. R. 1083; 33 B. 719.

or to infer that the learned Judges who decided *Sayad Gulam Hussein's* case (1) had not noticed the hyphen between the words 'joint' and 'family' in the Act of 1877. The hyphen was certainly brought to the notice of the Court in *Sayadalli's* case (11) when Ranade, J, observed that the use of the hyphen by itself did not justify any such restrictive interpretation. If the Article with the hyphen in the Act of 1877 could be applied—and I am not prepared to hold that the learned Judges were wrong in applying it—to Muhammadans generally in this Presidency, I see no reason why the Article without the hyphen in the Act of 1908 should be held to be inapplicable to them.

I see no insuperable difficulty in interpreting the word 'joint' as meaning 'undivided'; if the word be understood in that sense the view taken in *Sayad Gulam Hussein's* case (1) and followed in subsequent cases becomes easily intelligible and acceptable.

In view of the judgment of my Lord the Chief Justice which I have had the privilege of reading I do not consider it necessary to state my reasons in detail for the conclusion that the expression 'joint family property' is susceptible of the construction put upon it in *Sayad Gulam Hussein's* case (1)

I sincerely regret that I am unable to agree with my Lord the Chief Justice and my other learned colleagues on this question.

Reference answered in the negative.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3033 OF 1915.

April 26, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Smither.

MADHU SUDAN MULLICK AND OTHERS —PLAINTIFFS—APPELLANTS

versus

JAMIRUDDIN SHEIKH—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 50, cl. 20, presumption under, whether arises where there has been alteration in holding—Rent receipts, tenant, whether bound to produce.

The presumption under section 50 (2) of the Bengal Tenancy Act may arise even though there has been an alteration in the area of the holding. [p. 769, col. 1.]

Where there has been an increase in the area of the holding, but it is found from the landlord's papers that the tenant has held the holding at the same rate for twenty years immediately preceding the landlord's suit for enhancement of rent, the rent cannot be increased except for the excess area unless the presumption arising under section 50 (2) is rebutted. [p. 769, col. 1.]

If the plaintiff-landlord's own papers prove that the tenant-defendant was holding the land at the same rent for more than twenty years before the institution of the suit for enhancement of rent, it is not necessary for the tenant to produce his rent receipts to prove the same in order to avail himself of the presumption under section 50 (2) of the Bengal Tenancy Act. [p. 769, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Rajshahi, dated the 30th August 1915, modifying that of the Officiating Munsif, Nawabganj, dated the 18th December 1913.

FACTS.—The plaintiff brought this suit for an enhancement of rent on the ground that the tenant was paying rent below the prevailing rate as well as for additional rent at the enhanced rate for additional area, in other words, the suit was under sections 30 (*a*) and 52 of the Bengal Tenancy Act. The Munsif decreed the suit in full, and allowed the plaintiff an enhanced rent of Rs. 15-5-6. On appeal the lower Appellate Court allowed an increase of rent for the additional land but refused to grant any enhancement of the previous rent of Rs. 6-10 16 *gandas*. Hence this second appeal by the plaintiff.

Babu *Hemendra Nath Sen*, for the Appellants.—The effect of the lower Appellate Court's judgment is to split up the *jama* into two holdings, which he is not entitled to do, simply because he considers that the *jama* being an old one is a *mokarari jama*. The learned Judge is wrong in holding that the plaintiff is entitled to an enhancement of rent at the prevailing rate only for the excess area, when there is no evidence showing that the tenant has actually paid rent at an uniform rate for the last twenty years. It having been found that the tenant is occupying more land than he is entitled to occupy and that he is liable to pay an enhanced rate of rent for the excess land he is not entitled to the presumption under section 50,

[CHATTERJEA, J.—Section 50 lays down that the rent or rate of rent shall not be increased and it can be increased only on the alteration of area.]

The plaintiff has got a decree at the enhanced rate for the additional area, and he wants an enhancement of rent on the existing rent, especially when the defendant has not proved uniform payment for the requisite period entitling him to the benefit of section 50.

[Babu *Hemendra Kumar Sen*, for the Respondent.—The defendant has proved that there was no change in the rate of rent, and that is sufficient to raise a presumption under section 50, Bengal Tenancy Act.]

Of course, the plaintiff on being called upon to produce his papers did not do so. But that does not prove the defendant's uniform payment of rent. The defendant must himself prove uniform payment of rent for at least twenty years immediately before the institution of the suit, and this he must do by the production of rent-receipts. The *chitta* filed by the defendant cannot prove actual payment of rent, the defendant wants to deprive me of my legal rights, and he must give positive proof and satisfy the Court that he is entitled by law to do that. In fact the defendant has totally failed to prove uniform payment of rent.

[CHATTERJEA, J.—If the *chitta* shows uniform payment of rent, is that not sufficient?]

Yes. But the *chitta* does not show payment. A mere statement in the *chitta* is not sufficient to establish the defendant's case.

[CHATTERJEA, J.—Can you contend that the rent is not what is stated in the *chitta*?]

No. What I submit is that the *chitta* cannot show actual payment by the tenant.

Babu *Hemendra Kumar Sen* (for Babu *Atulya Charan Bose*), for the Respondent.—In order to raise a presumption under section 50, sub section 2 of the Bengal Tenancy Act it is not necessary for the tenant to show that he has been actually paying rent at an uniform rate for twenty years or more. Section 50 (2) expressly provides that if the tenant can prove that the *jama* has been held at a rent or rate of rent which has not been changed during the twenty years immediately prior to the institution of the suit that would be sufficient to raise a presumption in his favour that the rent of the *jama* is not liable to enhancement. Under section 50 (1) the landlord is entitled to an increment of rent only on the ground of alteration of area. So the learned Judge was quite right in saying that the plaintiff is only entitled to additional rent for the excess land in the occupation of the tenant, but is not entitled to an enhanced rate of rent.

Babu *Hemendra Nath Sen* replied.

JUDGMENT.—This appeal arises out of a suit for enhancement of rent of a holding under section 30 of the Bengal Tenancy Act and also for additional rent on account of additional area in the holding.

The defendant had a holding of 8 *bighas* and 5 *cottas* at a rent of Rs. 6-10 16 *gandas*. It has, however, been found that he is in possession of 2 *bighas* odd in excess of the area which he had been holding before. The Court of Appeal below gave a decree for additional rent for the excess area at the prevailing rate of rent, but refused to allow any enhancement with respect to the land included in the original holding namely, 8 *bighas* 5 *cottas* on the ground that the defendant had held at the same rent for a period of twenty years before the institution of the suit, and that therefore, the rent could not be enhanced.

The plaintiffs have appealed to this Court and it is contended before us that as there has been an alteration in the area of the holding held by the defendant the presumption under section 50 of the Bengal Tenancy Act does not arise and the plaintiffs are entitled to an increase of rent for all the lands held by the defendant. But that section lays down that "where a tenure-holder or a *raiyat* and his predecessor-in-interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement the rent or rate of rent shall not be liable to increase except on the ground of an alteration in the area of the tenure or holding." So that it is only an account of the excess area of the holding that the rent can be increased, and the section lays down that except that, there shall be no increase in the rent in such cases.

It is next contended that the learned Subordinate Judge was in error in hold-

ing that there was any presumption under section 50 of the Bengal Tenancy Act when defendant has not proved rent receipts showing payment of rent at a uniform rate for twenty years before the institution of the suit.

The learned Subordinate Judge has, however, found, "It is admitted that the old holding of Rs. 6 odd has been in defendant's possession at the same rate at least from 1290 up to 1317. Their *chittas* and the admission in the plaint combine to prove the facts." Then he goes on to refer to the fact that the plaintiffs did not produce their collection papers and counterfoils which were called for from them. In the first place it seems from the words quoted above that there was an admission by the Pleader for the plaintiffs that the defendant held at the same rent from 1290 to 1317. However that may be, there are certain *chittas* produced by the plaintiffs and the learned Subordinate Judge relies upon the *chittas* in support of that fact. It is contended by the learned Vakil for the appellant that the *chittas* cannot prove payment of rent and it was absolutely necessary for the tenant to prove actual payment of rent and to produce his *dakhilas* in order to avail himself of the presumption under section 50 of the Bengal Tenancy Act. But all that was to be proved under the sections was that the tenant had held at a rent or rate of rent which had not been changed during twenty years immediately preceding the institution of the suit. Ordinarily in order to prove that the rent had not been varied for twenty years previous to the institution of the suit the *raiyat* can give what is the best proof of non-variation *viz.*, that they had paid uniformly for the twenty years preceding the suit, and the best evidence of payment being the rent receipts, they are ordinarily filed to support the payment. If, however, the *zemindar's* own papers prove that the tenant held the land at the same rent or rate of rent for twenty years it is not necessary for the tenant to produce his rent receipts. The *chittas* produced in this case, at any rate some of them, are not merely record of measurement of land but they record the rent and the rate of rent at which the tenant held the land. If the *chittas* prove that the defendant had been holding the land at the same rent, namely, Rs. 6-10-16 *gandas* for twenty years before the institution of the suit, the defendant need not produce his rent receipts. The learned Subordinate Judge has found that the *chittas* proved the fact that the defendant had been holding at the same rent at least from 1290 to 1317. It has not been shown to us that this finding is incorrect, or is not supported by the *chittas* upon which it is based. That being so the appeal must fail and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2586 OF 1914.

July 12, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

SHYAMA CHARAN BHATTACHARJEE —PLAINTIFF—APPELLANT

versus

MUSTAFIZAR RAHAMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 60—Landlord and tenant—Tenant whether can plead that entire rent is not due to landlord registered as 16-annas proprietor under Land Registration Act.

Under the provisions of section 60 of the Bengal Tenancy Act, it is not open to a tenant to plead in defence to a suit for rent by a landlord, who has been registered, under the Land Registration Act, as the 16-annas proprietor of the land, that the entire rent claimed is not payable to the plaintiff, but part of it is due to a third person as a co-sharer of the plaintiff. [p. 770, col. 1.]

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 19th May 1914, reversing that of the Munsif, Patiya, dated the 19th May 1913.

Babu *Khitish Chandra Sen*, for the Appellant.

JUDGMENT.—This appeal arises out of a suit for rent.

The plaintiff claims the entire rent of the tenure from the defendant on the ground that he is the person registered under the Land Registration Act as proprietor of the entire 16 annas of the superior interest. The Court of first instance gave him a decree for the entire rent, but the learned Subordinate Judge, on appeal, has reversed that decree and dismissed the suit.

It appears that the proprietary interest belonged to two persons Ram Kant and Pran Krishna in equal shares. Ram Kant's interest devolved on his three sons, two of whom executed a conveyance in respect of 8 annas share to the plaintiff. The two sons of Ram Kant have been made parties to the suit as *pro forma* defendants. The third son is alleged to be insane. However that may be, the plaintiff got his name registered with respect to the 8 annas share of Ram Kant. The 8-annas which belonged to Pran Krishna, was purchased in the name of the plaintiff's son Naba Chandra. The latter died leaving a son; but the plaintiff got his name registered as the heir of Naba Chandra. In fact the plaintiff has got his name registered as the proprietor of 16 annas under the Land Registration Act and this is found by both the Courts below. The learned Subordinate Judge, however, has dismissed the suit on the ground that the plaintiff was not entitled to get his name registered as heir of Naba Chandra, nor in respect of the share of the third son of Ram Kant

Section 60 of the Bengal Tenancy Act lays down that "Where rent is due to the proprietor, manager or mortgagee of an estate, the receipt of the person registered under the Land Registration Act, 1876, as proprietor, manager or mortgagee of that estate, or of his agent authorised in that behalf, shall be a sufficient discharge for the rent; and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person." Under the express words of the section, therefore, it was not open to the defendant to plead in defence that any portion of the rent was due to any third person. The rights of such third person are provided for in the section itself. It says: "But nothing in this section shall affect any remedy which any such third person may have against the registered proprietor, manager or mortgagee."

We are accordingly of opinion that the Court below is wrong in holding that the plaintiff is not entitled to the rent claimed. The decree of the lower Appellate Court is, therefore, set aside and that of the Court of first instance restored with costs of this Court and the lower Appellate Court.

Decree set aside.

MADRAS HIGH COURT.

APPEAL SUIT No. 303 OF 1914.

February 2, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

ANSUR SUBBA NAIDU AND OTHERS—DEFENDANTS AND ADDITIONAL APPELLANT—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), *s.* 58—*Mining lease—Assignment, restraint on, effect of—Forfeiture, accrual of right to—Document, construction of—Stipulation to work mines 'in a skilful and workmanlike manner and continuously without voluntary intermission,' meaning of—Burden of proof.*

Per *Seshagiri Aiyar, J.*, (*Wallis, C. J.*, not expressing any opinion).—A provision in a mining lease restraining the lessee from assigning and empowering the lessor to re-enter in the event of assignment cannot be enforced where the lessee mortgages his right, unless the whole of his interest is transferred to the mortgagee. [p. 774, col. 1.]

The definition of the various classes of mortgage contained in section 58 of the Transfer of Property Act should not be read as amplifying the *quantum* of interest which a mortgage by law confers upon the mortgagee. Clauses (*b*), (*c*) (*d*) and (*e*) only prescribe the forms in which the various mortgages are to be expressed. The general legal effect is that which is predicated in clause (*a*). [p. 773, col. 2; p. 774, col. 1.]

Where the mortgaged property is situate in the *muffasal* and one of the parties is a Hindu, an English mortgage, notwithstanding the form in which the document is expressed, does not transfer an absolute interest in favour of the mortgagee. [p. 774, col. 1.]

Manly v. *Patterson*, 7 C. 394; 3 Ind. Dec. (N. S.) 803, distinguished.

Where a lease of mines provides that the lessee should work the mines continuously without voluntary intermission and in a skilful and workmanlike manner the burden of showing that the lessee has not worked as aforesaid lies on the lessor. [p. 774, col. 2.]

A proper and workmanlike manner may not mean the best possible mode of working for the lessor, but it means in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding. [p. 774, col. 2; p. 775, col. 1.]

The mere fact that a sufficient quantity of mineral is not produced is not enough to show that the mine has not been worked continuously and efficiently. [p. 775, col. 1.]

Appeal against the decree of the District Court, Nellore, in Original Suit No. 7 of 1912.

FACTS of the case appear clearly from the judgment.

The Hon'ble Mr. *S. Srinivasa Aiyengar* (Advocate-General) (with him Messrs. *K. Raja*

Aiyar and *S. Desikachariar*), for the Appellants.—The first contention is that the creation of the mortgage is not a breach of covenant not to assign. Assignment means transfer of an absolute interest. In a mortgage, the entire property does not pass to the mortgagee. No privity of estate is created between the lessor and the mortgagor.

[SESHAGIRI AIYAR, J.—"Transfers" means only in form and it does not pass the estate].

Provisos (*b*) to (*e*) of section 58 must be taken subject to proviso (*a*). In *Kannye Loll Sett* v. *Nistoriny Dossee* (1) and *Davalava* v. *Bhimaji Dhondo* (2), the question whether a mortgage is not an assignment was discussed. In *Govind* v. *Shamtaya* (3), it was held a mortgage is not an assignment and there is no privity. In India the mortgagor is the legal owner and it would be inconvenient if he is not considered the owner; he does not pass his entire interest in the property.

[SESHAGIRI AIYAR, J.—Can there be an equity of redemption in the English mortgage? *Moideen Saiba* v. *Gopala Kudwa* (4)].

Where the work continues there is no breach of covenant if it is done in a workmanlike manner. *Lewis* v. *Fothergill* (5), *Jervis* v. *Tomkinson* (6), *Wheatley* v. *Westminster Brymbo Coal Co.* (7).

[WALLIS, C. J.—What is the covenant in that case?]

To work uninterruptedly continually and effectively. *Lord Abinger* v. *Ashton* (8), *Foley* v. *Addenbrooke* (9).

Under the Board's Standing Orders it is the Government that can forfeit the lease and here there is nothing to show that Government had any notice of these facts.

Mr. *V. Ramesam.* (The Government Pleader) (with him Mr. *S. K. Parthasarathy Aiyengar*), for the Respondent.—The question as to the mortgage not being an assignment was not specifically pleaded in the written statement. No one thought of it until the Advocate-General appeared and raised the point in the lower Court.

As to the last point the Board of Revenue submitted to Government a letter stating the circumstances under which they consider the lease should be forfeited. The Government then sanctioned the forfeiture.

On the facts I will be able to satisfy the Court that in the circumstances the Government were justified in forfeiting the lease.

The question as to how each mine was worked, was then argued on both sides.

This appeal and the memorandum of objections filed on behalf of the respondent coming on for hearing on the 9th, 10th, 11th and 15th January 1917, respectively, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—This is an appeal from so much of the decree of the District Judge of Nellore in Original Suit No. 7 of 1912 as declared that the right of the defendants in the lands conveyed in the mining leases of the Tellabodu, D. F., and Palamani mines had determined and gave the plaintiffs a decree for mesne profits and possession. The District Judge found against the plaintiff on the 6th issue that the defendants had not incurred forfeiture under their leases by failing to work their mines continuously and without voluntary intermission and in a workmanlike manner, but that they had done so by executing the mortgage, Exhibit O4 of 16th August 1909, which was an assignment of the premises demised without the lessor's consent. For the appellants it is contended, *firstly*, that this ground of forfeiture was not pleaded or made the subject of an issue, and *secondly*, that the mortgage in question did not amount to an assignment within the meaning of the clause against assignment.

The plaint after referring to the leases and to the rules under which they were granted sets out in paragraphs 6 and 7 the substance of the covenant for continuous working without voluntary intermission in a skilful and workmanlike manner, and the condition of re-entry for breach of any of

(1) 10 C. 443; 5 Ind. Dec. (N. S.) 298.
(2) 20 B. 338; 10 Ind. Dec. (N, S.) 787.
(3) 5 Bom. L. R. 118.
(4) 31 Ind. Cas. 454.
(5) (1870) 5 Ch. 103.
(6) (1856) 1 H. & N. 195; 26 L. J. Ex. 41; 4 W. R. 683; 156 E. R. 1173; 108 R. R. 516.
(7) (1870) 9 Eq. 538; 39 L. J. Ch. 175; 22 L. T. 7; 18 W. R. 162.
(8) (1874) 17 Eq. 358; 22 W. R. 582.
(9) (1844) 13 M. & W. 174; 14 L. J. Ex. 169; 67 R. R. 540; 153 E. R. 72.

the covenants in the lease, and in paragraphs Nos. 9 and 10, as originally framed, alleges that the defendants had failed to start work in some of the mines and as regards the others had failed to work them "continuously or without voluntary intermission and in a workmanlike manner".

Paragraph No. 11 goes on to state that it had become clear that owing to their extravagance and mismanagement they had lost credit and it was impossible for them to resuscitate their business, and that it was also found that they had mortgaged the mines and entered into various transactions with divers persons touching the right to the mines which they had no right to do without the previous permission of the Government. Paragraph No. 12 then states that under the circumstances stated above the Government cancelled the nine leases.

As I read the plaint the case set up is that in consequence of the breaches specified in paragraphs Nos. 9 and 10 of the covenant set out in paragraph No. 6, the plaintiff had determined the leases under the power of re entry specified in paragraphl No. 7. Paragraph No. 11 I think merely refers to some reasons which induced the Government to insist on their rights of forfeiture, *viz.*, that by extravagance and mismanagement the lessees had lost credit and were not in a position to resuscitate the business, and that they had mortgaged the mines to the creditors and entered into various transactions with divers persons touching the right to the mines which they had no right to do without the previous permission of Government. Paragraph No. 12 whilst stating that the Government had cancelled the leases in the circumstances stated above leaves the legal grounds of forfeiture to be ascertained from the earlier part of the plaint (paragraphs Nos. 6 to 10) where they are duly pleaded, and cannot I think be read as justifying the cancellation pleaded on the ground of any of the matters referred to in paragraph No. 11. Some of the matters referred to in paragraph No. 11 are not grounds of forfeiture under the lease; and, if it had been intended to rely on them as such, both the particular covenants and the breaches relied on would have been specifically pleaded as in the case of the covenant for continuous working. The defendants in paragraph No. 9 of their written statement were fully justified in treating the grounds of forfeiture as contained in paragraphs Nos. 8 to 10 of the plaint, and in only applying for particulars as regards the alleged failure to work continuously, though they took occasion in paragraph No 8 to answer the allegations against them in paragraph No. 11 of the plaint. In this paragraph they expressly denied the execution of the mortgages referred to in paragraph No. 8, and, if the plaintiff's advisers had understood that the execution of these mortgages was relied on as a ground of forfeiture, it would have been their duty to ask for an issue as to whether any such mortgages had been executed, and, if so, whether they constituted a breach of the covenant not to assign, in the same way as they obtained an issue as to the alleged failure to work continuously, etc., in which case the defendants would have had an opportunity of asking for any other issues they might wish for with regard to the ground of forfeiture. This in my opinion shows conclusively that the pleadings were not then regarded as raising any question of forfeiture on this ground. It has been suggested that this question may be raised under issue 4, but that issue was clearly raised with regard to the specific pleas in paragraphs Nos. 10 and 11 of the defendant's written statement and cannot be extended so as to include matters not properly pleaded. No such question then arose in the pleadings or issues. What happened at the trial, as appears from the B diary, was that after P. W. No. 8 had been examined and almost at the close of the plaintiff's case the plaintiff marked a number of agreements, Exhibit O series, which were not proved by witnesses but admitted apparently for the defendants without objection. Our attention has not been called to any reference in the subsequent oral evidence to Exhibit O4, the mortgage now in question, but the 1st defendant having been questioned at the close of his cross-examination as 1st witness for the defence, as to his indebtedness deposed in re-examination that he had not obtained any advances under Exhibit O5 and Exhibit O3 and had got back the documents. It appears, however, from the B diary that at the very end of the case, on 25th March 1914, after the close of the plaintiff's evidence in rebuttal and on the day fixed for argument the

defendants filed Exhibit XVII, the plaint in Original Suit No. 41 of 1913, in which the mortgagees under Exhibit O4 sued the present defendants on their mortgage. The relevancy of the document apparently was that it did not treat Exhibit O4 as a mortgage of the mines themselves. The fact that the defendants filed it at the very last moment may show that they had heard this case was to be raised, not that they consented to its being raised or went to trial upon it. At the final argument the present Advocate-General, who was brought in to sum up the case for the defendants, contended, and in my opinion rightly, that the questions whether the execution of mortgages put in evidence constituted a breach of the covenants and whether the leases had been cancelled on that ground did not arise in the case, and I think for the reasons already given, the District Judge was not justified in treating this question as raised in the plaint and as covered by the second part of the fourth issue. If the plaintiff's advisers desire to rely on the ground of forfeiture it was their duty to ask for an amendment of the plaint, and, if this had been granted, the defendants would have been entitled to put in fresh pleas and appropriate issues could have been raised. Moreover, this is a case of forfeiture and without saying that there are any special rules of pleading applicable to such cases, I think the Court should be specially careful to see that the forfeiture is not upheld on grounds on which the parties have not gone to trial. This is sufficient to dispose of this part of the case, and it is unnecessary for me to express any final opinion on the contention of the learned Advocate-General that Exhibit O4, which is an English mortgage and would operate as an assignment in England has not this effect in India because under section 53 (*a*) of the Transfer of Property Act it is only a transfer of an interest in specific immoveable property for securing the payment of money and does not pass the whole interest to the mortgagee but only certain rights including apparently the rights to possession as mortgagee and to foreclosure or sale.

[After discussing the evidence as to the working of the mines his Lordship concluded;—]

If the plaintiff had relied on a breach of the covenant as far as possible to obtain mica, his case would have been overwhelming but putting this altogether out of the case as not relied on in paragraphs Nos. 9 and 10 of the plaint, I think that looking at the effect of the evidence as a whole, both oral and documentary, for the defendants as well as for the plaintiffs, the breaches of covenant charged in the plaint are sufficiently proved to justify the forfeiture and I find the 6th issue in the affirmative and would dismiss the appeal with costs.

It follows from my finding as to the Nandalagunta mine on the 6th issue that the plaintiff's memorandum of objections must be allowed with costs and the decree varied by upholding the forfeiture of this mine also.

SESHAGIRI AIYAR, J.—I agree with the judgment of the learned Chief Justice. I shall first say a few words on the question whether the execution of Exhibit O4 caused a forfeiture of the leases and then deal shortly with the other questions.

The learned Advocate-General contended, (1) that the mortgage Exhibit O4 did not transfer any right in the mines; (2) that the transfer, if any, did not amount to an assignment of the absolute interest in the properties, and (3) that it was not open to the Government to claim a forfeiture upon this ground as it was not specifically pleaded in the plaint. Upon the first point, I am unable to agree with the contention put forward. The operative portion of Exhibit O4 makes it abundantly clear that all the mines were intended to be transferred to the mortgagee. Upon the second question, I have come to the conclusion that the contention of the learned Advocate-General must prevail. Section 58 clause (*a*) of the Transfer of Property Act contains the definition of a mortgage. It begins by stating that a mortgage is the transfer of an interest in specific immoveable property. It does not say that a mortgage effects a transfer of the whole of the property to the mortgagor. Clauses (*b*), (*c*), (*d*) and (*e*) are illustration of the general definition. (*b*) refers to a simple mortgage; (*c*) to a mortgage by conditional sale; (*d*) to a usufructuary mortgage; and (*e*) to an English mortgage. These definitions of the

various classifications of the mortgage should not be read as amplifying the quantum of interest which a mortgage by law confers upon the mortgagee. Clauses (*b*), (*c*), (*d*) and (*e*) only prescribe the forms in which the various mortgages are to be expressed. The general legal effect is that which is predicated in clause (*a*). It was common ground that Exhibit O4 conforms to what is known as an English mortgage. It is true that the language of the definition suggests that the properties are transferred absolutely to the mortgagee. But that to my mind is not conclusive of the legal rights created by the document. When we turn to section 98 of the Transfer of Property Act, we find that parties in the case of these four mortgages are not to be governed entirely by the rights and liabilities created by the contract. Whereas in the case of anomalous mortgages, the rights and liabilities are solely regulated by the contract of the parties, in the case of these four mortgages and the combination of some of them, the rights and liabilities are governed by section 58 of the Transfer of Property Act. It is well settled that unless the whole of the interest of the mortgagor is transferred to the mortgagee, there can be no forfeiture with reference to a clause not to assign, under an English mortgage. *West* v. *Dobb* (10) lays this down explicitly; and that is followed in *Serjeant* v. *Nash, Field and Co.* (11), therefore, it seems to me that the transfer of the mines under Exhibit O4 did not violate the condition not to assign contained in the lease. It was held in *Shurnomoyee Dasi* v. *Srinath Das* (12) that a mortgage in the English form between Hindus of lands in the *mofussil* has always been treated by the Courts as a mortgage by conditional sale. There is the dictum of Pontifex, J., in *Manly* v. *Patterson* (13), that if the parties happen to be both Englishmen, all the incidents of an English mortgage would apply to such a transaction.

In the present case, the property is situated in the *mofussil* and one of the parties is a Hindu. Consequently the dictum in *Manly* v. *Patterson* (13) does not govern the present case. Both Mr. Shephard and Mr. Ghose, in their commentaries on the Transfer of Property Act, say that notwithstanding the form in which the document is expressed, an English mortgage does not transfer, in India, an absolute interest in favour of the mortgagee. I am of the same opinion. I, therefore, hold that Exhibit O4 did not offend against the condition not to assign the interest of the lessee without the sanction of the Government. The other mortgages are either simple or only convey a fractional interest in the mines. The learned Government Pleader, Mr. Ramesam, did not rely upon these mortgages as having led to the forfeiture. I entirely agree with the learned Chief Justice that it is not open to the plaintiff to rely upon the execution of Exhibit O4 as the cause of the forfeiture, as that was not properly pleaded.

The learned Advocate-General contended that there was a waiver of forfeiture by the Government. Issue 5 raises this question. I am not satisfied that the District Judge has shut out any evidence on the question. The facts relied on as showing the waiver have been discussed very fully by the District Judge and I see no reason to differ from his conclusions.

The learned Government Pleader sought to support the judgment of the District Judge upon a point decided by him against the Government. He has held that the burden of showing that the defendants did not work their mines continuously without voluntary intermission in a skilful and workmanlike manner lay upon the Government. There can be no question that he is right. The question is whether on the facts his conclusions are justified. The test as to what is meant by working the mines in a skilful and workmanlike manner is not easy to lay down. In *Leuris* v. *Fothergill* (5) Lord Hatherley, L. C., says: "A proper and workmanlike manner may not mean the best possible mode of working for the lessor, but it means in such a manner as shall not be simply an

(10) (1870) 5 Q. B. 460; 10 B. & S. 987; 39 L. J. Q. B. 190; 23 L. T. 76; 18 W. R. 1167.

(11) (1903) 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510.

(12) 12 C. 614; 10 Ind. Jur. 458; 6 Ind. Dec. (N. S.) 418.

(13) 7 C. 394; 3 Ind. Dec. (N. S.) 803.

attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding."

In *Wheatley* v. *Westminster Brymbo Coal Co.* (7) it is pointed out by Malins, V. C., at page 550 that the mere fact that a sufficient quantity of mineral is not produced is not enough to show that the mine has not been worked continuously and efficiently. The judgment suggests that if the sleeping rent is procured that would enable the lessee to continue to work.

The position of the Government would have been strengthened if evidence had been let in to prove the yielding capacity of the mines during the years 1909 and 1910 There is evidence that the two important mines, Tellabodu and D, were very deep and that water had accumulated in them. Expert evidence could have been let in to show within what time water could have been pumped out and how much mica could have been won by the employment of more coolies It is to be regretted that the plaintiff has not chosen to assist the Court by giving more specific and more relevant evidence.

The question has now to be decided on the materials placed before the Court. The statements annexed to the plaint and Exhibits M, N, F and H series afford us some guide. There can be no question that in 1909 the mines were worked for a less number of days than in the previous years, that only a few coolies were employed in that year, and that the quantity of mica won from the mines was very small. There is evidence that the defendants were pecuniarily in an embarrassed condition, and were unable to find the necessary funds for the working of these mines. Under these circumstances, can it be said that the mines were worked continuously and without voluntary intermission?

The District Judge has been hampered a great deal by the way the case was laid before him. I hesitated a great deal before coming to the conclusion that his findings on the facts should be upset. But the facts referred to by me and which have been examined fully and in great detail by the learned Chief Justice compel me to hold that the plaintiff has proved that the mines were not worked continuously and without voluntary intermission. I do not think it necessary to deal with the facts again as they have been clearly analysed if I may say so with respect, in the judgment of the learned Chief Justice.

I am of opinion that the decree of the District Judge should be upheld, though not for the reasons given by him, and that this appeal should be dismissed with costs. I also agree that the memorandum of objections should be allowed with costs.

Appeal dismissed.

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3093 OF 1913.

July 6, 1917.

Present:—Mr. Justice Walmsley and Mr. Justice Greaves.

CHAIRMAN, BALLY MUNICIPALITY—DEFENDANT No. 1—APPELLANT

versus

PRAMATHA NATH MOOKHERJEE AND OTHERS—PLAINTIFFS AND ABINASH CHANDRA GHOSE—DEFENDANT No. 2—RESPONDENTS.

Adverse possession – Possession prior to conveyance, nature of – Hindu Law – Alienation by widow - Reversioners, rights of – Estoppel—Consideration, refund of, to vendees – Probate and Administration Act (V of 1881), s. 90—Alienation, prohibition against.

The defendants who were in possession of certain land got a conveyance executed by a Hindu widow in respect of that land which belonged to her husband's estate, on paying a consideration for it. The widow was an executrix under the Will of her husband of which she had taken probate. On her death her daughter instituted a suit for the recovery of possession of the land on setting aside the conveyance and on the latter's death her sons, who were the reversionary heirs, continued the suit:

Held, (1) that limitation in favour of the defendants did not begin to run prior to the date of the conveyance as their previous possession could not have been adverse, inasmuch as by the payment of consideration to the widow for the conveyance executed by her, they recognized that she had some title to the land; [p. 777, cols. 1 & 2.]

(2) that the fact that the grandsons of the widow were aware of the sale and raised no objection could not estop them from challenging the legality of the sale, because at that time they had no right to the property, as their mother was still alive; [p. 777, col 2.]

(3) that as the power of alienation of the widow was restricted by the Will, section 90 of the Probate and Administration Act was a bar to the alienation by the widow of the property in suit; [p. 777, col. 2.]

(4) that in the absence of any proof that the consideration received for the conveyance was spent for the benefit of the estate no order could be made in favour of the defendants for a refund of the same. [p. 777, col. 2.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 6th June, 1913, reversing that of the Munsif, third Court, Howrah, dated the 21st February 1912.

FACTS of the case will appear from the following extracts from the judgment of the lower Appellate Court.

"The grounds of appeal on the merits of the case may be considered together. The suit is about 1 *cotta* of land within the Bally Municipality that admittedly belonged to the plaintiff's maternal grandfather, Roy Kedar Nath Chattopadhya Bahadur. He left a Will of which a Probate was granted to his widow Kamini Debi, the executrix appointed by the Will. She had life interest in the property of Kedar Babu and her daughter Khetramoni was the absolute owner according to the Will. Paragraph No. 2 of the Will restricts the power of the executrix to sell or make a gift of any portion of the property of the testator. The Bally Municipality has to rely upon a *kobala* executed by the executrix Kamini Debi in their favour for a consideration of Rs. 40 for their right to the disputed one *cotta* of land. No permission of the Court granting the Probate of Kedar Babu's Will to Kamini Debi was taken before execution of the *kobala* to dispose of the property. Hence the absolute owner according to the Will had power to set aside the *kobala* and she, Khetramoni, brought the present suit and, on her death, her sons were substituted as the plaintiffs and they have been prosecuting the suit. Section 90, clause (2), of Act V of 1881, is clear to show that the plaintiffs have a right to avoid the *kobala*.

There is only one point in favour of the defendant No. 1. The plaintiff Promatha Nath Mukherjee in his evidence says that the *kobala* was executed by Kamini Debi in his presence. The allegation, therefore, that the *kobala* was taken with the consent of Kamini Debi's grandsons is probably correct. But the plaintiffs were not the reversioners at the time. Their mother was the reversioner and there is no evidence to show that the *kobala* was executed with the consent of the mother of the plaintiffs. If there were any evidence to show that Rs. 40 paid by the Municipality as price of the land was spent for the benefit of the estate of Kedar Babu I would have held that the setting aside of the *kobala* would be subject to the payment of Rs. 40 by the plaintiffs to the Municipality. But there is no evidence to show that the money was spent by Kamini for the benefit of the estate.

The learned Munsif has found that the plaintiffs' claim is not barred by limitation. But the learned Pleader for the respondent argues that this finding is wrong. He says that when the Municipality had been in possession of the land in the lifetime of Kedar Babu, limitation would run from the date that the Municipality began to possess the land and not from the date of the death of Kamini Debi in 1909. But there is nothing to show when the Municipality began to possess the land."

Babu *Satis Chandra Ghose* (with him Babu *Lalit Mohan Banerjee*), for the Appellant

The dispute in the present case refers to one *cotta* of land only which was conveyed to the Municipality by one Kamini Debi on 27th October 1904. Her daughter now comes forward to set aside the deed of conveyance. The ground set up is that Kamini Debi had no power to alienate the property. We contend that the suit is barred by the law of limitation. The Municipality was in possession of the property from prior to 1904. The first Court has found the defendant held possession for 16 or 17 years. Limitation began from that prior date. Moreover, the plaintiffs acquiesced in the transaction of Kamini Debi inasmuch as it has been found that she in concurrence with the plaintiffs applied to the Municipality for release of the land. The plaintiffs being consenting parties to the transaction, cannot now turn round and be heard to say "we are not bound by the conveyance." Kamini Debi acted as a prudent manager and she had ample powers to sell the land for the benefit of the estate. Then there is the further point that the learned Subordinate Judge was wrong in holding that section 90 of the Probate and Administration Act prevented the widow from exercising

the powers of alienation. Refers to *Nursing Chunder Bysack, In the goods of* (1). Section 90 does not apply where the widow is the executrix and there are no debts and legacies. *Lakshmi Narain Chatterjee* v *Nanda Rani Debi* (2), *Lalit Chandra* v. *Baikuntha Nath* (3). An order should be made for the refund of Rs. 40 as it was spent by Kamini Debi for the benefit of the estate.

The lower Appellate Court ought to have gone into the question from what precise date the Municipality was in adverse possession and whether there was any legal necessity for the widow to execute the conveyance.

Dr. *Dwarka Nath Mitter* (with him Babu *Manmatha Nath Ganguly*), for the Respondent, was not called upon.

JUDGMENT.

WALMSLEY, J.—This appeal is preferred by the Chairman of the Bally Municipality. The subject-matter of the suit is one *cotta* of land. A widow of the name of Kamini Debi executed a conveyance in respect of this land on the 27th October 1904. She died on the 5th August 1909 and her daughter instituted the present suit for setting aside the document, and on her death the suit has been carried on by her sons. The property originally belonged to Rai Bahadur Kedar Nath Chatterjee husband of Kamini Debya. He left a Will of which Probate was taken by his widow on the 23rd August 1901. The suit was brought by the daughter of Kamini Debi for setting aside the document on the ground that Kamini Debi had no power to alienate the property. The main defences were that the suit was barred by limitation, that the sale benefited the estate and that the present plaintiffs, the grandsons of Kamini Debi, acquiesced in the sale. The suit was dismissed by the first Court but decreed by the Court of Appeal. The defendant has, therefore, preferred this second appeal. Three points have been urged by the learned Vakil on behalf of the appellant. The first is that the suit is barred by limitation. It is suggested that the Municipality was in possession of the property from some date prior to 1904 and that limitation began from that prior date. It seems to me, however, that possession of the Municipality cannot have been adverse before 1904, when by the payment of Rs. 40 to the widow the Municipality recognized that she had some title to the land. The second point is that the grandsons of Kimini Debi were aware of the transaction and raised no opposition. It is said that on that account they are now estopped from challenging the legality of the sale. But it must be remembered that at that time they had no right to the property because their mother was still alive. For that reason I think that they are not estopped. The third point taken is that the learned Subordinate Judge is wrong in holding that section 90 of the Probate and Administration Act prevented the widow from exercising the powers of alienation. In support of this argument reference has been made to the decision *In the goods of Narsing Chunder Bysack* (1). The present case appears to us to differ from the case cited. In that case Mr. Justice Sale remarked that all the debts and legacies had been paid. In the present case we have no information on that subject and we do not know whether the administration is at an end. It appears to me, therefore, that the section, which is very definite in its restrictions on the power of an executor was a bar to the alienation by the widow of the property in suit, and I think that the lower Court was right in the view it took as to the applicability of section 90. The last point raised is in respect of the sum of Rs. 40 paid by the Municipality. It is said that an order should be made for a refund of this sum. It has not been proved, however, that this sum was used by Kamini Debi for the benefit of the estate. That being so, an order cannot now be made in favour of the appellant for a refund of this sum of Rs. 40.

The appeal should, therefore, be dismissed with costs.

GREAVES, J.—I agree.

Appeal dismissed.

(1) 3 C. W. N. 635.
(2) 3 Ind. Cas. 287; 9 C. L. J. 116.
(3) 5 Ind. Cas. 395; 14 C. W. N. 463 at p. 465; 15 C. L. J. 305.

ZALIKHA BIBI *v.* KRISHNA DAYAL GIR.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1307 OF 1916.

June 13, 1917.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

Musammat ZALIKHA BIBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Mahant KRISHNA DAYAL GIR—DEFENDANT—RESPONDENT.

Chota Nagpur Tenancy Act (*VI B. C. of* 1908), *s.* 11—*Transfer of tenure, registration of, necessity of—Failure to register, consequence of*—Res judicata—*Rent suit.*

The assignment of a tenure under the Chota Nagpur Tenancy Act must be registered in accordance with section 11 of the Act. If the provisions of the section are not complied with the landlord is not entitled to recover from the tenant the rent due between the date of transfer and the date of registration. [p. 778, cols. 1 & 2.]

Where in a rent suit the issue as to the right of the plaintiff to maintain his claim for rent is raised and decided, it operates as *res judicata* in a subsequent rent suit. [p. 779, col. 1.]

Appeal from a decision of the Judicial Commissioner, Ranchi.

Mr. *Fakhruddin*, for the Appellants.

Messrs. *S. N. Palit* and *Kailash Pati*, for the Respondent.

JUDGMENT—The plaintiff in this suit seeks to recover from the defendants rent due under a *mokarrari* grant for the years 1968 to 1970 inclusive. It appears that many years ago a tenure was granted to one Bandhan Singh and others in perpetuity and that these persons created a *mokarrari* grant in favour of the defendants subject to a *malikana* rent. Bandhan Singh and others transferred their right, title and interest in this grant to the present plaintiff. The present plaintiff is the assignee of Bandhan and others and claims to recover the *mokarrari* rent due from the defendants. The case put forward by the defendants to resist the claim is that the plaintiff being a tenure-holder should have registered his transfer in accordance with section 11 of the Chota Nagpur Tenancy Act of 1908. The assignment that was made to the plaintiff was made in 1903 since which time he has not registered his transfer in the landlord's *sherista* as he was bound to do. Section 11 of the Chota Nagpur Tenancy Act appears to be mandatory in its terms; and if not observed the landlord is not entitled to recover from the tenants rent due between the date of the transfer and the date of the registration. Admittedly the plaintiff has not registered the transfer and the defendants contend that he is, therefore, estopped by the provisions of section 11 from maintaining the present suit. We agree with the learned Judicial Commissioner that if the point as to whether the plaintiff was a tenure-holder or not had been *res integra* we would have no hesitation in saying that he was; and that he was, therefore, incompetent to recover from the defendants upon the ground put forward by the defendants. But it appears that in this case there is another important factor. In the year 1911, this plaintiff brought a suit against the present defendants claiming rent for certain years and the point was expressly taken by the defendants in that suit, that the plaintiff was not entitled to maintain the suit by reason of the non-registration of his transfer. The learned Munsif who tried that case decided that the plaintiff was not a tenure-holder but merely an assignee of the rent due under the *mokarrari* and that being merely such an assignee, he was not bound to register his assignment under section 11 of the Chota Nagpur Tenancy Act.

We think that the learned Munsif who decided that case misunderstood the legal effect and meaning of the transfer made to the plaintiff in the year 1903. However, we are not concerned with that now because from that decision no appeal was preferred. The parties to that suit were the same as the parties to the present suit, and the issue as to the right of the plaintiff to maintain his claim for rent was raised then as now and the case was determined by a Court of competent jurisdiction. The learned Munsif may have been wrong as to the interpretation which he put upon the deed of transfer but that does not alter the fact that there has been a decision by a Court of competent jurisdiction upon a point directly and substantially in issue now between the parties. The learned Judicial Commissioner rightly felt himself bound by the previous decision in Suit No. 31 of 1911, and he held that that decision operated as *res judicata* between the parties to this suit.

Mr. Fakhruddin says that the doctrine

of *res judicata* does not apply to this case inasmuch as the Local Government did not under section 265 of the Chota Nagpur Tenancy Act apply the provisions of the Civil Procedure Code to this particular class of cases. That may be but we think that the decision in the former suit did operate as *res judicata* as between the parties to the present suit. The matter we think is concluded by the authority of the case reported as *Malkarjun* v. *Narhari* (1). Their Lordships of the Privy Council, dealing with the question of jurisdiction of the Court say, "It made a sad mistake, it is true, but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed." To the like effect is the case reported as *Gopi Nath Chobey* v. *Bhugwat Pershad* (2).

Mr. Fakhruddin has referred us to a Full Bench ruling reported as *Dwarkanath Roy* v. *Ram Chand Aich* (3). That case is obviously distinguishable from the facts of the present case; as also that reported as *Nitya Nunda Sarkar* v. *Ram Narain Das* (4). Therefore we must hold that in the present case the decree granted in Suit No. 31 of 1911 operates as *res judicata* as between the parties to the present suit and that the plaintiff is, therefore, entitled to succeed in this suit for recovery of rent even though he has not got his name registered. The appeal must, therefore, be dismissed.

The plaintiff having been guilty of not having his transfer duly registered in accordance with the requirements of the law is not entitled to any consideration. He has, however, promised to make amends by having his transfer registered within the space of one month from this date. The plaintiff will get no costs in this Court, in the lower Appellate Court and in the Munsif's Court.

Appeal dismissed.

(1) 25 B. 337 at p. 347; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739.

(2) 10 C. 697; 5 Ind. Dec. (N. S.) 468.

(3) 26 C. 428; 3 C. W. N. 266; 13 Ind. Dec. (N. S.) 876.

(4) 6 C. W. N. 66.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1599 OF 1913.

April 19, 1917.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

Sheikh JUMAN AND OTHERS—PLAINTIFFS NOS. 2, 3 AND 4—APPELLANTS

versus

MOHAMMAD NABINEOAZ AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Evidence Act (I of 1872), s. 91—Sale of immoveable property of less than Rs. 100 in value—Unregistered instrument of sale, admissibility of, in evidence—Registration Act (XVI of 1908), s. 49.

For the sale of an immoveable property of less than Rs. 100 in value an unregistered instrument, unaccompanied by delivery of possession, is of no avail and confers no title. [p. 780, col. 2.]

Where an immoveable property of less than Rs. 100 in value is sold by delivery of possession and an instrument of sale is also executed but not registered, the instrument is admissible as evidence of the nature of the transaction as under section 91 of the Indian Evidence Act such an instrument, although it does not confer any title and is merely evidentiary, is the only admissible evidence of the nature and terms of the transaction [p 781, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, Mymensingh, dated the 8th February 1913, modifying a decision of the Munsif, 4th Court, Netrokona, dated the 31st January 1912.

FACTS of the case appear from the judgment.

Babu *Birendra Kumar Dey*, for the Appellants.—The first point is, whether the two unregistered documents produced by the defendants are admissible in evidence to prove that the transaction in each case was a sale. The property in each case being valued at less than Rs. 100 a sale could be effected by delivery of possession. But if there is a document it must be registered,—*vide* section 54 clause 3, Transfer of Property Act. Registration of the document is compulsory.

By section 4 of the Transfer of Property Act, section 54 of the Act is to be read as supplemental to the Registration Act. Therefore under section 49 of the Registration Act, the document would be wholly inadmissible to prove that the transaction was a sale. Under section 91 of the Evidence Act oral evidence also is inadmissible.

JUMAN *v.* MOHAMMAD NABINEOAZ.

Possession of the defendants being admitted by the plaintiffs and defendants having admitted the previous title of the plaintiffs, it is for the defendants to prove that the transaction by which they obtained possession was a sale and not a usufructuary mortgage. The Courts below have found that the transaction in each case was a sale, only on the basis of the two unregistered documents, which, I submit, are inadmissible.

Secondly, the case for the defendants was that there was a regular partition among the plaintiffs by which plots Nos. 1, 2, 3 fell to the *saham* of their vendors. Both the Courts below find that the defendants have failed to prove the alleged partition. But the lower Appellate Court made a new case for the defendants in appeal, *viz.*, that by some informal arrangements these plots remained in the separate possession of the defendants' vendors. This is wrong. As the defendants have failed to prove partition, the plaintiffs other than the vendors are entitled to joint possession with the defendants.

Babu *Jatindra Mohan Choudhuri*, for the Respondents.—Under the Registration Act some documents are compulsorily registrable whereas the registration of some others is optional. Under section 54 of the Transfer of Property Act sale may be effected either by a registered instrument or by delivery of possession. Sale of properties of the value of Rs. 100 or more must be effected by a registered instrument. But sale of property of the value of less than Rs. 100 may be effected either by a registered instrument or by delivery of possession.

The finding is that there was delivery of possession and the value of the property was less than Rs. 100. The documents were certainly admissible in evidence to show the nature of the transaction. Section 49 of the Registration Act says no document required by section 17 to be registered shall be received in evidence of any transaction affecting property to which it relates. Such documents are not admissible to affect the property but they are certainly admissible to show the nature of the transaction. Section 91 of the Evidence Act says that oral evidence of the contents of a document required by law to be reduced to writing shall not be admissible. The value being below Rs. 100, the transaction of sale was not required to be reduced to writing. Delivery was enough to pass title. Therefore section 91 is no bar to the admissibility of oral evidence. Further, I stand upon the findings of both the Courts which are strongly in my favour.

(Stopped by the Court.)

Babu *Birendra Kumar Dey*, in reply.

JUDGMENT.

RICHARDSON, J.—The suit was brought by the plaintiffs to recover three plots of land which originally belonged to the plaintiffs Nos. 1 and 2 and the predecessor of the other plaintiffs. The defendants are in possession and the principal question is whether they obtained possession as usufructuary mortgagees for a term which has expired or in the character of purchasers. The defendants produced two unregistered conveyances executed by some of the plaintiffs or their predecessors one relating to plots Nos. 1 and 2 and the other to plot No. 3. Neither plots Nos. 1 and 2 nor plot No. 3 exceeds Rs. 100 in value. Relying upon the unregistered documents the Courts below have found that the transaction in each case was a sale, and not a mortgage, and that the sales were completed by the possession duly delivered by the vendors to the vendees. To the extent, therefore, of the title so acquired and so found the plaintiff's suit has been wholly dismissed.

The plaintiffs have appealed and it has been contended on their behalf that the documents on which the Courts below have relied are not admissible in evidence for want of registration. The point is one upon which there appears to be no express authority, at least none was cited in the argument.

Under the third clause of section 54 of the Transfer of Property Act "in the case of immoveable property of a value less than Rs. 100" a sale "may be made either by a registered instrument or by delivery of the property." It is clear, therefore, that in such cases an unregistered instrument unaccompanied by possession is of no avail and confers no title [*Makhan Lal Pal* v. *Bunku Behari Ghose* (1).] Under the Registration Act, to which by section 4 of the Transfer of Property Act the second

(1) 19 C. 623; 9 Ind. Dec. (N. S.) 858.

and third clauses of section 54 of the latter Act are to be read as supplemental, the unregistered instrument would not be admissible in evidence. But when the property sold is less than Rs. 100 in value and the sale is effectuated or completed by delivery of possession, there is no reason why the transaction should not be evidenced by a writing in the terms of a conveyance, even though the document has not been registered. The sale can be effected in two ways either by a registered instrument or by delivery. Registration is not necessary except as an alternative to delivery. *Ex hypothesi* there is delivery. Where there is delivery there need not be a registered instrument and if an instrument is executed but not registered there is no reason why it should not be admitted as evidence of the nature of the transaction, because neither the Transfer of Property Act nor the Registration Act requires its registration. The title passes by the delivery and does not depend on the unregistered document which is merely a piece of evidence.

It may be that in the case supposed the unregistered document is the only admissible evidence of the nature of the transaction. Under section 91 of the Evidence Act, where the terms of a grant "have been reduced to the form of a document," "no evidence shall be given in proof of the terms" of the grant, "except the document itself" or secondary evidence of its contents when secondary evidence is admissible. This provision, of course, does not exclude proof of the fact of delivery of possession. That fact may be proved whether there is a document or not and whether if there is a document, it does or does not require registration. But where there is a grant and a writing to support it, oral evidence of the terms of the grant is excluded. That would seem to be so even when the grant is made not by the document but by the delivery of possession which accompanies it. Though the document does not confer title and is merely evidentiary, it still seems to be the only admissible evidence of the nature and terms of the transaction.

For the reasons indicated, I am of opinion that the documents produced by the defendants were rightly admitted in evidence. On this part of the case, therefore, the appeal fails.

The defendants' vendors purported to sell the entirety of the disputed plots to the defendants but as those vendors did not represent all the co-sharer proprietors, the plaintiffs or some of them are entitled to the share or shares which the vendors had no right to sell. As, however, the lower Appellate Court has found that under some informal arrangement the defendants' vendors were in separate possession of properties sold, I agree with the learned Subordinate Judge that the plaintiffs are not entitled to a decree for joint possession to the extent of the unsold shares and that their remedy lies in a suit for partition. The true rights of the parties for instance, the right of the defendants as against the vendor plaintiffs, can only be worked out in such a suit.

In my opinion the appeal fails and should be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS CASE No. 307 OF 1917.
(CIVIL APPEAL No. 2598 OF 1915.)
July 18, 1917.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

BHAGWANT SINGH—DEFENDANT—PETITIONER

versus

NARINJAN SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110—Decision incidental to final conclusion, whether directly "involved"—Appreciation of evidence, whether 'point of law.'

Where a decree of the Chief Court affirms the decision of the Court below and the decision of both Courts is based on facts held to be established, no certificate for leave to appeal to His Majesty in Council can be granted, even though the decision incidentally involves a decision on the question of the interpretation to be put on certain documents, as this cannot be regarded as a "substantial" point of law "directly involved" in the case. [p. 782, col. 2.]

Appreciation of the value of documentary evidence is not the same as a misconstruction or misinterpretation of a document, and does not involve a question of law. [p. 782, col. 2.]

Petition, under section 110 of the Code of Civil Procedure, for leave to appeal to His Majesty in Council, against the judg-

ment and decree of the Chief Court of the Punjab, reported as 39 Ind. Cas. 29, dated the 2nd January 1917, passed in the appeal case noted above.

Mr. *Fazl-i-Hussain*, for the Petitioner.

Bakhshi *Tek Chand*, for the Respondent.

ORDER.—This is an application under section 110, Civil Procedure Code, praying for a certificate for leave to appeal to His Majesty in Council against a decree of a Division Bench of this Court passed on the 2nd January 1917, confirming a decree passed by the Subordinate Judge, 1st Class, Ludhiana, on the 21st June 1915 As the decree of this Court confirmed the decision of the Court below, no certificate can be granted unless some substantial question of law is involved. On behalf of the applicant we have heard Mr. Fazl-i-Hussain at length and Mr. Tek Chand on behalf of the opposite party. Mr. Fazl i-Hussain referred us to *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (1), *Venkateswara Iyan* v. *Shekhari Varma* (2), *Shri Vishwambhar Pandit, In re* (3), *Gopinath Birbar* v. *Goluck Chunder Bose* (4) and contended that inasmuch as the construction of certain documents was involved, this amounted to a question of law which entitled him to the certificate prayed for. Mr. Tek Chand contended that even if there was any question as to the proper interpretation to be placed on the document or any documentary evidence in the case, this would obviously be incidental to the final decision and could not be regarded as a question of law which was "substantial" and "involved" in the final decision in the case. He referred to *Mulraju Lakshmi Venkayamma Rao* v. *Venkatadri Appa Rao* (5); *Bhagat Singh* v. *Jai Ram* (6); *Diwan Abdul Hakim* v. *Hari Lal* (7); *Likal* v. *Sharif-ul Hassan Khan* (8) and *Vir Singh* v. *Tirath Ram* (9). It is unnecessary to discuss these rulings in detail. In the latest ruling of this Court, *i. e.*, *Vir Singh* v. *Tirath Ram* (9), it was held that where a decree of the Chief Court affirmed the decision of the Court immediately below, and the decision of both Courts was based solely on the facts which were held to be established although this involved a decision on a point of limitation in respect of a small portion of the property in dispute, as no substantial question of law was involved in the proposed appeal to His Majesty in Council, within the meaning of section 110, Civil Procedure Code, the application for a certificate must be rejected.

After giving our careful consideration to the arguments addressed to us by Mr. Fazl-i-Hussain we are wholly unable to see that there is any substantial question of law involved in the proposed appeal to His Majesty in Council.

Turning to the grounds of the proposed appeal our attention was drawn to page 8 line 2 of the judgment of this Court as referring to ground No. 1. No doubt this involves the construction to be placed on certain letters, but the decision on this point was only incidental to the final conclusion and cannot be regarded as directly involved in it.

As to ground No. 2 we were referred to page 9, line 17 "appreciation" of the value of documentary evidence is not the same as a misconstruction or misinterpretation of a document and no question of law is here involved.

Page 20, line 6 was referred to in connection with ground No. 3 but here again the finding on a question of fact is assailed and no question of law is involved.

The remainder of the grounds were dealt with generally by Mr. Fazl-i-Hussain and a perusal of them shows that they deal with questions of fact alone. We accordingly dismiss this application with costs.

Application dismissed.

(1) 4 I. A. 109; 1 M. 252; 1 Ind. Jur. 323; 3 Suth. P. C. J. 387; 3 Sar. P. C. J. 698; 1 Ind. Dec. (N. S.) 167.

(2) 8 I. A. 143; 3 M. 384; 5 Ind. Jur. 542; 4 Sar. P. C. J. 259; 1 Ind. Dec. (N. S.) 822.

(3) 20 B. 699; 10 Ind. Dec. (N. S.) 1035.

(4) 16 C. 292 *n*; 13 Ind. Jur. 339 *n*; 8 Ind. Dec. (N. S.) 192 *n*.

(5) 30 Ind. Cas. 372.

(6) 26 Ind. Cas. 402; 22 P. R. 1915 at p. 128; 19 P. W. R. 1915; 66 P. L. R. 1915.

(7) 62 P. W. R. 1908.

(8) 48 P. R. 1904.

(9) 35 Ind. Cas. 583; 64 P. R. 1916; 15 P. L. R. 1917.

SRINIVASA AIYAR *v.* SESHA IYER.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 233 OF 1916.

March 14, 1917.

Present:—Mr. Justice Oldfield and Mr. Justice Bakewell.

P. R. SRINIVASA AIYAR—PLAINTIFF—APPELLANT

versus

A. SESHA IYER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 23, 65—Marriage brokage contract—Money paid, recovery of, suit for—"Discovered to be void," meaning of.

Payment of money to induce a prospective bridegroom to marry is payment made in pursuance of a marriage brokage contract, and whether such money can be recovered back or not depends upon whether there has been performance of a substantial part of the contract or not. [p. 785, col. 1; p. 786, col. 1.]

A entered into a contract with *B* and *C* to give his sister in marriage to *D* son of *B* and brother of *C*, all members of a joint undivided Hindu family, and to pay him Rs. 1,000 and actually paid him Rs. 400. *A* did not give his sister in marriage to *D* and sued to recover back the amount paid by him to *D*, under the agreement:

Held, (1) that the contract being in effect a marriage brokage contract and as such, opposed to public policy, was void; [p. 784, col. 2.]

(2) that a suit to recover the money paid under the agreement could lie only in the absence of the performance of a substantial part of the agreement. [p. 785, col. 1; p. 786, col. 1.]

Ledu, Coachman v. *Hira Lal Bose*, 29 Ind. Cas. 625; 43 C. 115; 21 C. L. J. 537; 19 C. W. N. 919, dissented from.

Taylor v. *Bowers*, (1876) 1 Q. B. 291; 45 L. J. Q. B. 163; 34 L. T. 38; 24 W. R 499, relied upon.

Case-law discussed.

Per *Bakewell, J.*—The words 'discovered to be void' in section 65 of the Contract Act are more apt to describe an agreement which was void *ab initio* but was not then known by the parties to be so, than an agreement of which the illegality must be taken to have been always known to the parties. [p. 787, cols. 1 & 2.]

Letters Patent Appeal against the order of Mr. Justice Burn, dated 6th October 1916, in Civil Revision Petition No. 862 of 1915, to revise the decree of the Court of the Subordinate Judge, Madura, in Small Cause Suit No. 1314 of 1915.

FACTS.—This was a suit by the plaintiff to recover part of the money paid to the defendants Nos. 1 and 2 for marrying plaintiff's sister to the son of the first defendant and the brother of the second defendant. A sum of Rs. 1,000 was agreed to be paid, out of which there was a cash payment of Rs. 400. The suit is to recover that amount. The Subordinate Judge dismissed the suit on the Small Cause side. A revision petition was filed in the High Court against that order and it was dismissed by Burn, J. The present appeal is under section 15 of the Letters Patent against that order.

The judgment of Mr. Justice Burn, is as follows:—

"The plaintiff in this case based his claim to the return of money on the fact that he was entitled to restitution because the contract, in pursuance of which the money was paid, was rescinded by the defendants. The finding of the Subordinate Judge is against this contention. On the facts he finds that the plaintiff was responsible for the breach. The plaintiff failed to establish the case with which he went into Court.

The plaintiff now seeks to set up a perfectly new ground of claim. He wishes to rely on the fact that the contract was void under section 23 of the Indian Contract Act IX of 1872, and that he is entitled to restoration of the money, which the defendants have received, under section 65 of the Indian Contract Act. I do not think that the plaintiff should be allowed to raise this question now. The defendants relied upon this as a ground of defence but the plaintiff cannot for this reason adopt this as a fresh ground of attack.

In this view, it is unnecessary to refer in detail to the decisions which have been quoted in support of the plaintiff's present claim. I may say, however, that there is authority for holding that section 65 of the Indian Contract Act has no application to a payment of the kind now in question which, according to the plaintiff's present contention, was made in pursuance of a contract known by him to be void *ab initio* on the ground of its being immoral and contrary to public policy. *Ledu, Coachman* v. *Hiro Lal Bose* (1), *Nathu Khan* v. *Sewak Koeri* (2) and *Girdhari Singh* v. *Neeladhar Singh* (3).

The petition is dismissed with costs."

Dr. *K. Pandalai*, for the Appellant.

Messrs. *T. R. Venkatrama Sastri* and *K. S. Ramabhadra Aiyar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—Plaintiff, here appellant,

(1) 29 Ind. Cas. 625; 43 C. 115; 21 C. L. J. 537; 19 C. W. N. 919.

(2) 9 Ind. Cas. 161; 15 C. W. N. 408.

(3) 16 Ind. Cas. 1004; 10 A. L. J. 159.

sued defendants for Rs. 400, alleged to have been advanced to them out of Rs. 1,100, payable under an agreement as consideration for the marriage of his minor sister with Raman, 1st defendant's son and 2nd defendant's brother. There were three defences, that (1) there was no cause of action, because 1st defendant entered into the agreement only on behalf of Raman and 2nd defendant was not a party to it at all; (2) the agreement was not broken by defendants; (3) it was invalid, as being against public policy, and the money, advanced under it, was, therefore, irrecoverable.

Of these defences, the first was not dealt with either at the trial or by the learned Judge in this Court, though one would have supposed that a decision regarding the existence of a cause of action would have been reached, before enquiry began into the validity of the agreement set up as constituting it or the responsibility for breaking that agreement. It is said that the plea was abandoned. But the trial was under Small Cause Procedure and no issues were framed. Raman was, according to plaintiff's 2nd witness and 1st defendant, of age at the date of the agreement. The latter said that he took away the Rs. 400 paid under it. It is not the case that no evidence to support the defendants' pleas was adduced; and it was admitted before us that they were relied on in this Court, although the learned Judge did not mention them. It is not possible in these circumstances to hold that they were abandoned or that defendants cannot support the learned Judge's decision with reference to them, if they can be established and if it is not sustainable on other grounds.

The learned Subordinate Judge's finding on the second defence, that plaintiff, not defendants, broke the agreement, is one of fact and must be accepted. It is, however, to be observed that, coupled as it was with a plea that the agreement was unlawful and, therefore, unenforceable, it could justify no legal conclusion. For the plea in effect that defendants were absolved by plaintiff's refusal to perform his part from any duty under the agreement was irreconcilable with the contention that such performance would have been in conflict with public policy. Shortly, they could not complain of plaintiff's refusal to do what they alleged would have been wrong.

On the remaining question, there is no doubt that the agreement was unlawful and, therefore, void. As set up in the plaint, it involved no suggestion that the money to be paid was for settlement on the bride or her issue or was anything but remuneration to defendants for bringing about the marriage; and, as plaintiff's grounds of appeal Nos. 5 and 6 and 1st defendants' written statement paragraph 8 and 2nd defendant's paragraph 13 show, both sides are agreed that such an agreement would be unlawful, *Kalanagunta Venkata Kristnayya* v. *Kalanagunta Lakshmi Narayana* (4) and *Devarayan Chetty* v. *Muthuraman Chetty* (5). The question is then whether plaintiff is entitled to recover what he paid under such an agreement and whether defendants can retain an advantage received under it. This question was not raised in the plaint, the Subordinate Judge refusing to deal with defendants' allegation that the agreement was unlawful, because he had found in their favour as to responsibility for its breach. On this account the learned Judge held that plaintiff could not raise that contention here also expressing the opinion that his claim was unsustainable with reference to section 65 of the Indian Contract Act. That section, however, is not applicable. *Dayabhai Tribhovandas* v. *Lakhmichand Panachand* (6), *Gulabchand Parachand* v. *Fulbai Harichand* (7) and *Ledu, Coachman* v. *Hira Lal Bose* (1). The Indian Contract Act affording no direct guidance, the conclusions of the learned Judge must be tested with reference to authority.

He has supported his conclusion against the existence of any right to recover what has passed in connection with an unlawful agreement by citation of three cases. But in one of them *Girdhari Singh* v. *Neeladhar Singh* (3), it was conceded that, if the contract was contrary to public policy, the plaintiff was not entitled to recover; and the case is, therefore, no authority against the contention,

(4) 3 Ind. Cas. 554; 32 M. 185; 18 M. L. J. 401; 4 M. L. T. 1.

(5) 18 Ind. Cas. 515; 37 M. 393; 24 M. L. J. 310; (1913) M. W. N. 200.

(6) 9 B. 358; 5 Ind. Dec. (N. S.) 238.

(7) 3 Ind. Cas. 748; 33 B. 411; 11 Bom L. R 649.

advanced before us, that the general rule is subject to an exception in the plaintiff's favour when no portion or when no substantial portion of the unlawful purpose has been carried out. So also the next case of *Nathu Khan* v. *Sewak Koeri* (2), since it was one of completed performance. The third case of *Ledu, Coachman* v. *Hira Lal Bose* (1) cannot be dismissed so shortly, since it directly negatives the contention just referred to by the state ment, "It is plain that, although where money has been paid under an unlawful agreement, but nothirg else is done in performance of it, the money may be recovered back, yet this exception will not be allowed, if the agreement is actually criminal or immoral; where the contract is illegal, because contrary to private law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered or money paid on it". The distinction drawn would appear to be between agreements contrary to law or public policy and others, which would merely have an unlawful object and would also, therefore, be void under section 23 of the Indian Contract Act. But there is no warrant for it in that section, since all alike are made unlawful, or (with all respect) in the cases referred to by the learned Judges, who moreover, take no account of other cases, in which the exception was applied without reference to the distinction proposed.

Of the cases referred to by them *Taylor* v. *Chester* (8) was a case of completed performance and *Howson* v. *Hancock* 9), one of a claim to recover money paid on a wager, in which no further performance was possible. *Tappenden* v. *Randall* (10) is relied on only for a *dictum*, which apparently has not affected later decisions. So also the learned Judge's quotation from *Colline* v. *Blantern* (11), though it is reproduced in *Kearley* v. *Thomson* (12), and *Barclay* v. *Pearson* (13), to be referred to later. Of the Indian cases cited *Bai Vijli* v. *Nansa Nagar* (14), is not of importance, since this point and the authorities regarding it were not considered. The learned Judge's reason for rejecting two decisions in the opposite sense, *Bakshi Das* v. *Nadu Das* (15) and *Gulabchand Paramchand* v. *Fulbai Harichand* (7), that they relate to marriage brokage contracts, is in any case not available to us in the present connection.

On the other hand the exception to the general rule, based on the absence of any or of any substantial performance, is clearly recognized without reference to the distinction proposed in a case later than the majority of those relied on by the learned Judges, *Taylor* v. *Bowers* (16), in which the object of the agreement, a fraud on creditors, would, if persisted in, have resulted in the frustration of the Insolvency Law. Distrust of the decision in *Taylor* v. *Bowers* (16) was, no doubt, expressed in *Kearley* v. *Thomson* (12), but not on the ground that it overlooked the distinction drawn by the learned Judges, which was not in fact referred to, although the object of the agreement was described as to defeat justice. The principle of *Taylor* v. *Bowers* (16) was, moreover, adopted fully in *Barclay* v. *Pearson* (13), already referred to, though the agreement related to what was regarded as a lottery, the opinion being expressed that those who had paid money under it could recover. Of the Indian cases those must be distinguished, in which the title sued on could be established only on the foundation of the validity of the unlawful agreement; as for instance in *Yaramati Krishnayya* v. *Chundru Papayya* (17). In *benami* cases, however, for example *Banka Behary Dass* v. *Raj Kumar Dass* (18), and *Govinda Kuar* v. *Lala Kishun Prosad* (19), the decision has always turned not on the extent to which the agreement, if it were performed, would conflict with law or public policy, but on whether it was performed and the unlawful purpose was affected wholly

(8) (1869) 4 Q B. 69; 10 B. & S. 237; 38 L. J. Q. B. 225; 21 L. T. 359.

(9) (1800) 8 T. R. 575; 101 E. R. 1555.

(10) (1801) 2 Bos. & P. 467; 5 R. R. 662; 126 E. R. 1388.

(11) (1765) 2 Wilson 341; 1 Sm. L C. 369; 95 E. R. 847.

(12) (1890) 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804.

(13) (1893) 2 Ch. 154; 62 L. J. Ch 636; 3 R. 388; 68 L. T. 709; 42 W. R. 74.

(14) 10 B. 152; 5 Ind. Dec. (N. S.) 487.

(15) 1 C. L. J. 261.

(16) (1876) 1 Q. B. 291; 45 L. J. Q. B. 163; 34 L. T. 938; 24 W. R. 499.

(17) 20 M. 326 at p. 329; 7 Ind. Dec. (N. S.) 231.

(18) 27 C. 231; 4 C. W. N. 289; 14 Ind. Dec. (N. S.) 153.

(19) 28 C. 370.

or substantially or not. The decision of the Privy Council in *Petherpermal Chetty* v. *Muniandy Servai* (20) may in particular be mentioned, *firstly*, because it refers to the weight of the decision in *Taylor* v. *Powers* (16), as unimpaired by *Kearley* v. *Thomson* (12), and *secondly*, because the contention that there had been a fraudulent arrangement to defeat creditors and a step taken to carry it out, "which would on the trial of an indictment for conspiracy have amounted to a good overt act of conspiracy", was brushed aside as irrelevant and the effecting of the contemplated fraud alone was regarded as material. Authority standing thus, it is (with all due deference) not possible to follow the decision in *Ledu, Coachman* v. *Hira Lal Bose* (1), or to confirm the decision, which is under appeal.

It is, however, argued by Mr. Venkatarama Sastri for defendants, *firstly*, that the exception above referred to, to the general rule depends, not on whether there has been performance of the unlawful agreement, but on whether the transfer of an advantage under it was merely ostensible or was intended to be real, recovery of the advantage being allowed only in the former class of cases. That is not the test recognized in the authorities already referred to or in *Great Berlin Steamboat Company, In re* (21), in which the transfer was treated as irrevocable, though it was clearly ostensible. It is then urged with reference to *Kearley* v. *Thomson* (12), that plaintiff cannot recover, because though the whole of the unlawful agreement has not been performed, a substantial portion has been; and on the view already expressed, a remand on this point may, no doubt, be fairly claimed.

The last question raised is whether plaintiff can rely on defendant's admission that the agreement was unlawful either generally or when, as in this case, he did not refer to its unlawfulness in his plaint. The answer, however, to the question in both forms is the same, that in the words of Mellish, L. J., in *Taylor* v. *Bowers* (16), plaintiff does not "as the rule is laid down in *Simpson* v. *Bloss* (22) require any aid from the illegal transaction to establish his case. He is not bringing the action for the purpose of enforcing the illegal transaction . . . . . To hold that plaintiff is enabled to recover does not carry out the illegal transaction, but the effect is to put every body in the same situation as they were before it was determined on". Or, as the point was put by James, L. J., "It is the defendant, who has got really to show the fraud", the element vitiating the agreement in the case under consideration . . . . . "It is the defendant, who has got to make out his title to the goods from the transaction, which is a fraud and which it seems he was a party . . . . . and there would be no title in the defendant independently of that". To adapt these principles to the present case, the plea that the agreement is unlawful is not plaintiff's but defendants'. Defendants, as already pointed out, cannot, relying on it, also complain of plaintiff's default. They can (and this is the point at present material) rely on it, only if they further allege and prove that the unlawful agreement or a substantial part of it has been performed. On this point their written statements contained nothing; and it was, therefore, not plaintiff's but their pleading, which was defective. If the Subordinate Judge had considered the unlawfulness of the contract, plaintiff would (for all that appears) have pointed this out. The contention on his side is one purely of law and in the circumstances there is no adequate reason for depriving him of the benefit of it.

Defendants have further proposed to support the lower Court's judgment with reference to the counter-claim made in their written statements to damages on account of loss of reputation. It has not, however, been shown how this claim can be sustainable as arising out of the breach of an admittedly unlawful agreement or how it can be reconcilable with defendants' denial that they were parties to that agreement. The questions for consideration are, therefore, only:

(1) Whether the plaint agreement was entered into with defendants or either of them

(20) 35 C. 551; 10 Bom. L. R. 590. 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 18 M. L. J. 277; 35 I. A. 98; 4 M. L. T. 12; 4 L. B. R. 266. (P. C.),

(21) (1884) 26 Ch. D. 616; 54 L. J. Ch. 68; 51 L. T. 445.

(22) (1816) 7 Taunt. 246; 2 Marsh 542; Holt N. P. 273; 129 E. R. 99, 17 R. R. 509,

or with Raman with or without 1st defendant as his agent?

(2) Whether with reference to the authorities above referred to the agreement or a substantial part of it was performed?

The Letters Patent Appeal must be allowed and the Subordinate Judge's decision set aside with a direction to restore the Small Cause suit to file and re-hear it, admitting any additional evidence tendered, in the light of the foregoing. Costs to date in both Courts will be costs in the cause and will be provided for in the decree to be passed.

BAKEWELL, J.—In India marriage is not generally matter of contract between the parties thereto but is a status or condition imposed upon them by persons who are under a social duty to do so. The authorities which have been cited support, I think, the proposition that they who undertake this duty must have regard solely to the interest of their wards and must not stipulate for a profit for themselves.

The pleadings in this case are not clear but I think that the plaint alleges an arrangement between the parties that a marriage portion should be paid out of the estate of the deceased father of the prospective bride and that certain jewels should be presented to her by the relations of the prospective bridegroom; and, apart from other averments in the written statement of the 1st defendant, it might be inferred that his case was that the marriage portion was to be paid to the bridegroom, the sum of Rs. 400 now claimed, being portion thereof, had been in fact paid to him and that the defendants gained no benefit from this payment because the bridegroom had been adopted into another family. I fail to see anything contrary to public policy or morality in an agreement between third parties, which is intended solely for the benefit of the married couple or either of them. Having regard, however, to the defendants' admission that the agreement was illegal, and that they had some interest in the sum now claimed, I do not think that it is open to the defendants at this stage to maintain that the agreement was valid.

The words 'discovered to be void' in section 65 of the Contract Act are more apt to describe an agreement which was void *ab initio* but not then known by the parties to be so, than an agreement of which the illegality must be taken to have been always known to them, and I agree that in this case it is safer to rely upon the authorities cited by my learned brother. These authorities show, I think, that in a suit for money had and received to the use of the plaintiff, the defendant may plead that it has been applied in accordance with their agreement, and the plaintiff cannot reply that the agreement was illegal because he is *particeps criminis*. If the agreement is still wholly executory and no material part of the illegal purpose has been accomplished, defendant cannot plead that he holds the money for that purpose. [See *Barclay* v. *Pearson* (13), *Petherpermal Chetty* v. *Muniandy Servai* (20) and the cases there cited]. These propositions apply when the parties are in *pari delicto* and to agreements void under Civil Law; different considerations may arise in the case of an agreement to commit an offence against the Crown. I agree to the order proposed by my learned brother.

Appeal allowed;
Case sent back.

V. R. P.

COURT OF THE BOARD OF REVENUE, BIHAR AND ORISSA.

March 10, 1917.

Present:—Mr. Walsh.

In re BHOJRAJ MAHTO AND OTHERS—PETITIONERS.

Bengal Tenancy Act (*VIII B. C. of* 1885), *ss.* 40 (5), 188—*Appeal by only some of the landlords, whether maintainable—Civil Procedure Code* (*Act V of* 1908), *O. XLI, r.* 4.

Though an application for commutation of rent under section 40 of the Bengal Tenancy Act must be made under section 188 of the Act, by all the landlords together, or by an agent on their behalf, yet there is no such restriction in the case of an appeal in which the procedure followed is that which is laid down in Order XLI, rule 4, Civil Procedure Code, 1908. [p. 788, col. 1.]

Read a petition, received on the 19th January 1917, from Bhojraj *alias* Bhojal Mahaton and others, protesting against the order of the Commissioner of the Patna Division, dated the 16th December 1916, modifying the order of the Collector of Patna, dated the 15th August 1916, in the matter of the commutation of rent in village Pawai *Thana* Islampur, in the District of Patna.

NAINA PILLAI v. RAMANATHAN CHETTIAR.

Read also a letter No. V 452-11, dated the 27th February 1917, from the Commissioner, Patna Division, submitting a report on the above petition.

RESOLUTION.—The petitioners applied for the commutation of their rent which was fixed at a rate of Rs. 6-10 0 per *bigha*. The petitioners, and one of the landlords representing a $1\frac{1}{2}$ annas share appealed to the Collector, who after remanding the case for further enquiry dismissed both appeals. The landlords of $1\frac{1}{2}$ annas share appealed againt this order to the Commissioner, who raised the rate of commutation to Rs. 6-12 0 per *bigha*. The present petition is against that order, on the ground, amongst others, that, under section 188 of the Bengal Tenancy Act, an appeal against an order of commutation under section 40 of that Act must be by all of the landlords.

Section 188 lays down that where two or more persons are joint landlords, anything which the landlord is, under this Act, required or authorised to do must be done either by both or all those persons acting together; or by an agent authorised to act on behalf of both or of all of them. An application for commutation of rent under section 40 (1) when made by a landlord, has to be made by all the landlords together, or by an agent on their behalf.

But under section 40 (5) the order of commutation is "subject to appeal in like manner as if it were an order made in an ordinary revenue proceeding."

There is no such restriction in the case of revenue appeals in which the procedure that has always been followed is the same as that followed by the Civil Courts, which is stated in rule 4, Order XLI of the first Schedule of the Code of Civil Procedure.

There has been no irregularity in the present case on the above ground.

On the merits of the case, also, the Board sees no reason to differ from the finding of the Commissioner. The petition is, therefore, dismissed.

Petition dismissed.

MADRAS HIGH COURT.

APPEAL No. 248 OF 1914 AND
APPEALS NOS. 115 AND 116 OF 1915.
December 22, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

IN A. S. No. 248 OF 1914

A. S. N. NAINA PILLAI MARAKAYAR—DEFENDANT No. 1—APPELLANT

versus

T. A. R A. R. M. RAMANATHAN CHETTIAR AND OTHERS—PLAINTIFFS NOS. 1, 2, 4 AND 5, DEFENDANT No. 2—RESPONDENTS

IN A. S. No. 115 OF 1915

GOPALA THEVAN AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

RAMANATHAN CHETTIAR AND OTHERS—PLAINTIFFS NOS. 1, 2, 4 AND 5, DEFENDANTS NOS. 3 TO 5—RESPONDENTS

IN A. S. No. 116 OF 1915

PAZANI THEVAN AND OTHERS—DEFENDANTS NOS. 1 TO 4—APPELLANTS

versus

RAMANATHAN CHETTIAR AND OTHERS—PLAINTIFFS NOS. 1, 2, 4 AND 5, DEFENDANT NO. 5—RESPONDENTS.

Landlord and Tenant—Ejectment, suit for—Occupancy right, plea of Inam, *grant of, to temple—Presumption of grant of both* warams—*Onus of proof—Jurisdiction of Court—'Estate'—Madras Estates Land Act (I of* 1908), *s* 3 (2) (d —'Kudivaram', *meaning of*—Taram faisal muchilika, *recitals of* 'kudimiras', 'swamibogam' *in, effect of—Transfer by tenants Acquiescence by temple trustees—Estoppel—Evidence Act (I of* 1872), *ss.* 90, 114, 115—*Unsigned accounts, presumption as to—Improvements, claim for, by alleged occupancy tenant—Transfer of Property Act (IV of* 1882), *s.* 51.

The word '*kudivaram*' has got several meanings. Its literal significance is the share of the cultivator in the produce raised In that sense, the *kudivaram* belongs to the cultivating tenant, whether he has got a right of permanent occupancy in the land or is a lessee for only one year, or is a lessee from year to year or for a fixed term or is even a mere tenant-at-will. *Kudivaram* is also used in the sense of the *right* of such a tenant of whatever kind in the land so long as he continues in possession of the land. Finally, it is also used to mean the right of a tenant having a permanent occupancy tenure in the land in his holding In this last sense, it is also called *mirasidari* right and sometimes *kudimiras* right. [p. 795, col. 2; p. 796, col. 1.]

In an *inam* village in which there are no tenants having occupancy rights and of which the *inamdar* is also the *mirasidar*, the full ownership right is in

NAINA PILLAI *v.* RAMANATHAN CHETTIAR.

the *inamdar* and the distinction between *melvaram* right and *kudivaram* right is of no utility. [p. 795, col. 2.]

A *mirasidar* who gets a *shrotriem* grant from the Government does not lose thereby his original *kudivaram* right in the lands and might be called both an *inamdar* and a *mirasidar*. [p. 796, col. 1.]

Where trustees of a temple to whom certain lands were granted by the Government as *inam* sue the tenants in ejectment, the burden of proving that the *inamdar* was not the owner of the *kudivaram* right at the time of the grant lies on the defendants inasmuch as the effect of upholding such a plea would be to oust the jurisdiction of the Civil Court. [p. 795, col. 2.]

A defendant opposing an action in ejectment on the ground of his possessing occupancy rights should prove it strictly.

The mere execution of *taram faisal muchilikas* to Government prior to the grant to the temple does not indicate the possession by the tenants of permanent occupancy rights. The mention of such expressions as '*kudimiras*' *swamibogam*, *Ulavadai*, etc., is not conclusive proof of such rights. [p. 799, col. 2.]

Mere length of tenure will not give a right of permanent occupancy to a *ryot*, who has been let in from year to year. [p. 798, col. 2.]

The acquiescence by temple trustees in transfers made by the tenants of the lands in their holdings or their non-opposition to such transfers will not create an estoppel against the landlords nor give the tenants permanent rights. Where a landlord is legally entitled to grant rights as against him to a tenant, he can, by acquiescence or conduct amounting to estoppel, be treated as having made such grant. But the trustees of a temple have no legal right or power to confer higher rights on a temple tenant in the temple lands in his holding than he originally possessed except for the necessities or the clear benefit of the temple. Nor can such higher rights be invoked by the law of limitation or prescription when lesser rights were conferred on the tenant by a document between the parties or by the conduct of the trustees. [p. 796, col. 1.]

Section 90 of the Evidence Act does not enable a Court to presume that unsigned accounts of a temple which do not purport to be in the handwriting of any particular person or persons were written by the authorised accountants of the temple. Nor can section 114 be invoked in aid of such a presumption. [p. 794, col. 1.]

Section 51 of the Transfer of Property Act does not apply, even by analogy, to the case of a tenant, as it cannot be said that he is a person believing in good faith that he is absolutely entitled to the land; and a tenant who believes he has occupancy rights cannot, under the section, claim compensation for improvements made by him. [p. 800, col 1.]

Appeals against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suits Nos. 40, 42 and 61 of 1913, respectively.

The Hon'ble Mr. *S. Srinivasa Aiyangar*, Advocate General, Messrs. *T R. Ramachandra Aiyar* and *S. Muthiah Mudaliar*, for the Appellants,

The Hon'ble Mr. *T. Rangachariar* and Mr. *S. Varadachariar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—These three appeals have arisen out of three suits brought by the same plaintiffs. The suits were tried together and were disposed of by the Temporary Subordinate Court of Tanjore in the plaintiff's favour by one and the same judgment. Appeal Suit No. 248 of 1914 was filed directly in the High Court. The other two appeals were filed in the Tanjore District Court and were transferred to this Court to be heard along with Appeal Suit No. 248 of 1914.

(2) The suits were brought in ejectment by five of the six trustees of the Manthrapureeswaramswamy temple, the 6th trustee who did not care to join in the suits being impleaded as one of the defendants in each suit (2nd, 3rd and 5th defendant respectively). He allowed all the three suits to proceed *ex parte* so far as he was concerned.

(3) The plaints and the written statements of the contesting defendants are very similar in all the suits. Thirteen issues are common to the three suits. In one of the suits (Appeal Suit No. 115 of 1915—Original Suit No. 42 of 1913), there is one issue: "Did first defendant execute a lease deed to the trustees in 1899 in respect of plaint item 12," which is peculiar to that suit. That issue was found in the affirmative by the lower Court and the finding was not contested in the arguments on appeal before us. In the two other suits (Appeal Suit No. 248 of 1914 and No. 116 of 1915, Original Suits Nos. 40, 41 and 61 of 1913 respectively), there is an issue as to whether improvements have been effected by the contesting defendants and if so, whether the said defendants are entitled to claim compensation for such improvements as a condition precedent to the passing of a decree in plaintiffs' favour in ejectment and, if so, what compensation amounts are due to them. In Original Suit No. 61, the defendants let in no evidence about improvements and the issue was found against them by the lower Court and no argument in the appeal was addressed to us on that question. In the other suit (Original Suit No. 40), the learned Subordinate Judge found (*a*) that the 1st defendant planted trees at a cost of about Rs. 150, but (*b*) that there was "no evidence

as to when the new trees were planted and on what plots," and (*c*) that the 1st defendant had, when planting the trees, no *bona fide* belief that he was entitled to a permanent occupancy right in the lands, he and his father-in-law (who assigned his rights to him) having been speculative alienees from several recalcitrant cultivating tenants of their respective holdings. Section 51 of the Transfer of Property Act gives a right of compensation only to a transferee who *bona fide* believes himself to be "absolutely entitled" to a property and makes improvements in such belief. Assuming that by analogy even the person who believes himself to have a permanent occupancy right is also similarly entitled to compensation, the question of the 1st defendant's *bona fide* belief (in Original Suit No. 40) largely depends on the decision of the other important common issues in the three suits. One other peculiar issue in suit No. 61 is: "Does item No. 8 belong to the temple?" That was decided by the lower Court in the plaintiffs' favour on the evidence of the plaintiffs' witnesses Nos. 3, 6 and 13 and nothing was urged before us which could induce us to give a different finding on that question.

(4) Of the 13 common issues, one is "what is the correct extent of the lands claimed in the plaint?" The correct extents were found by the Commissioner appointed by the lower Court and are set out in paragraph No. 143 of its judgment. The lower Court adopted the Commissioner's report and no question is raised in the appeals before us on that point. Another common issue was the general issue: "To what reliefs are plaintiffs entitled?" and it, therefore, needs no separate treatment. Another issue (7th issue) deals with the question whether proper notices to quit were given to the contesting defendants. The evidence of the plaintiff's 4th and 14th witnesses and the documents Exhibits N and 6 series establish the service of proper notices and the defendants did not venture into the witness-box to deny the receipt of such notices by them. The 9th and 10th issues deal with the question of the rate of rent and the mesne profits claimable by the plaintiffs and the periods for which profits are claimable provided, of course, the contesting defendants are found to have no right of occupancy. The findings of the lower Court on these issues were not attacked before us.

(5) Having thus cleared the ground of the subsidiary questions involved in the suits, I shall now proceed with the more important issues, namely, the issues Nos. 1 to 6, 8 and 11. The 1st issue is: "Does the temple own the entire interest (*melvaram* and *kudivaram*) in the plaint land? And is the temple entitled to eject the 1st defendant?" The 2nd, 3rd and 4th issues raise the question whether the right of permanent occupancy belonged to the contesting defendant or defendants, in their respective holdings as transmitted from their predecessors-in-title; and even if such a right did not originally vest in their predecessors-in-interest, whether it has been since acquired by prescription or by the limitation bar as against the plaintiffs. The 6th issue is: "Are the trustees of the temple estopped from claiming to eject the 1st defendant for the reasons set forth in the (written) statement?" The 8th issue raises the question "whether the Estates Land Act is applicable to the suit lands and has this Court" (the Civil Court as distinguished from the Revenue Court) "no jurisdiction to entertain the suit." It was conceded by the appellants' learned Vakil that the decision of this issue depends on the answer to the 1st issue. If the plaint temple owned the *kudivaram* right in all the village lands from the beginning, the lands do not fall within the definition of Estate in section 3 (*d*) of the Estates Land Act.

(The subsequent acquisition by the tenants and their heirs and assignees by limitation or prescription of an occupancy right which was at the time of the *inam* grant vested in the *inamdar* and not in the tenants cannot, of course, oust the jurisdiction of the Civil Courts.)

(6) The plaintiffs relied in support of their claim, not only on the ancient Government records C and C 1 but also on the document, Exhibit A. This latter document is a *muchilika* which was executed in August 1831 by the nine principal Karaigar cultivators of the plaint Mangal village, acting as representatives of the Ullur Karayeedu cultivators. The 5th issue framed in the suits relates to this *muchilika*. That issue as framed in Original Suit No. 40 of 1913 is as follows: "Is the *muchilika* of 1831 genuine and binding on the 1st defendant or his predecessors-in-

title; if so, are the plaintiffs entitled by virtue of the *muchilika* to eject the 1st defendant from the plaint properties." So far as the genuineness of the *muchilika* is concerned, no question was raised in the lower Court at the trial of the suits. (See also paragraph 6 of the 1st defendant's written statement which indicates that the genuineness of the *muchilika* was not seriously intended to be called in question even from the beginning). Its genuineness was not disputed before us. It is a document more than 30 years old and it was executed in favour of the District Collector who, as Agent of the East India Company, was the Manager of the plaint Hindu temple and other Hindu public temples in the Tanjore District between 1806 and 1847. He became the Agent of the Board of Revenue in 1817 under Regulation VII of 1817 which vested the superintendence of such temples in the Board. The document comes from proper custody, the Collector having handed over charge of all the affairs of the temple to two Hindu trustees in 1847 (See Exhibit A 2). This document Exhibit A was obtained by the Tahsildar from the nine executants and was sent to the Collector along with the Tahsildar's report Exhibit P which expressly refers to Exhibit A.

(7) This *muchilika*, Exhibit A, of August 1831, was preceded by a document Exhibit L, dated July 1831, which is an agreement executed between all the village Karaigar cultivators. The genuineness of this ancient document, Exhibit L, also cannot be reasonably called in question. (See as to its production from proper custody P. W. No. 7.) Exhibit L was clearly executed in anticipation of the Karaigars being able to obtain the *taram faisal* lease of the cultivable lands in the village from the Collector. Exhibit L makes provision for the following matters, (1) the manner in which the Karayeedu tenants are to divide the village lands (to be so obtained from the Collector) for purposes of cultivation, (2) the mode of paying the *Sircar* assessment and the *swamibhogam* due to the temple, (3) the collection of rents from Purakkudies who do not belong to the *karai* and who might cultivate some of the village lands as sub lessees of the Karaigar lessees, (4) the disposition of all the income and expenditure connected with the lands, and (5) the division of the net assets realized from the lands in *Faslies* 1241 and 1242 (July 1831 to June 1832 and July 1832 to June 1833).

(8) It is well known that in the Tanjore District, the Collector, Mr. Kinderseley, introduced during the decade 1831 to 1840, in respect of the temple lands under his management, *what* is called the *taram faisal muchilika* system under which lands were leased for cultivation at an annual paddy rent fixed on the then cultivable extent with provision for the commutation of such paddy rent to money value, the leases containing other characteristic terms and conditions. In the plaint village, before this *taram faisal muchilika*, Exhibit A, was obtained in 1831 what was known as the "proposal" *ijara* lease system prevailed during the 11 years 1820 to 1830. In the still earlier period, that is before 1820, the profits (from the lands) due to the temple were, as regards lands not directly under the temple Pannai Farm cultivation, collected from the cultivating tenants in the shape of a share of the gross grain outturn as regards grain growing lands (50 per cent. being the land-holder's share of the produce from *nanja* lands and 40 per cent. from *punja* lands). Under the "proposal" system (1820 to 1830), the lands were let for cultivation to that "proposal" lessee who offered the highest rent, each letting being for a very short term of three to five years. (See Exhibits A1, A3, A4 and A5 which are documents executed to Government in connection with these "proposal" leases between 1820 and 1830) Under the *taram faisal muchilika* system introduced in 1831, the lessees held for an indefinite term paying an *annual* money rent calculated at a fixed commutation value as regards paddy rent. For excess area cultivated in a particular year, for waste lands brought under cultivation for the raising of garden crops and so on, provisions are inserted for payment of additional rents. The lessees are also bound to supply labour on the occasions of the temple festivals and when repairs have to be done to the temple lands, channels, etc. (It has to be here stated that the translations

in the printed paper book of several documents like Exhibits A, C, L, F, etc., in this case contain many inaccuracies and are in some places even unintelligible. Correct translations accepted by both sides were, however, placed before us during the hearing of these appeals). The *muchilika* Exhibit A mentions about 67 *velies* of *nanja* land and 16 *velies* of *Punja* land as granted for cultivation to its executants total 83 *velies*. (A *veli* is $6\frac{2}{3}$ acres). It is clear from the ancient records (see Exhibit C and C 1) that in the year 1723 or so, the extent of cultivable land was only 10 *velies* of *nanja* and 15 *velies* of *punja*, total 25 *velies*. It also appears from these records that the whole village was held on what was known in the Mahratta regime as "*Rokka Kuthagai*" tenure more than 20 years ago, that the Mahratta King of Tanjore for some reason altered the original favourable *Rokkakuthagai* tenure into the ordinary "*sarjayitha*" or profit sharing tenure under which the Government obtained its assessment in the shape of a share of the grain produce, that the trustee of the temple complained about the year 1723 that this conversion of that favourable tenure into the ordinary tenure diminished the income of the temple to such an extent that it was unable to meet the expenses properly and that he prayed for the restoration of the original *Rokkakuthagai* settlement tenure. The old favourable tenure was accordingly restored by the Rajah on the auspicious occasion of the solar eclipse in the *Soorsan* year 1124 (1723 A. D.) at the holy sea-side shrine of Vedaranyam, though the *Rokkakuthagai* cash assessment was increased from 100 *chakrams* to 125 *chakrams* (1 *chakram* is equal to Re. 1-9-0). The old Rajahs used to give what is called *Mohini* allowances to the temples as pious gifts annually and the *Mohini* allowance for this temple is 72 *chakrams*, which was deducted by the temple from the *Rokkakuthagai* or cash assessment of 125 *chakrams*.

As I said before, the original cultivation extent seems to have been only 25 *velies*, though, of course, the temple owned the entire lands in the village including waste *poramboke*, house sites, etc. In 1809, when the Collector prepared the Register, Exhibit C, the extent actually found under cultivation was estimated according to the old rough measurement to be 37 and odd *velies* of *nanja* and 43 and odd *velies* of *punja*, about $80\frac{1}{2}$ *velies* on the whole, and the temple is entered in the register as owner of these $80\frac{1}{2}$ *velies besides the remaining waste lands* whose extent was estimated (again very roughly) at about $16\frac{1}{2}$ *velies*. (See last clause of Column 8 in Exhibit C). The *pymash* measurement accounts Exhibits F (1816-17) and Exhibit F-1 (1828-29) give the extent of the cultivated lands including *tope* as about 93 or 94 *velies*. [The translation of the term "*Rokkakuthagai*" in Exhibit F, F-1, and other documents as "cash lease" found in the printed paper book is very misleading. As I have saidalready, it is a technical revenue term used for a particular kind of revenue settlement made by the Tanjore Kingdom as regards some of the lands assessed to revenue. In the Tanjore District Manual, page 487, *Rokkakuthagai* is defined as 'assessment also (that is, like *shrotrium*) fixed on favourable rates either from favour or as an inducement to reclaim waste." I might also state here that the portions of Exhibit F-1 which contain entries about *pymash* Nos 419 to 500 are irrelevant as they relate to another village altogether)]. The "proposal" *ijara* document between 1820 and 1831 and the *taram faisil muchilika* Exhibit A also indicate that the cultivated area ranged in those years between 80 and 90 *velies*. It is well known that owing to the internal political disturbances, waste lands in *mirasi* districts like Tanjore and Chingleput which could have been cultivated so as to benefit both the *mirasidars* and Government were not, in the olden times, brought under cultivation and that the *mirasidars* were expected by the Government to settle cultivators in their villages as permanent residents for bringing lands under cultivation and even to induce residents of other villages to migrate during the cultivation season temporarily, the former class of cultivators becoming Ullur Purakkudies and the latter continuing to be Asalur Purakkudies. The "proposal" lessees were eventually unable to extend the area of cultivation so as to benefit the temple

which was being managed by the Collector. The *taram faisal muchilika* system was then introduced and it has resulted in the cultivated area being increased to 140 *velies*, there being practically now no waste area to be brought under cultivation.

It was admitted on behalf of the appellants (and it could not be well denied as the very portions of Exhibit F-1—on which the appellants relied disclosed the fact) that at least in 21 *velies* out of 64 *velies* of wet land cultivated before 1820, the plaint temple owned both the *melvaram* and *kudivaram* interest and was cultivating that area with the temple's own farm or *pannai-parakkudi* servants and its own ploughs. (See description of *pymash* Nos. 387, 388, 521, 524, 535, 537, 538 and 527 in Exhibit F-1). It was, however, found by the Collector that it was convenient to have even these 21 *velies* let out to the *taram faisal muchilika* lessees and to have the direct *pannai* cultivation discontinued altogether. The appellants are unable to explain how the temple came to own the *kudivaram* in the 21 *velies* or in only 21 *velies*. It is also significant that when a small area of waste lands in the village was acquired by the Government in 1883 under the Land Acquisition Act, no person other than the temple claimed or was awarded any part of the compensation value, the whole being paid to the temple (See Exhibit E). The appellants' learned Vakil contended that the undertaking, Exhibit A-2, given in 1847 by two respectable Hindus to the Collector indicated that the cultivating lessees of the temple lands owned permanent occupancy rights. It is a matter of well-known history that the East India Company, about the year 1840, directed the Board of Revenue and the Collectors to give up the management of the Hindu temples under their control. According to such directions, the Collector of Tanjore between 1847 and 1857, transferred the management of the temples under him to Hindu trustees who gave undertakings like Exhibit A 2 to him. The 7th clause of Exhibit A2 on which the appellant's learned Vakil relies is as follows:—"In regard to the *purakkudies* of the said Sarvamanyam villages, we shall, following the custom in vogue in each village and the custom in the Samasthanam, acquit ourselves properly as had been hitherto done following the custom or practice, without violating or encroaching their rights." Now, "*purakkudies*" as such have no occupancy rights and this vague clause in a document to which the *purakkudi* tenants were no parties cannot confer any rights upon them. The 11th issue, namely, "Are plaintiffs disentitled to eject 1st defendant by reason of the *muchilika* of 1847 executed to Government," was, therefore, rightly decided by the Subordinate Judge against the appellants.

I think that the defendants who claim as alienees and representatives of the original tenants of the temple during the time of its management by the Collector are clearly bound by the terms of Exhibit A executed by their predecessors-in title and that the terms of Exhibit A clearly negative any occupancy right in them. The learned Subordinate Judge has dealt with Exhibit A and the other evidence in the case in a very careful well-considered and exhaustive judgment. Notwithstanding the long and elaborate arguments advanced by the appellant's learned Vakils before us, they have failed to show that the statements in that judgment as to the contents and construction of the documentary and other evidence disclose any material inaccuracies. The only error of importance pointed out is that the lower Court relied on the *cadjan* accounts, Exhibit M series which are contended to be inadmissible in evidence. These accounts purport to relate to the incomes derived from the plaint village lands by the temple between 1712 and 1823 and to the expenditure incurred out of that income. If these documents are admissible in evidence, they almost conclusively establish the plaintiffs' case on the first issue. The documents, however, are not signed by any person and do not purport to be in the handwriting of any person. Section 90 of the Evidence Act says: "Where any document purporting or proved to be 30 years old, is produced from any custody which the Court in any particular case considers proper, the Court may presume that the *signature* and every other part of such document *which purports to be in the*

handwriting of any particular person is in that person's handwriting and, in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to be executed and attested." I do not think that this section enables the Court to presume that unsigned accounts which do not purport to be in the handwriting of any particular person or persons were written by the authorised accountants of the temple to which the accounts purport to relate. I at first thought that section 114 of the Evidence Act might enable the Court to presume, "regard being had to the common course of natural events" that these elaborate accounts were really written by accountants employed by the trustees of the temple. But on further consideration, and having regard to the decisions in *Sheo Nandan Ahir* v. *Ram Lagan Singh* (1), *Basi Nath Pal* v. *Jagat Kishore Achariee* (2), *Ubilack Rai* v. *Dallial Rai* (3) and *Uggrakant Chowdhry* v. *Hurro Chunder Shickdar* (4); [See also *Airey, In re, Airey* v. *Stapleton* (5)], as to the limits of the presumption permitted to be raised by section 90 of the Evidence Act, I do not think that I would be justified in doing so. Vague expressions are used in some decisions to the effect that a document more than 30 years old and coming from proper custody might be "presumed to be genuine." The use of such vague language (instead of following the words of the section which deal with the signature, handwriting, execution and attestation found in such documents and purporting to be those of particular persons) is likely to lead to confusion of thought and to the Court raising presumptions as to the existence of facts not within the scope of section 90. I would, therefore, exclude Exhibit M series altogether from consideration as evidence in this case. In this connection I might also state that the documents on the defendant's side which came into existence after 1901 (Exhibit O when the first notice of ejectment was issued by the plaintiffs) are also of very little importance. I am further not disposed to attach any weight to the *pattah* Exhibit G of 1900 which seems to have been obtained by the temple authorities either unnecessarily (as they had already obtained *inam pattahs*) or to create evidence in their favour with a view to litigation. Documents H series following the *pattah* G may also be left out of consideration. The *inam* register and the title deed B and B-1 are also inconclusive.

In paragraph 46 of his judgment, the learned Subordinate Judge sums up his conclusions on the principal issues. Omitting his reference to Exhibits B-1, M series and G (1) I shall quote the greater portion of the paragraph (with a few alterations at the end) as it expresses fairly and fully my own conclusions on the evidence. "In the present case, the reference to the whole of the village in Exhibit C as that which was granted to the temple, the recital in column 8 in Exhibit C that the temple actually enjoyed the whole of the village including the *poramboke*, the payment of compensation to the temple; *vide*, Exhibit E, the grant of a land to a *gurukkal* by the temple, *vide*, "entry in Exhibit B, the entry in the Collector's register Exhibit D that Manthrapurswaraswami is the *mirasidar*, the last word denoting in the District of Tanjore that he is the proprietor of the soil, the reference in Exhibit F to Manthrapurswaraswami as *miras* solely entitled to the enjoyment of the village, the recital in Exhibit J10 of 1815 that the village is *ekaboga gramam*, the recital in Exhibit A 5 that Mangal village belongs to the temple, the reference in the lease deeds executed to the Collector before 1831 to the *cultivation* being undertaken by the lessees, the reference to the temple as the owner and village as *miras* of *Ekabogam* Manthrapurswaraswami in Exhibit F-1, ... the reference in Exhibits II series from 1891 to 1899 to Manthrapuriswaraswami as *miras* Manthrapurswami, the collection of fishery rent, *tope* rent and house site rent by the temple, the admitted ownership of the temple of some *pannai* lands as conclusively proved by Exhibit F-1 and L among others . . . . . the reference to the same tenants by more than one name such as *olavadai kudimiras* and *purakkudi Ullur* or Asalur, in the *pymash*, the reference to

(1) 30 Ind. Cas. 908; 13 A. L. J. 921.
(2) 35 Ind. Cas. 298; 20 C. W. N. 643; 23 C. L. J. 583.
(3) 3 C. 557; 1 Ind. Dec. (N. S.) 939.
(4) 6 C. 209; 3 Ind Dec. (N. S.) 137.
(5) (1897) 1 Ch. 164: 66 L. J. Ch. 152; 76 L. T. 151 45 W. R. 286.

these men as *purakkudis* in the Tahsildar's report Exhibit P, the lease of the entire Mangal to certain persons by the Collector for the cultivation of lands from *Faslis* 1230 to 1240, "the execution of Exhibit A by certain persons for the cultivation of lands without any reference to their *kudikani* right in it and with a stipulation for payment of *swamibogam* to the temple and *rokkakuthagai* to Government so long as they are in possession of the lands," the absence of all mention of *kudikani* right in the *muchilika* executed by the trustees to the Collector and the provision made in Exhibit A for the supply of labour to the temple festivals and for payment of such *tirvai* as is fixed by Government in respect of the special crops raised and in respect of *poramboke* waste land, etc., suggest the inference that the temple was entitled to both the *kudivaram* and *melvaram* rather than that the tenants had *kudikani* rights. Not a single document has been produced by defendants to show or to suggest that the temple was not "the owner of" both *melvaram* and *kudivaram* rights in the village . . . . . In my opinion plaintiffs have proved by means of documents and course of dealings evidenced by documents that it is more likely that the temple was "the owner" of the entire village and was both the *melvaramdar* and *kudivaramdar* than that it had only the *melvaram* right." I might add that the accounts J series ranging between 1806 and 1840 are themselves sufficient to prove the plaintiffs' contention. For instance, Exhibit J-74 shows that the "proposal" lessee himself realised the proceeds of the lands and gave out of the proceeds the *purakkudivaram* due to the cultivating tenants.

As against this, the appellants relied on what strikes my mind as inconclusive and one sided transactions and on some weak suggestions. One of the arguments advanced was that *rokkakuthagai* tenure being a tenure on favourable terms as to assessment, the temple was only an *inamdar*, that the grant of an "*inam*" is presumably only the grant of the Government assessment (either a portion or the whole) and not of the *kudivaram*, and that the burden of proving that the temple also owned the *kudivaram* was upon the plaintiffs. As regards the burden of proof in such cases I was a party to some decisions beginning in 1912 in which it was held that the burden of proving that an *inamdar* was the owner of the *kudivaram* at the time of the grant of the *inam* to him, lay upon the *inamdar*, but my view (which differed from an earlier decision in 1910) has not been accepted in some later decisions of this Court which have held that as the jurisdiction of Civil Courts would be ousted if the *inamdar* was presumed not to have been the owner of the *kudivaram* [and if the village is accordingly held to be an estate under section 3 clause 2 (*d*) of the Estates Land Act] the person so seeking to oust the jurisdiction of the Civil Courts by alleging that the *inamdar* was not the *kudivaramdar* at the time of the *inam* grant ought to prove his said allegation. [See *Ravulapati Papi Reddi* v. *Nanduru Peda Venkatacharyulu* (6).] The learned Subordinate Judge (evidently following my view) threw the burden in this case on the plaintiffs of proving that the temple was the owner of the *kudivaram* right from the beginning, and even so, found that the plaintiffs have proved their case. Without going to the question of burden of proof I am clearly satisfied that the evidence in this case very clearly establishes the plaintiff's contentions. In an *inam* village in which there are no tenants having occupancy rights and of which the *inamdar* is also the *mirasidar*, the full ownership right is in the *inamdar* and the distinction between *melvaram* right and *kudivaram* right is of no utility. (The word '*kudivaram*' has got several meanings. Its literal significance is the share of the cultivator in the produce raised. In that sense, the *kudivaram* belongs to the cultivating tenant, whether he has got a right of permanent occupancy in the land or is a lessee for only one year or is a lessee from year to year or for a fixed term or is even a mere tenant at-will. *Kudivaram* is also used in the sense of the right of such a tenant of whatever kind in the land so long as he continues in possession of the land. Finally, it is also used to mean the right of a tenant "having a permanent occupancy tenure in the land in his holding." In this last sense, it is called

(6) 26 Ind. Cas. 67; (1914) M. W. N. 794; 16 M. L. T. 247; 27 M. L. J. 567.

also *mirasdari* right and some times *kudimiras* right. See *Chinnan* v. *Kondam Naidu* (7) where Spencer, J, deals with the meaning of the *kudimiras* That decision also establishes that a *mirasidar* who gets a *shrotriem inam* grant from the Government does not lose thereby his original *kudivaram* right in the lands and *might be called both a mirasidar and an inamdar*).

The appellants further relied on the fact that since about 1867, they and their predecessor-in-title have been hypothecating, mortgaging and selling the lands in their respective holdings to the knowledge of the temple trustees and of the temple officials and that they have been granted rent receipts describing them as *kudimirasidars* (The documents filed on the defendants' side and dated earlier than 1867, namely, Exhibits 75, 76, 77, III (A) and III (B) are easily manufactured *cadjans* and I agree with the Subordinate Judge that their genuineness should not be presumed). The temple trustees and the *kanakkans* were, however, themselves interested in some of the village lands as cultivators or as alienees from cultivators and their conduct is not of much value as against the temple. No doubt, where a landlord is legally entitled to grant rights as against him to a tenant he can, by acquiescence or by conduct amounting to estoppel, be treated as having made such grant. But the trustees of a temple have no legal right or power to confer higher rights on a temple tenant in the temple lands in his holding than he originally possessed except for the necessities or the clear benefit of the temple. The acquiescence and conduct of the trustees cannot, therefore, affect detrimentally the rights of the temple. In *Satya Sri Ghoshal* v. *Kartik Chandra Das* (8), Jenkins, C. J., says: "The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity; it cannot be made in favour of that which offends legal principles. It is this that prevents our accepting the view of the lower Appellate Court as final, for it would seem that the property to which the presumption has been applied is *debutter*."

"If it was *debutter* at the time the tenancy originated then this would affect the applicability of the presumption for, to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of variable rent from time to time, would be a breach of duty in a *shebait* and is not, therefore, presumable; *Maharanee Shibessuree Debia* v. *Mothooranath Acharjo* (9)." No provision of that branch of the law which relates to limitation or prescription has been pointed out to us which could confer such enhanced right on a temple tenant (whose rights were in the first instance defined by the terms of a document conferring on him lesser rights) by reason of the conduct of the trustees of the temple. That the allegation in many of these transfer documents filed on the defendants' side, namely that the alienors owned occupancy rights, was, in all probability, not *bona fide*, is shown by the fact that not only waste lands of the temple subsequently brought under cultivation but even lands admitted to have been under the direct *pannai* cultivation of the temple originally have been alienated with such false recitals.

Another argument of the appellants was that in the *pymash* account Exhibit F-1, 9 *kudimiras karaigars* are mentioned and the temple itself is also called an additional *kudimirasidar* and *karaigar*. These *pymash* accounts are first prepared by the lower revenue officer and surveyors, (Vattam Karnam assistants, Mujumdars and so on) and then there is a revision or check by a higher officer called Brigedar. In the *pymash* Exhibit F of 1816-17, the word '*miras*' occurs only as regards residential sites with their appurtenant backyards called '*manaikollai*', and even as regards these '*manaikollais*', only 16 out of 21 are

(7) 23 Ind. Cas. 113; 26 M. L. J. 169; 1 L. W. 41.

(8) 13 Ind. Cas. 596; 15 C. L. J. 227; 16 C. W. N. 418.

(9) 13 W. R. (P. C.) 18; 13 M. I. A. 270; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

stated to belong to certain cultivators with *mirasi* right, the remaining 5 belonging to *kasavargam* tenants, that is, tenants newly introduced into the village by the temple *mirasidar* for cultivation purposes on condition that they would give up their dwelling sites to the *mirasidar* when they ceased to do cultivation work for him. *Ullur purakkudies* (as distinguished from *asolur purakkudies* and *kasavargam* tenants) usually have permanent *residential* rights in the village and the word '*miras*' which in its widest sense means proprietary right (and is used to denote even hereditary right in temple offices) may, without impropriety, be used to describe the rights of these *ullur purakkudies* in their residential sites and they might be called *kudimirasdars* of such sites. The reference in Exhibit F-1 to the temple as one of the *kudimirasidars* seems to be almost meaningless, except in this sense of a permanent resident. The temple is the landlord and landowner and is described in ancient documents as the full *ekabogam* (exclusive right) *rokkakuthagai mirasidar* of the entire village and in Exhibit F-8 also it is so described in several places. If it is only one of several *kudimirasidars*, it cannot be called *ekabogam mirasidar*, and would be only one of several *palabhogam mirasidars*. It is further significant that out of the nine persons described as *kudimirasidars* in the beginning of Exhibit F 1, the mark of one man alone appears against his designation as *kudimiras* Ammayappa Thevan, while the marks or signatures of others describe them as either *olavadai* or *ulavadai miras*. Again, in another portion of Exhibit F-1, where a count of all the ploughs in the village is made, all these persons are called *ullur purakkudies*, while the temple alone is called *rokkakuthagai mirasidar*. Lastly, when the *Ajmash* or check measurement was made by the Brigedar on these *pymash* accounts (he seems to have checked about 44 entries), the descriptions of at least some of those persons who were entered as *kudimiras* cultivators in the checked entries in the preliminary *pymash* were, in pursuance of a *Huzur* order, corrected into *ulavadai miras* which description does not, of course, imply any occupancy right. As pointed out by the lower Court in paragraphs Nos. 97 to 99 of its judgment, the cultivating tenants under the temple (which is the *ekabogham miras* proprietor of this village) seem to have signed or put their marks (many of them being marksmen whose marks or names were entered for them by some unknown person) in these *pymash* accounts describing themselves indiscriminately and variously even in the course of the same document as *olavadai*, *olavadai miras*, *olavadai kudimiras*, *ullur olavadai*, *ultur purakkudi* and so on. Not much importance, therefore, could be attached to these varying descriptions. It was not formerly to the interests of the temple to disturb these persons, though they have been only cultivators from *fasli* to *fasli*. That such cultivators should in their own estimation and owing to their not being disturbed for long, try to raise themselves by making unilateral declarations is not unnatural. From being *pannai* cultivating servants or *asalur purakkudies*, they become *ullar purakkudies* and begin to call themselves *olavadai* tenants, *olavadai miras*, *olavadai kudimiras* and even occasionally *kudimires*.

Of the several executants of Exhibit A who were allowed (probably by an oversight in the Collector's office) in the beginning of the document to style themselves *kudimiras*, only one ventured to sign it as such. Under all the circumstances of this case, too much importance should not be attached to this fact, especially as in the *arzee*, Exhibit P, sent by the Tahsildar to the Collector along with Exhibit A, he calls them only *kudis* or cultivator and even the man Iyya Pillay who signed as *kudimiras* is called in Exhibit P only *purakudimiras*. Further the terms in the body of Exhibit A are wholly inconsistent with any right of permanent occupancy in the executants. The word "*swamibogam*" used in Exhibits A, F, F 1, and other documents has got a settled meaning in the Tanjore and Chingleput Districts. Wilson in his Glossary says: "*Swamibhogam* in the Tamil country means the share of the produce or rent which is paid to the *mirasidar* or hereditary proprietor by the tenant cultivator holding the land in farm for a fixed period." I think the use of the word *swamibogham* in Exhibit A is almost conclusive as to the full proprietorship of both the *melvaram* and *kudivaram* rights in the temple.

Lastly, it seems to me that the principal

questions raised in this case have been in a manner settled in the plaintiffs' favour by the decisions of this Court and of the Privy Council given in similar cases which had arisen in the same Tanjore District. I shall refer only to four of these decisions. In *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (10) the plaintiff as trustee of the Piruppalur Sriyajneshwaraswami Muttam sued to recover *covil* or temple lands which were leased to the defendants under a deed of agreement, Exhibit A, dated 14th August 1837, entered into between the defendants and the Government who at that time held the management of the *pagoda* property. The suit was brought in 1868. Defendants set up a perpetual right of occupancy, one of the grounds being that for 30 years they had paid *swamibhogam* money at a fixed annual rate. The material terms in the *taram faisal muchilika*, Exhibit A, in that case were very similar to the terms of the *taram faisal muchilika* Exhibit A in this case. It was held that the tenancy continued to be regulated by the agreement Exhibit A which created only a tenancy from *fasli* to *fasli* and that mere long enjoyment cannot alter the nature of the tenure. In *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi* (11), the tenants executed a *muchilika* for the lands in the village of Sandaputtur belonging to a Hindu temple, the *muchilika* having been executed in 1830 to the Government who was then managing the temple lands through the Collector. The Collector handed over the management to a Hindu trustee in 1857 on the latter's giving an undertaking to the Collector not to eject the *ryots* so long as they paid *cist*. To this undertaking the *ryots* were, of course, no parties. The *ryots* set up the right of occupancy and also the trustee's undertaking of 1857 as a defence to the suit. The learned Judges followed *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (10), and held that the tenants had acquired no right of occupancy though the consolidated rent fixed by the *muchilika* of 1830 had been paid separately by the several persons who claimed under the original tenant of 1830 and though there had been alienations by the tenants of their several holdings. Mr. Justice Brandt says in his judgment "Defendants rely very much on their possession of the lands by themselves, or by those under whom they claim from the 1st of January 1830, if not from a still earlier date. But mere length of tenure for any period will not give a right of permanent occupancy to a *ryot*, who has been let in as a tenant from year to year * *

* It was admitted by Turner, C. J., in *Krishnasami Pillai* v. *Varadaraja Ayyangar* (12), that the period of occupation which should confer upon the *ryot* a permanent tenure could only be settled by legislation." "The *muchilika* of 1st January 1830 does not tend to show that the title of those who executed them was permanent. On the contrary, there are some expressions which favour a contrary supposition; and if there are expressions which indicate an intention that the occupation should be for more than one *fasli*, they are [as Sir Colley Scotland said of similar expressions in a *muchilika* in *Chockalinga Pillai's* case (10)] indefinite as to any period of time except that of the *fasli*, and clearly, therefore, did not bind the will of either party beyond the currency of each *fasli* while the tenancy remained undetermined. The defendants say that their tenancy was not created by this *muchilika*, but that it existed before that as a right of permanent occupancy. The defendants' predecessors-in-title may have been in possession before 1830. But if they had a permanent right of occupancy, they would probably have taken care to have that right expressly recognised in the *muchilika* of 1830. At present the permanency of their title before 1830 has not been proved."

"In the *muchilika* executed in favour of Government by the plaintiff's predecessors on the 7th December 1857, he promised to respect the rights and privileges of the *purakudies* according to the customs of the respective villages, and of the country; and that, as long as they should pay the *cist* properly, he would not eject them. But he did not thereby admit that the *ryots* had any permanent right in the soil, or that the *swamibhogam* was to be the same for all ages. The passage in question amounts to little more than an engagement to respect the

(10) 6 M. H. C. R. 164.
(11) 11 M. 77; 4 Ind. Dec. (N. S.) 54.
(12) 5 M. 345 at p. 357; 2 Ind. Dec. (N. S.) 240.

rights of the *ryots* whatever those rights might be."

"In the result it appears to me that the defendants have not shown that they had any higher title than that of cultivating tenants from year to year." The whole of these remarks, it appears to me, apply to the present case also. The next case is that reported as *Chidambara Pillai* v. *Thiruvengadathiengar* (13), to which Mr. Justice Muthusami Aiyar, (who belonged to the Tanjore District) was a party. The plaintiffs there, were trustees of the Rajagopalaswami temple at Mannargudi in the Tanjore District. The defendants (tenants) paid the Government assessment tc Government and the *swamibogam* or *mirasbogam* to the temple trustees. On account of the *Mohini* allowance due by the temple, the revenue due on the village to the Government was shortly before suit assigned to the temple, and this temple, therefore, became (in a sense) also an *inamdar*. The tenants set up *kudikani* right, that is, permanent right of occupancy and relied upon a *pymash* account of 1839 and on the free alienations by the tenants of their holdings, the alienations having begun so long ago as in 1848. The learned Judges held that the entries in the *pymash* account are not conclusive, that the assertion in the sale-deeds of *kudikani* rights by the tenants cannot bind the temple, that the *karayeedu* system, (namely, periodic re-distribution of lands among the *ryots*) having been obtaining in the village cannot also give a permanent right of occupancy to the tenants in the village that the undertaking given by the trustees to the Collector not to eject the tenants so long as they regularly paid the rent without mentioning that the *ryots* have any *kudikani* rights, cannot help the tenants and that the trustees were entitled to eject the tenants. At page 10 it is said: "Seeing that the Officers of Government had managed the temple villages for many years prior to 1857, it is not improbable that the consideration shown by them to the *purakudies* as an incident of good management and the length of time for which the *purakudies* cultivated, inspired them with a belief that they were not liable to be ejected so long as they were punctual in the payment of rent. This may account for sales and mortgages by the appellants and their predecessors 'accompanied with an assertion of *kudikani* right' which may loosely be used to indicate a permanent tenure of some kind or other." "The non-specification of lands in the leases, the fact that each of the appellants cultivated separately and that there was an occasional re-distribution of lands held by the *Purakudies* are referable to the conventional mode of leasing to chief men among the *purakudies* leaving it to them to select others who are to cultivate with them and to distribute the portions to be cultivated by each as may be arranged between them." [In the Full Bench case in *Sivatha Muthu Asari* v. *Revd. J. N. H. Mesguita* (14), it was expressly decided that where "there is an instrument defining the terms of the tenancy and it shows that there is no permanent tenancy" created under it, the facts of alienation and subletting by the tenants and even the fact that the original letting was a building lease cannot confer a permanent right of occupancy.]

The fourth and the last case I shall refer to is the important Privy Council decision reported as *Mayandi Chettiyar* v. *Chokkalingam Pillay* (15), their Lordships reversing by their said decision the decision of this Court reported as *Chockalingam Pillai* v. *Mayandi Chettiar* (16). In that case also, the tenants began to hold under a *taram faisal muchilika* which was executed in December 1831 and completed in January 1832. They claimed permanent occupancy right on grounds very similar to those advanced in the present case. The executants called themselves *ulavadai mirasidars*. They relied also on long enjoyment with a uniform rate of rent. Their Lordships point out that the description as *ulavadai mirasidars* "does not occur in any document emanating from the Collector's office but only in documents put forward by the applicants themselves"

(13) 7 M. L. J. 1.

(14) 19 Ind. Cas. 824; 24 M. L. J. 642 at p. 651; (1913) M. W. N. 480; 13 M. L. T. 513.

(15) 27 M. 291 *et seq.*; 8 C. W. N. 545; 31 I. A. 83; 14 M. L. J. 200; 8 Sar. P. C. J. 587 (P.C.).

(16) 19 M. 485 *et seq.*; 6 M. L. J. 247; 6 Ind. Dec. (N. S.) 1043.

and their Lordships state: "In the case of *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (10), in which the circumstances were very similar to those of the present appeal, and there was a *muchilika* in similar terms, it was held that no permanent tenancy was created. 'The language of the agreement,' said Scotland, C. J., (page 168), 'had, I think, no greater effect than the ordinary form of *muchilika* given by a *ryot* in exchange for a *pattah*, except so far as it indicated the intention that its terms should apply to every successive *fasli* for which the holding might be continued by neither party exercising the right to terminate it at the end of a *fasli*' This decision was followed by the Madras High Court in the case of *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi* (11), in which the circumstances were almost identical; and their Lordships see no reason to differ from the conclusions at which those learned Judges arrived, upon a state of facts which cannot be distinguished in any material degree, from those in the present suit." Thus their Lordships of the Privy Council expressly approved of the decisions in *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (10) and *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi* (11), in which it was held that lessees under *taram faisal muchilikas* executed to the Collector of Tanjore in the thirties of the last century could not claim permanent occupancy rights by mere length of possession.

I agree with the lower Court for the reasons already stated that the 1st defendant who evidently belongs to the trading class had no *bona fide* belief that his vendors had a permanent occupancy right in their holdings. It has been held in *Rajah of Venkatagiri* v. *Mukku Narayya* (17), that section 51 of the Transfer of Property Act will not apply to the case of a tenant as it cannot be said that he is a person believing in good faith that he "is absolutely entitled" to the land. It, therefore, follows that even assuming that the 1st defendant *bona fide* believed that his vendor had occupancy rights he cannot claim compensation under section 51 of the Transfer of Property Act. In the result I would dismiss the appeals with the costs of the respondents (plaintiffs).

NAPIER, J.—I agree.

Appeals dismissed.

V.R.P.

(17) 7 Ind. Cas. 202; 37 M. 1; (1910) M. W. N. 369; 8 M. L. T. 258.

CALCUTTA HIGH COURT.

RULES *Nisi* NOS. 132 AND 143 OF 1917.

May 7, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Smither

Kumar NARESH NARAYAN ROY—PETITIONER

versus

THE MIDNAPORE ZEMINDARY CO., LTD—OPPOSITE PARTY.

Bengal Tenancy Act (*VIII B. C. of* 1885), *s.* 153 *A*—Ex parte *decree for rent—Application to set aside decree, maintainability of*

An application for setting aside an *ex parte* rent-decree is not entertainable unless it contains a statement of the injury sustained by the applicant by reason of the decree. [p. 801, col. 2.]

Annoda Prosonno Mukherjee v. *Nil Madhab Parui*, 11 Ind. Cas. 123; 15 C. L. J. 52, followed.

Rule against the order of the District Judge, Murshidabad, in Miscellaneous Appeals Nos. 46 and 47 of 1916.

FACTS material to the report will appear from the judgment of the lower Appellate Court and from the *bona fide* petition of the petitioners, which were as follows:—

"These two appeals arise out of two applications for setting aside two *ex-parte* decrees in rent suits. The learned Munsif rejected the applications on the ground that, as required under section 153A of the Bengal Tenancy Act, they did not contain a statement of the injury sustained by the applicant by reason of the decrees. In my opinion the view taken by the lower Court was perfectly correct. It is true that in a subsequent application filed by the applicant on the date of the final hearing it was stated that through some mistake it had not been mentioned in the original application that the appellant had sustained injury by reason of the *ex parte* decrees. But even in this subsequent application as pointed out by the lower Court, there is no statement of the injury, by which is meant a statement describing concisely the nature of the injury, in order to enable the Court to pass necessary

orders under clauses (*a*) and (*b*) of the section in question. It is obvious that unless some description of the injury be noted in such applications, the Court will not be in a position to pass necessary orders under the above clauses. The result is that I dismiss both these appeals with their respective costs. Pleader's fees being assessed at Rs. 4 in each appeal."

Against this decision the following application was made to the High Court for revision under section 115, Civil Procedure Code:—

To

The Hon'ble Sir Lancelot Sanderson, Kt., Chief Justice, and his companion Justices of the said Hon'ble Court.

The humble petition of the abovenamed petitioner

Most Respectfully Sheweth:—

1. That the opposite party named above instituted a rent suit against your petitioner in the Court of the 2nd Munsif of Jangipore, and by the suppression of the processes against your petitioner obtained an *ex parte* decree.

2. That on the 26th December 1915, your petitioner came to know of the said decree when the process in execution of the said decree was served upon his *Cutchery*.

3. That your petitioner filed an application on the 25th January 1916, in the Court of the said Munsif of Jangipore for setting aside the said *ex parte* decree.

4. That your petitioner averred in the said application that the plaintiffs would not get any decree against your petitioner if your petitioner had an opportunity of filing his defence on knowing the contents of the plaintiff opposite party's plaint.

5. That your petitioner further stated in the said application that even then at the time of filing the said application your petitioner had no knowledge of the contents of the plaint in the said suit.

6. That your petitioner further prayed that as he had no knowledge of the suit, he may be allowed to file his defence appropriate to the suit for there was no relationship of landlord and tenant between your petitioner and the said opposite party.

7. That the learned Munsif refused to take evidence in the matter and dismissed your petitioner's application for setting the said *ex parte* decree on the ground that the said application did not fulfil the requirements of section 153 A of the Bengal Tenancy Act.

8. That your petitioner appealed to the District Judge of Murshidabad against the said decision of the Munsif but the said appeal has also been dismissed on the 14th November 1916.

9. That your petitioner being aggrieved by the aforesaid orders begs to move your Lordships for setting aside the same on the following amongst other

GROUNDS.

1. For that the Court below failed to exercise the jurisdiction vested in it by law.

2. For that the application sufficiently fulfilled the requirements of section 153A of the Bengal Tenancy Act.

3. For that the Court below ought to have exercised its jurisdiction to prevent gross abuse of the process of the Court.

4. For that in any case the Court below ought to have entered into evidence so that your petitioner might have had an opportunity of showing that there was no relationship of landlord and tenant between your petitioner and the opposite party and that nothing would be due by your petitioner to the plaintiff on account of rent and that further that the plaintiff's rent suit was not maintainable.

Your petitioner, therefore, humbly prays that your Lordships may be pleased to call for the records of the case and to issue a Rule calling upon the opposite party to show cause why the orders of the District Judge of Murshidabad, dated the 14th November 1916, in Miscellaneous Appeal No. 46 of 1916, and of the Munsif of Second Court of Jangipore, dated the 29th of July 1916, should not be set aside or pass such other or further orders as to your Lordships may seem fit and proper.

And your petitioner as in duty bound shall ever pray.

Babu *Dwarkanath Chuckerbutty*, (with him Babu *Jatindra Nath Lahiri*), for the Petitioner.

Mr. *Sen Gupta*, Counsel, (with him Babu *Probodh Kumar Das*), for the Opposite Party.

JUDGMENT.—These Rules must be discharged. It is sufficient to say that we follow the decision of this Court in the case of *Annoda Prosonno Mukherjee* v. *Nil Madhab*

Parui (1). The Rules are discharged with costs one gold *mohur* in each case.

Rules discharged.

(1) 11 Ind. Cas. 123; 15 C. L. J. 52.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 453 OF 1915.

February 5, 1917.

Present:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Shah Din.

MUHAMMAD UMAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUNSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 18—Vesting of property in Receiver—Suit to establish right to property—Receiver, whether necessary party—Insolvency Court, permission of, necessity of.

A Receiver was appointed of an insolvent's estate and the Court holding that certain houses belonged to the insolvent, directed him to deliver possession thereof to the Receiver and ordered the latter to sell the estate The insolvent's sons put in an objection alleging that they had a two-thirds share in the houses, but their objection was disallowed. They then brought a suit to establish their right to their share in the houses:

Held (1) that even if the possession of the houses in dispute remained with the plaintiffs, the order of the Insolvency Court deciding that the houses belonged to the insolvent had the effect of vesting the houses, as part of the insolvent's estate, in the Receiver, and the latter was, therefore, a necessary party to the suit; [p. 803, col. 1.]

(2) that the Receiver could not be sued without the permission of the Court which had appointed him; [p. 803, col. 2.]

(3) that such permission was not a condition precedent to the institution of the suit, and the plaintiffs should be allowed a reasonable time to apply to the Insolvency Court for leave to proceed with the suit against the Receiver. [p. 804, col. 1.]

Case law discussed.

Second appeal from the decree of the District Judge, Ambala, dated the 5th December 1914.

Mr. *Zia-ud-Din*, for the Appellants.

Mr. *Sundar Das*, for the Respondents.

JUDGMENT.—The facts of the case are briefly these. On the 15th of July 1911, the District Judge of Ambala declared one Mangal Khan an insolvent under the Provincial Insolvency Act, III of 1907, and appointed a Receiver of the insolvent's estate. On the 9th May 1913, the District Judge passed an order directing the insolvent to deliver to the Receiver possession of his estate, including two houses Nos 577 and 578, and by the same order the Receiver was directed to sell the estate. On the 14th May 1913, the sons of Mangal Khan put in a petition of objections alleging that a two-thirds share in the two houses just mentioned belonged to them, and not to the insolvent, and prayed that the said share may be released. This petition was disallowed on the 23rd of January 1914, and on the 4th of February 1914, the present suit was brought by the sons of Mangal Khan for a declaration of proprietary rights of a two-thirds share in houses Nos. 577 and 578. In this suit the insolvent Mangal Khan and his creditors and the Receiver appointed by the District Judge were all impleaded as defendants.

On behalf of the Receiver it was pleaded that no suit could be brought by the plaintiffs against him without first obtaining the sanction of the District Judge, by whom he had been appointed Receiver of the insolvent's estate.

The Munsif, following *Dunne* v. *Kumar Chandra Kisore* (1) and *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (2), held that the plaintiffs' suit was not maintainable against the Receiver without the permission of the District Judge who had appointed him Receiver of the insolvent's estate, and that such permission was a condition precedent to the right of the plaintiffs to sue. Upon this ground the Munsif dismissed the suit. On the plaintiffs' appeal the learned District Judge agreed in the view taken by the Munsif and dismissed the appeal.

In second appeal it has been contended before us:

(1) that the Receiver was not a necessary party to the present suit;

(2) that if he was a necessary party, the suit was maintainable against him without the permission of the District Judge, who had appointed the Receiver, being first obtained; and

(3) that if the permission of the District Judge was necessary, the Munsif should have stayed proceedings and allowed the plaintiffs a reasonable time to apply to the

(1) 30 C. 593; 7 C. W. N. 390.
(2) 32 C. 270; 9 C. W. N. 247.

District Judge for the necessary permission to proceed against the Receiver.

The following authorities have been cited and discussed in the course of the argument:—*Annapurani Ammal* v. *Subramanian Chettiar* (3); *Kamatchi Ammal* v. *Sundaram Ayyar* (4); *Dunne* v. *Kumar Chandra Kisore* (1); *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (2); *Banku Behary Dey* v. *Harendra Nath Mukherjee* (5); *Maharaja of Burdwan* v. *Apurba Krishna Roy* (6); *Sarat Chandra* v. *Apurba Krishna Roy* (7); *Balthazar* v. *Burma Engineering and Trading Co.* (8); *Venkatasubbaramiah* v. *Nambura Ramiah Sethi* (9); and *Cochrane, Ex parte*; *Mead, In re* (10).

The contention advanced by the appellant's Pleader that the Receiver was not a necessary party to the present suit is, in our opinion, not well founded, and *Annapurani Ammal* v. *Subramanian Chettiar* (3) is distinguishable from the facts of this case. By virtue of the order of adjudication made by the District Judge on the 15th of July 1911, and by his order of the same date appointing a Receiver for the property of the insolvent, such property at once vested in the Receiver under section 18 of the Provincial Insolvency Act. Even, therefore, if possession of the two houses to which the present suit relates remained with the plaintiffs, the above mentioned orders of the District Judge, read with his order, dated the 28th of June 1912, by which he decided that the houses in question belonged to the insolvent, had the effect of vesting the houses, as part of the insolvent's estate, in the Receiver. Such being the case, the Receiver was a necessary party to the present suit. In *Annapurani Ammal* v. *Subramanian Chettiar* (3) the judgment-debtor was declared an insolvent and his estate was vested in the official assignee after the objection proceedings in respect of part of the judgment-debtor's property under attachment in execution of a decree had been instituted, and the High Court of Madras held that in such circumstances the official assignee was not a necessary party to a suit for a declaration brought under section 283 of the old Code of Civil Procedure by the unsuccessful party in the objection proceedings. In our opinion that decision does not apply to the present case.

On the question as to whether, in a case like the present, the Receiver can be sued without the permission of the Court that had appointed the Receiver being first obtained, the principle is now well established that such permission is necessary and for the purpose of applying this rule to a particular case it is immaterial whether the Receiver is appointed by the Court under the provisions of the Civil Procedure Code or under those of the Insolvency Act. In *Cochrane, Ex parte*; *Mead, In re* (10) it was held that where a Receiver of a bankrupt's property had been appointed by the Court of Bankruptcy, it was a contempt of Court for the holder of a valid bill of sale goods of the bankrupt to oust the Receiver from possession which he had taken of such goods. If a person other than a landlord distraining for a year's rent claimed a better title than the Receiver he was bound to apply to the Court of Bankruptcy for leave to enforce his rights. The principle laid down in this English case was followed in *Dunne* v. *Kumar Chandra Kisore* (1) where it was held that when a Receiver is appointed by the Court, his possession is possession of the Court and he cannot be interfered with except with the leave of the Court. The same principle underlies the decisions in *Miller* v. *Ram Ranjan Chakravarti* (11), *Kamatchi Ammal* v. *Sundaram Ayyar* (4), *Balthazar* v. *Burma Engineering and Trading Co.* (8) and *Venkatasubbaramiah* v. *Nambura Ramiah Sethi* (9). Following these authorities we hold that the present suit was not maintainable against the Receiver of the insolvent's estate except with the leave of the Insolvency Court that had appointed the Receiver.

The last question for decision is whether the Munsif was right in holding that since the present suit had been instituted without the previous permission of the

(3) 31 M. 347; 4 M. L. T. 197.
(4) 26 M. 492.
(5) 8 Ind. Cas. 1; 15 C. W. N. 54.
(6) 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 50.
(7) 11 Ind. Cas. 187; 15 C. W. N. 925; 14 C. L J. 55.
(8) 17 Ind. Cas. 916; 5 Bur. L. T. 163.
(9) 24 Ind. Cas. 622.
(10) (1875) 20 Eq. 282; 44 L. J. Bk. 87; 32 L. T. 508; 23 W. R. 726.

(11) 10 C. 1014; 5 Ind. Dec. (N. S.) 677.

Court appointing the Receiver the suit must be dismissed; in other words, that the permission of the Court for obtaining relief against the Receiver could not be obtained after the institution of the suit. On this point the decision of a single Judge of the Calcutta High Court in *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (2) supports the Munsif's view but this decision has since been dissented from in three Division Bench judgments of the same High Court reported as *Banku Behary Dey* v. *Harendra Nath Mukherjee* (5) *Maharaja of Burdwan* v. *Apurba Krishna Roy* (6) and *Sarat Chandra* v. *Apurba Krishna Roy* (7). We have no hesitation in holding that the three last mentioned decisions of the Calcutta High Court lay down a sound principle of procedure applicable to cases like the present; in other words, we are clearly of opinion that the leave of the Insolvency Court that had appointed the Receiver was not a condition precedent to the institution of the suit against him by the plaintiffs in the present case.

It now remains to consider whether, in the circumstances of this case, the Munsif should not have stayed proceedings and allowed the plaintiffs a reasonable time to apply for the necessary sanction to the Insolvency Court to proceed with the suit against the Receiver. A reference to the judgment of the Munsif shows that it was contended before him by the plaintiffs' Pleader that if the sanction of the Insolvency Court for obtaining redress against the Receiver was necessary, such sanction was not a condition precedent to the institution of the suit and that the suit could be proceeded with after obtaining such sanction. The Munsif followed the ruling in *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (2) on this point and dismissed the suit because the necessary sanction had not been obtained before the suit was brought by the plaintiffs against the Receiver. Inasmuch as the rule laid down in the case just cited is erroneous, as held in the subsequent decisions of the Calcutta High Court above referred to, we hold that the plaintiffs should have been allowed a reasonable time to apply to the Insolvency Court for leave to proceed with the suit against the Receiver.

We accordingly accept this appeal and setting aside the decree of the District Judge we remand the suit for a fresh decision with reference to the foregoing remarks. In the circumstances of the case we direct that the costs incurred in this litigation should abide the result.

Appeal accepted.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 16 OF 1916.

June 7, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

BAGHA MOWAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM LAKHAN MISSER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (d)—Landlord and tenant—Evidence—Compromise, petition of, varying rent payable, whether admissible in evidence without registration—Record of Rights, entry in, mode of proving.

In a suit for the recovery of arrears of rent, a petition of compromise between the parties which was filed in a previous suit for rent was put in evidence for proving the amount of rent payable:

Held, that the petition of compromise not having been registered was not admissible in evidence. [p. 806, col. 1.]

Lalit Mohan Ghose v. *Gopali Chauk Coal Co. Ld.*, 12 Ind. Cas. 723; 39 C. 284; 14 C. L. J. 411; 16 C. W. N. 55; *Biraj Mohini Dassee* v. *Kedar Nath Karmokar*, 35 C. 1019; 8 C. L. J. 90; 12 C. W. N. 854, relied upon.

A document which embodies a contract for variation of the rent payable in respect of a lease is in essence a lease and is compulsorily registrable. If it is not registered in accordance with law, it is not only, not admissible in evidence, it does not even constitute a valid and operating contract between the parties. [p. 806, col. 1.]

A party against whom an entry in the Record of Rights has been put in evidence, is not limited to a particular mode of proof, for the purpose of establishing its incorrectness, but he can prove *aliundi* that the entry is in fact incorrect, *e. g.*, as having been based upon materials, not admissible in evidence. [p. 806, col. 1.]

Appeal against the following judgment of Mr. Justice Roe, dated the 16th December 1915, in Appeal from Appellate Decree No. 3429 of 1912.

ROE, J.—This appeal is directed against a decision of the Subordinate Judge of Shahabad modifying a decision of the Munsif of Arrah. The plaintiff as landlord brought this suit for rent for certain *bhaoli* lands

and *nagdi* lands against the defendants. The defendants pleaded that they had no *bhaoli* lands, that the *nagdi* rents sued for was not the real rent and that they had paid Rs. 172 to the landlord. Upon the claim to rent for *bhaoli* lands, the learned Subordinate Judge agreed with the Munsif in holding that the plaintiff's case had been proved and as regards the payment of Rs. 172 both Courts have held that it was proved. Upon the question of facts there is no further contest. The only point at issue before this Court is whether the *nagdi* rent claimed by the plaintiff was in fact sufficiently proved. The learned Munsif made a decree at the rate claimed by the plaintiff. The learned Subordinate Judge in modification of his decision has given a decree at the rates admitted by the defendants. The rent claimed by the plaintiff was that recorded on the finally published Record of Rights. On a consideration of the issues of laws and fact involved in this case, the learned Subordinate Judge writes: "some reliance has been placed in this case on behalf of the plaintiff on the survey *khatyan* (Exhibit 7) but the document (Exhibit B) shows that this entry in the *khatyan* is based not on the plaintiff's papers but on a *solehnamah* above referred to. The *khatyan*, therefore, cannot help the plaintiff. I hold that the *solehnamah* is inadmissible as it has not been registered. The *jama* stated by the defendants may not be correct but in this case the plaintiff can get a decree only at the rate admitted by them, there being no other proof of the rental." The circumstances in which this *solehnamah* was held by the Subordinate Judge to be inadmissible are that it was a document settling the rental of 35 *bighas* of land at an annual rent of Rs. 139-2 0 and that it was filed in a suit in which the only issue was what was the rent due upon 17 *bighas* of land. Cognizance of this agreement was not taken by the Court which tried the suit, the only decree in the suit being that the suit for rent was dismissed. The agreement was not registered. I agree with the learned Sub-Judge that the *solehnamah* was not in fact admissible in evidence. But the Record of Rights must be presumed to be correct until it is proved by evidence to be incorrect. The learned Subordinate Judge has not found that it has been proved to be incorrect. He has found only that it was prepared on the basis of a finding dependent upon inadmissible evidence. The evidence of the method by which the Settlement Officer arrived at this conclusion is not the evidence contemplated in section 103 (*b*) of the Bengal Tenancy Act. The evidence contemplated in that section is evidence amounting to proof of the incorrectness of the record itself. The learned Subordinate Judge has specifically stated that the *jama* stated by the defendants may not be correct; there was in fact no direct evidence that the Record of Rights was incorrect. The suit should have been decreed on the basis of the entries contained in that record.

The appeal is, therefore, allowed, the decree of the Subordinate Judge is set aside and that of the Court of first instance restored. The costs of this appeal and of the lower Appellate Court will be paid by the respondents.

Dr. *Dwarka Nath Mitter* (with him Babu *Nabin Chandra Pal*), for the Appellants.

Babu *Probodh Kumar Das* for Babu *N. C. Bordaloi*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Roe in a suit for recovery of arrears of rent. One of the questions in controversy between the parties related to the amount of rent payable in cash. The Court of first instance decreed the claim in full. The Subordinate Judge on appeal modified that decree and allowed the plaintiff a decree at the rate admitted by the defendants. Before the Subordinate Judge, as before the Trial Court, reliance was placed upon a petition of compromise filed in a previous suit for arrears of rent. This document embodied an agreement to pay Rs. 139-2 0, as rent for an area of 35 *bighas*. A question was thereupon raised, whether the document was admissible in evidence. The Trial Court came to the conclusion that it was admissible in evidence. The Subordinate Judge took the contrary view. There can be no doubt that the opinion of the Subordinate Judge is supported by the decision of a Full Bench in *Lalit Mohan Ghose* v. *Gopali Chauk Coal Company, Limited* (1) and

(1) 12 Ind. Cas. 723; 39 C. 284; 14 C. L. J. 411; 16 C. W. N. 55.

the earlier decision of this Court in *Biraj Mohini Dassee* v. *Kedar Nath Karmokar* (2). These cases show that a document which embodies a contract for variation of the rent payable in respect of a lease is in essence a lease and is compulsorily registrable. If it is not registered in accordance with law, it is not only, not admissible in evidence, it does not even constitute a valid and operative contract between the parties. The Subordinate Judge accordingly left the petition of compromise out of consideration and modified the decree of the Court of first instance. On appeal to this Court, Mr. Justice Roe has held that the plaintiff is entitled to succeed on the strength of an entry in the Record of Rights. This entry, it may be conceded, is, under sub-section 3 of section 103B of the Bengal Tenancy Act, evidence of the matter referred to therein and must be presumed to be correct until disproved by evidence to be incorrect. The Subordinate Judge held that the entry had been proved by evidence to be incorrect, when it was shown that the entry was based solely on the petition of compromise which, as we have already explained, did not constitute in law, a valid and operative contract between the parties, in modification of the pre-existing agreement between them. Mr. Justice Roe has held that the entry cannot be rebutted in this manner, but that other evidence must be adduced to prove that the entry is incorrect. In our opinion sub-section (3) of section 103B need not be interpreted in the manner suggested, in fact if it is, as it has actually been, established that the only evidence wherein the entry was made by the Settlement Officer does not support his conclusion, that is the strongest possible proof that the entry is incorrect. The party is not limited to a particular mode of proof; he can prove, *aliundi*, that the entry is in fact incorrect but there is no reason why he should not achieve the same result by proof that the material whereon the Settlement Officer based his decision does not in law justify his conclusion as to the relative rights and obligations of the parties. We are of opinion that the view taken by the Subordinate Judge is correct and that his decree should not have been modified.

(2) 35 C. 1010; 8 C. L. J. 90; 12 C. W. N. 854.

The result is that this appeal is allowed, the decree made by Mr. Justice Roe set aside and that of the Subordinate Judge restored with costs of two hearings in this Court.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1434 OF 1916.

April 27, 1917.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

DUNIA LAL CHOUDHURY AND OTHERS—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

Musammat NOWRATAN KOER—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 65, 68—Mortgage, usufructuary—Dispossession of mortgagee—Right to sue for mortgage money.

Where the dispossession of a usufructuary mortgagee is due to his own fault he has no remedy under section 68 of the Transfer of Property Act. [p. 807, col. 2.]

A usufructuary mortgagee who fails to take a defence to a suit by a subsequent mortgagee which would preserve the security is not entitled under section 68 of the Transfer of Property Act to sue for the mortgage money. [p. 807, col. 1.]

Appeal from a decision of the District Judge, Darbhanga, dated the 6th September 1916, setting aside a decision of the Munsif, Darbhanga, dated the 31st May 1916.

Mr. *Murari Prasad*, for the Appellants.

Mr. *Lakshmi Kumar Jha*, for the Respondent.

JUDGMENT.—The facts set forth in the plaint are that the plaintiff by a usufructuary mortgage, dated the 26th of *Kartik* 1294, held 10 *bighas* of *khudkasht* land and remained in possession thereof until dispossessed by Indu Narain Jha in execution of a decree obtained upon a mortgage-bond dated the 30th October 1889, which is subsequent to 26th of *Kartik* 1294. It is admitted that the plaintiff was made a party to the suit brought by Indu. It appears from the judgment in that suit that he failed to put forward any mortgage anterior to the mortgage of Indu Narain. That he was dispossessed by Indu Narain has been found as a fact by the lower Appellate Court and in consequence of that dispossession the lower Appellate Court has given a decree for

Rs. 500 principal and Rs. 360 interest from the date of dispossession.

There were four defendants in the case. Defendants Nos. 3 and 4 have acquiesced in the decree against them which is according to an entry made in the finally published Record of Rights equal to a half share in the mortgage. Defendants Nos. 1 and 2 appeal.

Two grounds have been taken in appeal. *Firstly*, that limitation would run only from the date of the mortgage itself. And *secondly*, that no suit would lie in the circumstances of the case.

Section 68 of the Transfer of Property Act sets out the grounds upon which a usufructuary mortgagee may institute a suit for the mortgage money. The last clause of that section runs: "Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed,.....the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage money." And section 65, clause (*b*), runs: "The mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend the mortgagor's title thereto".

The question of law involved in this case is whether the usufructuary mortgagee having failed to take a defence to a suit by a subsequent mortgagee which would presumably have preserved the security, he is entitled under section 68 to sue for the mortgage money. We are of opinion that this question must be answered in the negative. It was open to the plaintiff either to contest the right of Indu Narain to enter into possession of the property upon the basis of his purchase in execution or as a party to the suit to apply under section 57 of the Act for the deposit of a sum sufficient to cover his encumbrance. He took neither of these actions; why he did not do so, is not explained. He allowed himself to be turned out when he by taking reasonable care in the suit against him, might have avoided that misfortune. Clearly his dispossession was in a large measure due to his own default. Where dispossession of a mortgagee is due to the fault of the mortgagee the mortgagee has no remedy under section 68. We, therefore, allow this appeal in respect of the interest of defendants Nos. 1 and 2 and set aside the decree so far as it affects their interests. Bearing in mind the facts of the case and that the defendants Nos. 3 and 4 have acquiesced in the decree throughout we direct that each party bear its own costs throughout the litigation.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 842 OF 1915.

February 6, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

SATHULA VENKANNA—DEFENDANT No. 1—APPELLANT

versus

NAMUDURI VENKATAKRISHNAYYA AND ANOTHER – DEFENDANT No. 2 AND PLAINTIFFS —RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 113 – *"Certain date", meaning of—Suit for specific performance of contract to transfer decree on payment of decretal amount—Limitation, commencement of—Construction of Act*—Certum est quod certum reddi potest, *applicability of.*

In cases where a right to enforce specific performance vests in a third party to whom the ascertainment of the date on which performance becomes due need not necessarily be known, the doctrine *certum est quod certum reddi potest* has no application. [p. 809, col. 2.]

The Limitation Act operates as a bar to legally enforceable claims and it should, therefore, be construed as much as possible in favour of the person whose right is sought to be barred. [p. 809, col 1]

A agreed with *B* to transfer to *C* a certain decree in *A*'s favour, on condition that *B* paid to *A* the amount due under the decree within six months. *B* paid the sum three days after the lapse of six months. In a suit by *C* against *A* to enforce specific performance of the contract to transfer the decree instituted beyond three years from the date fixed for payment of the amount by *C* but within three years from the date when performance was refused:

Held, that the case fell within the second clause of Article 113 of Schedule I of the Limitation Act and having been brought within three years from the date of refusal of specific performance, it was not barred by time. [p. 809, col. 2.]

Second appeal against the decree of the Subordinate Judge, Cocanada, in Appeal Suit No. 82 of 1914, preferred against that of the District Munsif, Cocanada, in Original Suit No. 714 of 1912.

SATHULA VENKANNA v. NAMUDURI VENKATAKRISHNAYYA.

Mr. *G. Venkataramiah* for Mr. *V. Ramesam*, (Government Pleader) for the Appellant.

Mr. *M. Patanjali Sastri* for Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit instituted by the plaintiff to compel the 1st defendant to execute a duly registered transfer in respect of a decree in a suit, Original Suit No. 364 of 1904. The 1st defendant was the holder of this decree and he had by an agreement, Exhibit F, made with one Jayanti Venkayya, (the second defendant) agreed that on Jayanti Venkayya paying to him the amount of that decree he would transfer the decree to the plaintiff. The particular clauses of that agreement which are important are to the following effect: (1) the amount was to be paid within six months; (2) the transfer in favour of the present plaintiff was to be made as soon as the amount in respect of the *razinamah* was paid. It is to enforce this latter clause that the suit is brought. No point has been taken that it was not open to the plaintiff, not a party to the contract, to bring a suit for specific performance; so we must deal with it as if that right did vest in him. The lower Appellate Court has held that the suit is primarily barred under Article 113 of the Limitation Act, but that the circumstances under which the 1st defendant received the money from the 2nd defendant constituted him a trustee for the plaintiff within the meaning of section 10 of the Limitation Act, and it, therefore, held that the suit was not barred. Before us this contention was not relied on by the respondent and we think rightly, for it would be quite impossible to bring this case within the language of that section. But it has been urged by the respondent that the contract does not contain the date fixed for the performance and that the second clause "when the plaintiff has notice that performance is refused" is the starting point for limitation and that, therefore, the suit is not barred. For the appellant it is contended that the date is fixed for the performance and the suit is out of time. Admittedly of course no specific date was fixed; and the question that remains is whether it is possible in these circumstances to apply the doctrine *certum est quod certum reddi potest*, so as to bring the case within the Article. A very careful argument has been addressed to us by both sides. We have been strongly pressed with the decisions of the Privy Council in *Juggomohun Ghose* v. *Manickchund* (1) and of the Court of Queen's Bench in *Merchant Shipping Co.* v. *Armitage* (2) and *London Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (3). These decisions turned on the construction of the Interest Act which is as follows, "that upon all debts or sums certain payable at a certain time the jury on the trial of any issue may allow interest" There is no doubt that the Privy Council in dealing with this clause has given a very restricted meaning to it, and their Lordships gave their reasons for so deciding at great length. They point out that the sum may never be due and that even if due it is uncertain in amount at the time of the contract and it necessarily follows of course that the amount which will be payable for interest will be equally uncertain. They also point out that this provision is an alteration of the Common Law and is in its nature penal and for these reasons, they construed the Act strictly.

The case of *Merchant Shipping Co.* v. *Armitage* (2) was argued before the Exchequer Chamber and the decision that there was no principal sum payable at a time certain on which interest could run was given by the Court after the decision on the main question in respect of which the case is really reported. No reasons are given by the learned Judges for that decision. It appears that about the same time the opposite view was taken by the Court of Queen's Bench in a case reported as *Duncombe* v. *Brighton Club and Norfolk Hotel Co.* (4). Their Lordships did not consider the policy of the Act but confined themselves to applying the doctrine of *certum est* in its entirety. They quote and follow the language of Lord Kenyon in an old case which language is reproduced as being a correct exposition of the doctrine in Broom's Legal Maxims, *vide* page 479. That language certainly is in

(1) 7 M. I. A. 263; 4 W. R. (P. C.) 8 19 E. R. 308; 1 Suth. P. C. J. 357; 1 Sar P C. J. 631.

(2) (1874) 9 Q. B. 99; 43 L. J. Q. B. 24; 29 L. T. 809.

(3) (1893) A. C. 429. 63 L. J. Ch. 93; 1 R. 275; 69 L. T. 637; 58 J. P. 36

(4) (1875) 10 Q. B. 371; 44 L. J. Q. B. 216, 32 L. T. 863; 23 W. R. 795.

the widest terms, for it applies the maxim whether the time can be ascertained by any process of computation at the time the contract is made or whether it cannot. I will quote a few words: "That certainty need not be ascertained at the time; for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. As, if a lease be granted for 21 years, after three lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty and *id certum est quod certum reddi potest*." We have, therefore, a clear conflict on the language of the Interest Act.

Now we have not to decide this question on the construction of that Act, and we must bear in mind the essential difference between the Interest Act and the Limitation Act. As pointed out in the Privy Council case, the Interest Act is penal and imposes a higher liability than was known to common law. It should, therefore, be construed strictly. On the other hand, the Limitation Act is one which operates as a bar to a claim which is legally enforceable, and it should, therefore, be construed as much as possible in favour of the person whose right is sought to be barred. There are indications that the Courts of this country have been inclined to give a liberal application to the language in Article 113. The case in *Muhi ud din Ahmad Khan* v. *Majlis Rai* (5) is one case. The decision of Mr. Justice Boddam in *Pindiprolu Sooraparaju* v. *Pindiprolu Veerabhadrudu* (6) is another. We do not think it necessary, however, to express a final opinion on this point because in this case there is an element which seems to us to render the doctrine inapplicable. It may be that it is right to apply the doctrine fully between the actual parties to the contract who would get the benefit and be subject to the liabilities under the contract and to whom, therefore, the payment of the money would be on a certain date, some time or other to their knowledge. But in cases where a person is entitled to bring a suit on the contract who may not and need not, and very likely may not be aware of the date becoming fixed, we cannot think that the doctrine will apply. Taking this case for instance the second defendant was bound to pay the amount within six months to the 1st defendant, and on the date of that payment the 1st defendant was bound to transfer the property to the plaintiff. He might have paid it within two days; and the plaintiff need not have known anything about it. He might have paid it, as in fact he did, three days after the due date and the plaintiff might not have known anything about it. He might not have paid it till years after the due date and the 1st defendant might have accepted payment and the plaintiff might not have known anything about it. It seems to us, therefore, that in cases where a right to enforce specific performance vests in a third party to whom the ascertainment of the date need not necessarily be known, the doctrine *certum est quod certum reddi potest* can have no application. We, therefore, on this narrow ground alone, hold that the suit is not barred by reason of the first part of Article 113 and that as he is within time under the second part of the Article, the claim is not barred. It is admitted that there is no defence on the merits. The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

V.R.P.

(5) 6 A. 231; A. W. N. (1884) 42; 3 Ind. Dec. (N. S.) 837.

(6) 30 M. 486; 17 M. L. J. 505; 2 M. L. T. 443.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 484 OF 1916.

February 5, 1917.

Present:—Sir Donald Johnstone KT., Chief Judge, and Mr Justice Shah Din.

KUNDAN LAL—DEFENDANT—APPELLANT

versus

SHADI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 18—Suit to establish right to property—Property sold by Receiver—Receiver, whether necessary party Court, permission of.

In a suit to establish title to property which has already been sold by the Receiver, it is not necessary to join the latter as a party defendant, and the mere fact that his name is on the record as a defendant is not sufficient to defeat the plaintiff's claim on the ground that the permission of the Insolvency Court has not been obtained for the prosecution of the claim.

DEBENDRA NATH DE *v.* TULSIMONI DASI

Second appeal from the decree of the Divisional Judge, Ambala, dated the 2nd February 1914.

Bakhshi *Tek Chand*, for the Appellant.

Lala *Dharam Das Suri*, for the Respondents.

JUDGMENT.—The facts of this case are stated in the judgment of the Munsif and it is unnecessary to repeat them here. The Munsif was of opinion that the Receiver of the insolvent's estate who had been appointed by the District Judge when the order of adjudication was made was a necessary party in this litigation; and that since he could not be impleaded as a defendant without the previous permission of the Insolvency Court, which had not been obtained by the plaintiffs, the suit must be dismissed as being not maintainable. The suit was dismissed accordingly. On appeal the learned Divisional Judge held that the suit was not bad because sanction for the institution of the suit had not been given by the Insolvency Court; and he accordingly reversed the decision of the Munsif on the preliminary point and remanded the suit for a fresh decision under Order XLI, rule 23, Civil Procedure Code.

The sole question before us in this appeal is whether or not the Receiver was a necessary party to the suit; for if he was a necessary party, the suit could not, as we have held to-day in our judgment in *Muhammad Umar* v. *Munshi Ram* (1), be proceeded with, so far as the Receiver is concerned, without the leave of the Insolvency Court that had appointed him.

After hearing arguments and referring to the record, we are of opinion that the Receiver was not a necessary party to this litigation. The record shows that before the plaintiffs brought their suit the Receiver had sold the land in dispute to Kundan and Relu, defendants Nos. 1 and 2, and, therefore, whatever legal interest the Receiver had in the land as such Receiver under the Provincial Insolvency Act had ceased to exist. As he had no subsisting interest in the subject-matter of the suit at the time when the present claim was made, it was perfectly unnecessary for the plaintiffs to make him a party defendant, and the mere fact that his name is on the record is insufficient to defeat the plaintiff's claim on the ground that the permission of the Insolvency Court for the prosecution of the claim had not been obtained. On this ground we maintain the Divisional Judge's order of remand and dismiss this appeal with costs.

Appeal dismissed.

(1) 41 Ind. Cas. 802; 54 P. R. 1917.

CALCUTTA HIGH COURT.

CIVIL RULE No. 510 OF 1916.

August 11, 1916.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

DEBENDRA NATH DE AND OTHERS—PETITIONERS

versus

TULSIMONI DASI—OPPOSITE PARTY.

Land Acquisition Act (I of 1894), s. 32—Compensation money invested under provisions of section—Special Judge, power of, to deal with questions of application of money—Hindu widow, right of, to get fund invested - Burden of proof.

The sum awarded as compensation for land acquired under the Land Acquisition Act, which is invested in Government securities under the provisions of section 32 of the Act, remains in the custody of the Special Judge, so that he is competent to deal with the question of its application. [p. 811, col 1.]

Consequently, he is the proper officer to determine whether any portion of the fund so invested should be made over to the widow of the person to whose estate the land acquired belonged and for this purpose to investigate whether contingencies have happened which entitle the widow to make an absolute alienation of the fund. [p. 811, col. 2]

Where the widow applies to the Special Judge for portions of the fund so invested it is incumbent upon her in the first instance to establish that events have happened which entitle her to spend either in whole or in part the fund in the custody of the Court. When she has satisfied the Court that such events have happened the burden of proof shifts to the reversioners to meet her allegations. [p 811, col. 2]

Section 32 of the Land Acquisition Act contemplates the application of the compensation money in the purchase of other lands, which when acquired must become additions to the estate of the full owner from whom the widow derives title. But an application of the money to save a land comprised in the estate inherited by the widow from her husband, from an impending sale, is not an investment "in the purchase of other lands" within the meaning of that section. [p. 812, col. 1.]

DEBENDRA NATH DE *v.* TULSIMONI DASI.

Rule against an order of the Land Acquisition Judge, 24-Pergannahs, dated the 17th June, 1916.

Babus *Sib Chunder Palit* and *Hit Lal Guha*, for the Petitioners.

Dr. *Dwarka Nath Mitter*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order, made by a Special Judge under the Land Acquisition Act, for the disposal of a portion of a fund in his custody which had been invested in Government securities under section 32. It appears that land which formed at one time part of the estate of one Khagendra Nath Dey and had, after his death, vested in his childless widow Tulsimoni Dasi was acquired under the Land Acquisition Act. The sum awarded as compensation was accordingly invested in Government securities under the provisions of section 32. The widow has now applied to the Land Acquisition Judge to take steps to sell a portion of the Government securities in order to enable her to satisfy a charge created by a Receiver on land comprised in the estate inherited by her from her husband. Notice of this application was served upon the reversioners who entered appearance and objected. The Land Acquisition Judge thereupon heard the objections and overruled them. We are now invited to set aside this order on two grounds: *first*, that the Land Acquisition Judge had no jurisdiction to entertain the application of the widow; and *secondly*, that, if he had jurisdiction, he should not have made the order without enquiry into the truth of the allegations made by her. In our opinion, the first contention is not well founded but the second must prevail.

As regards the first objection, we observe that the principle applicable to cases of this character was explained by this Court in *Mrinalini Dasi* v. *Abinash Chunder Dutt* (1) and *Kamini Debi* v. *Promotho Nath Mookerjee* (2). These cases show that as the fund is in the custody of the Special Judge, he is competent to deal with the question of its application. There is no controversy that the Special Judge is competent to apply the fund in the purchase of other lands or in payment to a person who has become absolutely entitled thereto. Such authority, however, implies a power to make an enquiry. There is no foundation for the contention that the application should have been made to the District Judge. If the land had not been acquired for public purposes, it would have been open to the widow to alienate the same on the allegation of legal necessity without the permission of the District Judge. No doubt in such an event the purchaser would have taken the property subject to the inevitable risk of a challenge from the reversioners when the succession should open out. The land, however, has been converted into money and is in the custody of the Special Judge; he is consequently the proper officer to determine whether any portion of the fund should be made over to the widow and for this purpose to investigate whether contingencies have happened which entitle the widow to make an absolute alienation of the fund. The first objection consequently fails.

As regards the second objection, it is plain that the Special Judge should have taken evidence to determine judicially whether the allegations of the widow are or are not well founded on fact. The orders recorded in the order sheet seem to indicate that the view which found favour with the Special Judge was that the burden lay upon the reversioners to substantiate their objections. The true position, however, as explained in the case of *Kamini Debi* v. *Promotho Nath Mookerjee* (2) is that it is incumbent upon the widow in the first instance to establish that events have happened which entitle her to spend either in whole or in part the fund in the custody of the Court. When she has satisfied the Court that such events have happened, the burden, no doubt, shifts upon the reversioners to meet her allegations. Reliance, however, was placed on behalf of the widow upon the decision in *In re Pfleger* (3) to show that it was competent to the Special Judge to apply the funds in the purchase of other lands and that in the case before us, the application in substance invited

(1) 6 Ind. Cas. 508; 11 C. L. J. 533; 14 C. W. N. 1024.

(2) 10 Ind. Cas. 491; 13 C. L. J. 597; 39 C. 33.

(3) (1868) 6 Eq. 426.

the Special Judge to take action in this direction. In our opinion, this contention is ingenious but unsound. What section 32 contemplates is the application of the compensation money in the purchase of other lands. But these lands when acquired must become additions to the estate of the full owner from whom the widow derives title. The substance of the transaction proposed here, on the other hand, is that a portion of the fund should be applied to discharge a burden which has been imposed upon another portion of the estate of the husband of the lady. The contention put forward is that if the charge is not so satisfied, the property encumbered would be sold and would pass out of the hands of the widow. But if the funds in the custody of the Special Judge are applied to save the property from impending sale, the result clearly is, not "the investment of money in the purchase of other lands," but the satisfaction of a charge imposed upon another portion of the estate. This, in our opinion, could never have been intended by the framers of section 32 as an 'investment.'

The result is that this Rule is made absolute and the order of the Special Judge discharged. The record will be returned to him in order that he may hold an enquiry into the truth of the allegations made by the widow and to determine whether circumstances have arisen which justify an alienation by the widow for legal necessity. If a case of legal necessity is made out the Special Judge will make an order for the proposed application of the fund in his custody; otherwise, the application must be dismissed. There will be no order for the costs of this Rule

Rule made absolute; Case remanded.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 515 OF 1916.

June 21, 1917.

Present:—Mr. Justice Chapman and Mr. Justice Jwala Prasad.

SUKHDEO DASS AND OTHERS - APPELLANTS

versus

MANGAL CHAND AND ANOTHER RESPONDENTS.

Contract Act (IX of 1872), s. 23—Consideration, illegal Agreement not to prosecute for non-compoundable offence—Prosecution, threat of, effect of.

Where the consideration for an agreement is a promise not to prosecute for an offence which is not compoundable, the agreement is not enforceable by law; but this limitation of freedom of contract should only be enforced where it is quite clear that the consideration for the agreement was such an illegal promise Where on a mere threat to prosecute or an apprehension that prosecution would take place an agreement has been come to, this threat or apprehension is not sufficient to vitiate the agreement. The distinction in such cases between the motive for coming to an agreement and the actual consideration for the agreement itself must be kept carefully in view and this care must particularly be exercised in a case where there is a civil liability already existing and which is discharged or remitted by the agreement. [p. 813, col. 2]

Appeal against a decision of the District Judge, Muzaffarpur, dated the 7th February 1916, reversing that of the Munsif, Muzaffarpur, dated the 11th September 1915

Messrs *Purnendu Narayan Sinha* and *Naresh Chandra Sinha*, for the Appellants.

Mr. *Baikuntha Nath Mitter*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This appeal arises out of a suit upon a hand note, the sum claimed being Rs. 575-14 9 with interest amounting to Rs. 1 6-13-6. The defence was a defence of accord and satisfaction. The defendant's case was that a sum of Rs. 933 10-0 was due to them from one Muni Lal, a relation of the plaintiffs, who had been the defendant's *gomashta*, that they remitted Rs. 333 10 0 from this sum due from Muni Lal and agreed with the plaintiffs that the balance of Rs. 600 due to them from Muni Lal should be set off against what was due by the defendants to the plaintiffs under the hand-note, that at the time of this agreement Rs. 83-12-3 was paid by the defendants to the plaintiffs as the balance due from them, and that upon the receipt of this sum the

plaintiffs agreed that what was due under the hand note should be treated as discharged.

The Munsif did not believe this story of accord and satisfaction and decreed the suit. In appeal the learned District Judge differed from the finding of the Munsif and has held that the allegation of accord and satisfaction has been proved.

The first contention before us is that the consideration which was accepted towards satisfaction of the debt due upon the hand note was not a legal consideration inasmuch as it amounted to a promise not to prosecute Muni Lall criminally and, therefore, the learned District Judge has erred in giving effect to this accord and satisfaction.

For the purpose of disposing of this point, we gave the appellants opportunity to lay before us the evidence in regard to it, there being no reference to it in the judgment of the learned District Judge. The evidence which has been placed before us on this point consists first of a recital in the document which purported to be the record of the agreement of accord and satisfaction. This recital is to this effect: —

"Muni Lall Marwari, who is my near relation, *i. e.*, my own *sarhu*, was *gomashta* of Mangal Chand Jagar Nath Prasad from a long time; he has dishonestly appropriated under *bahi khata* the sum of Rs. 933 10-0 belonging to Mangal Chand Jagar Nath Prasad aforesaid. When on seeing *bahi khata* and on testing the same this was evidenced, Mangal Chand Jagar Nath Prasad became ready to institute *nalis* in Court against Muni Lall aforesaid. If *nalis* be made Muni Lall aforesaid will become very much harassed and disgraced. For this reason and inasmuch as he is my near relation I have compromised."

We have been asked to read with this recital the evidence of the defendant Jagar Nath Prasad to this effect:

"Muni Lal was my *gomashta*. He misappropriated Rs. 933-10 0 from my shop. When I intended to bring a criminal case against Muni Lal for misappropriation, he brought Ram Sarup Ram, one of the plaintiffs, who is his *sarhu*, to settle the matter." The matter was referred to and was in fact subsequently settled by a *panchayet* and so far as the evidence is concerned there is no evidence that anything was said at that *panchayet* about the intention to criminally prosecute Muni Lal. Where the consideration for an agreement is a promise not to prosecute for an offence, which is not compoundable, the agreement is not enforceable by law, but this limitation of freedom of contract should only be enforced where it is quite clear that the consideration for the agreement was such an illegal promise. When on a mere threat to prosecute or on an apprehension that prosecution would take place an agreement has been come to, this threat or apprehension is not sufficient to vitiate the agreement. The distinction in such cases between the motive for coming to an agreement and the actual consideration for the agreement itself must be kept carefully in view and this care must be particularly exercised in a case where there is a civil liability already existing and which is discharged or remitted by the agreement. Applying these considerations to the present case, I am not satisfied that the consideration, using the term in its strict sense, for this agreement was a promise not to prosecute Muni Lal for embezzlement. It may be that Muni Lal's relations, the plaintiffs, were led to enter into this agreement by a fear that their relation would be criminally prosecuted, but that does not mean that the consideration for the agreement into which they entered was a promise not to prosecute Muni Lal. In fact there is no evidence that any such promise was made. The agreement is susceptible of the explanation that Muni Lal was released from civil liability by this discharge.

The judgment of the learned District Judge has been assailed upon another ground, that is, that he has not properly dealt with the evidence. The judgment certainly is too short for a good judgment upon the evidence in this case and it is not without difficulty that we have been able to justify some of the statements made in the judgment. The statement that "the fact of embezzlement by the *gomashta* is clearly proved" has some basis on the evidence of Muni Lal where he says that he left the shop of the defendant with some of

AHMAD v. SAMAND.

his accounts incomplete. The statement that the fact of embezzlement was found to be proved by the learned Munsif—almost amounts to a mis-statement. What the learned Munsif found was that the amount claimed and alleged to be due from Muni Lal was not due from him, though the Munsif says that something was due from Muni Lal. The learned District Judge says that the witnesses are men of good standing and entirely unconnected with either party. The Munsif, by reference apparently to the *bahi khata*, notices that two of the witnesses were debtors of the defendants, but the learned Judge's remark upon the point is susceptible of justification from the fact that out of these witnesses two were cross-examined on this point, otherwise than by a suggestion that they were defendant's customers.

The learned District Judge's judgment is somewhat near the line at which we interfere with judgments which are based upon misconception or mis-statement of the evidence, but in the present case, I am not prepared to say that mis-statements, such as there are in the judgment, have overstepped the line, and I am not prepared to set aside the judgment on this ground. The result is that the appeal is dismissed with costs.

JWALA PRASAD, J.—I entirely agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 884 OF 1915.

February 7, 1917.

Present:—Sir Donald Johnstone, KT., Chief Judge.

AHMAD—PLAINTIFF—APPELLANT

versus

SAMAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation — Mukarraridari *rights—Tarkhans of* Mauza *Bhangi, Attock District—Necessity.*

Tarkhans of *Mauza* Bhangi, Attock District, are governed by the ordinary agricultural custom and among them a *mukarraridar* cannot sell his holding except for valid necessity even where the vendee is the representative of the superior landlord who created the *mukarraridari* rights. [p. 815, col. 1.]

Umar-ud-Din v. *Janto*, 101 P. R. 1906; 156 P. L. R. 1906, *Abdul Hakim* v. *Musammat Bilochni*, 47 P. R. 1900; P. L. R. 1900 p. 381, distinguished.

Second appeal from the decree of the District Judge, Attock, dated the 22nd January 1915.

Mr. *Muhammad Rafi*, for the Appellant.

Messrs. *Muhammad Din* and *L. M. Datta*, for the Respondents.

JUDGMENT.—The land in suit in this case consists of three *khasra* numbers, the old numbers being 16, 15 and 18 and the new numbers 18, 17 and 20, respectively. Defendant No. 1, father of plaintiff, sold these numbers for Rs. 700 to the other defendants. The plaintiff, asserting that the land is ancestral and that his family follow Customary Law, claims that the sale is invalid against him for want of consideration and "necessity". The defendants Nos. 2 and 3 pleaded that there was consideration and "necessity" and that the land was not ancestral *qua* the plaintiff, and that defendant No. 1, being a *mukarraridar*, had absolute power of selling his rights whether "necessity" existed or not, and in addition to these pleas they put in various objections of a technical kind which need not now be discussed. The first Court held that there was consideration and "necessity" that the land was ancestral *qua* the plaintiff that the parties were governed by Muhammadan Law, and that a *mukarraridar* had absolute power of sale; and on these findings it dismissed the plaintiff's claim with costs. The lower Appellate Court rejected the appeal but on different grounds holding that the land is not ancestral, that necessity and consideration are not proved, that the parties do not follow Muhammadan Law but custom, and that the *mukarraridar* had not unrestricted powers of alienation. It follows that the lower Appellate Court, but for its finding on the question of the ancestral nature of the land, would have given plaintiff a decree.

On second appeal being made to this Court, it appeared to me that the inquiry regarding the nature of the land had been so imperfect as to warrant further investigation. This further inquiry, the result of which has now come to hand, makes it quite clear that the land is ancestral, having been undoubtedly held by the plaintiff's grandfather, Mohkam Din. Taking the lower Appellate Court's judgment with this correction, I think the natural result would be to give plaintiff a decree in full, and in

my opinion this is the proper course for me to take. No doubt in argument before me defendant's Counsel again asserts that the parties follow not custom but Muhammadan Law, and he quotes in support of this *Abdul Hakim* v. *Musammat Bilochni* (1) and *Umar-ud-Din* v. *Janto* (2). The former, however, is a case of Tarkhans living in Multan City and definitely found to be non-agriculturists; and the case of 1906 is from the well known village of Kotli Loharan in the Sialkot District, a village in which there is no agricultural land at all, the property in question being a house and a vacant site and the compact body of Lohars who own that village being emphatically non-agriculturists. It is obvious that these rulings do not help the defendants in any way. I, therefore, agree with the lower Appellate Court that the parties do follow ordinary agricultural custom.

The next point taken is that, inasmuch as the vendor was a sort of tenant, *i.e.*, a *mukarraridar*, therefore, the suit is incompetent, but a reference to ruling *Gauhra* v. *Har Bhaj* (3) and to the Gazetteer of the Attock District of 1907, page 223, makes it quite clear that, whatever a *mukarraridar* may really be, he is certainly not an occupancy tenant, and, therefore, none of the principles that have been laid down regarding alienations by an occupancy tenant, have any bearing on the case. No doubt one of these *khasra* numbers, namely, No. 17 (old 15), has been sold to the representatives of the superior proprietors who created the *mukarraridari* rights; but I am unable to see how this really affects the question. In the ruling of 1905, referred to above, the reason why a reversioner was not allowed to contest a sale to a landlord of *mukarraridari* rights was that in the *wajib-ul-arz* of that particular village the landlord was given a special right of pre-emption. There is nothing of this kind in the present case.

Lastly, defendants' Counsel argues that consideration and "necessity" are proved. Whether this is strictly so or not there can be no doubt about the finding of the lower Appellate Court. The only important item in the purchase money is the sum of Rs. 500 said to have been paid to one Achal Singh on a mortgage. Some oral evidence was produced by the defendants as to this matter, but the mortgage deed was not produced. Apparently no documentary evidence is forthcoming. The first Court believed that evidence but the lower Appellate Court refused to accept it. The finding, therefore, is merely a finding of fact and cannot be argued in second appeal.

For these reasons, I decree plaintiff's claim in full with costs.

Appeal accepted.

(1) 47 P. R. 1900; P. L. R. 1900 p. 381.
(2) 101 P. R. 1906; 156 P. L. R. 1906.
(3) 16 P. R. 1905; 41 P. L. R. 1905.

CALCUTTA HIGH COURT.
APPEAL FROM ORDER NO. 214 OF 1917.
July 18, 1917.
Present:—Mr. Justice Walmsley and Mr. Justice Greaves.
KEDAR NATH MANA—JUDGMENT-DEBTOR—APPELLANT
versus
JOGENDRA NATH DAS—DECREE-HOLDER—RESPONDENT.

Presidency Small Cause Courts Act (XV of 1882), s. 31 (b)—Decree, transfer of, for execution by Small Cause Court to Munsif direct, legality of—Mistake, clerical, in name of decree-holder in copy of decree transmitted, whether of consequence.

The transfer by a Presidency Small Cause Court of its decree for execution to a Munsif direct without intervention of the District Judge is perfectly good under section 31 (*b*) of the Presidency Small Cause Courts Act. [p. 816, col. 2.]

Where in the copy of a decree transmitted for execution and the certificate of transfer, the name of the decree-holder was written as Benode Behari Das in the place of Benode Behari Bose, the correct name:

Held, that it was apparently a mere clerical mistake and was of no consequence. [p. 816, col. 1.]

Appeal against the order of the Subordinate Judge, first Court, Hooghly, dated the 30th April 1917, affirming that of the Munsif first Court, Uluberia, dated the 8th January 1917.

Babu *Saroda Charan Maity*, for the Appellant.

Babu *Asiranjan Chatterjee* (with him Bab *Panchanan Ghose*), for the Respondent.

KEDAR NATH MANA *v.* JOGENDRA NATH DAS.

JUDGMENT.—This appeal arises out of the following circumstances. One Benode Behari Bose obtained a decree in the Presidency Small Cause Court against the appellant and subsequently sold this decree to one Jogendra Nath Das. At the instance of Jogendra Nath Dass the decree of the Small Cause Court was transferred for execution to the Munsif at Uluberia. Before the Munsif three objections were taken and they were all overruled by him. There was an appeal to the Subordinate Judge but that was dismissed. The first objection taken in this Court is that in the certificate, as also in the copy of the decree, the name of Benode Behari Das was written in place of Benode Behari Bose. This apparently was merely a clerical error and is of no consequence.

The second objection relates to the notice of assignment. The objections that were pressed in both the lower Courts were of an entirely different nature. We cannot, therefore, go into the question regarding the notice of assignment.

The third point is as follows. The decree was sent by the Small Cause Court direct to the Munsif without the intervention of the District Judge. It is said that this is an error and in consequence the subsequent proceedings will not merely be irregular but utterly void, and our attention has been drawn to the case of *Debi Dial Sahu* v. *Maharaj Singh* (1). But under section 31 (*b*) of the Presidency Small Cause Courts Act it is laid down that the Court may in all other cases (that is to say, other than the cases where execution is sought against immoveable property situate within the local limits of a High Court) send the decree for execution to any Civil Court within the local limits of whose jurisdiction any immoveable property of the judgment-debtor may be found. The Small Cause Court at Calcutta reads that section as meaning that the provision of Order XXI, rule 5, of the Code of Civil Procedure, which requires that when the decree is transferred to another Court for execution that decree should be sent in the first instance to the District Judge, does not apply to the decrees of Presidency Small Cause Courts and the printed notice which accompanies the decree sent for execution invites the attention of the Court to which the decree is transferred to the fact that Order XXI, rule 5 does not apply. I do not, of course, suggest that this statement by the Small Cause Court, has any legal effect, but I mention it merely to show that in sending the decree direct to the Munsif the Small Cause Court was following its usual practice. Looking at section 31 (*b*). I cannot myself understand why there should be such a clause if it did not mean that the procedure of the Small Cause Court was put on a different footing from that of other Courts in the matter of transferring decrees for execution. The question is one which does not appear to have been discussed on many occasions; but in the case of *Shamsunder Saha* v. *Anath Bandhu Saha* (2) reference is made to this point and it appears to me that the proper interpretation to be put upon the judgment delivered by the late Chief Justice is that he held in that case that the transfer of the decree to the Munsif direct was perfectly good under section 31 (*b*) of the Presidency Small Cause Courts Act and that the incompetency of the Munsif in that case sprang solely from the fact that his pecuniary jurisdiction was not large enough to cover the decree sent to him. On the authority of this ruling as also upon what appears to be the plain meaning of section 31 (*b*), I think that the objection is not tenable. I must add that the learned Vakil has expressly withdrawn the argument that the Munsif had not territorial jurisdiction to deal with the decree. I am of opinion that the appeal should be dismissed with costs. I assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

(1) 22 C. 764; 11 Ind. Dec. (N. S.) 507.

(2) 6 Ind. Cas. 97; 37 C. 574; 14 C. W. N. 662.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 615 OF 1917.

June 29, 1917.

Present:—Mr. Justice Teunon and Justice Sir Shamsul Huda, KT.

WAZUDDI—COMPLAINANT PETITIONER

versus

RAHIMUDDI AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Acquittal—Application by private person to set aside acquittal—High Court, interference by—Cattle Trespass Act (I of 1871), s. 10—Seizure of cattle for coercing owner to pay rent for grazing, whether offence—Theft.

Per *Teunon, J.*—No hard and fast rule should be laid down that applications made to the High Court by complainants for setting aside acquittals of persons who have been charged with the commission of offences are to be discouraged, as that would result in the High Court abdicating its functions and, in the present conditions of India, in denial of justice. Every such application should be considered on its own facts. [p. 817, col. 2.]

Per *Huda, J.*—The practice of the High Court has always been to discourage such applications when presented on behalf of private parties and this practice should not be departed from. [p. 820, col. 1.]

Per *Teunon, J.*—A lessee of grazing land is entitled, under section 10 of the Cattle Trespass Act, to impound cattle whose owners, while obstinately refusing to come to any arrangement with the lessee or to pay the customary or any fee, insist on grazing their cattle on the lessee's pasture. The fact that the lessee may hope that in order to prevent the impounding, the owners will make a payment, does not make the lessee's conduct unlawful nor converts the seizure of the cattle into an attempt at distraint. [p. 817, col. 2.]

Per *Huda, J.*—Such seizure by the lessee without any intention to take the cattle to a pound for the purpose of coercing the owners of the cattle to pay the arrears of rent for grazing is clearly illegal and amounts to an attempt of theft, which the owners are entitled to resist by use of force. [p. 820, col. 1.]

Babus *Manmatha Nath Mukerjee*, and *Jatindra Kumar Das Gupta*, for the Petitioner.

Babus *Gopal Chandra Das* and *Bibhuti Bhusan Saha*, for the Opposite Party.

JUDGMENT.

TEUNON, J.—On the general question of applications made to this Court by complainants in respect of the acquittal of persons whom they have charged with the commission of offences I adhere to the views expressed in my dissentient judgment in the case reported as *Faujdar Thakur* v. *Kasi Choudhuri* (1) I need add nothing to what I then said beyond this that to lay down as a hard and fast rule that such applications are to be discouraged is for this Court to abdicate its functions and in present conditions in India must necessarily result in denials of justice. Every such application should, in my view, be considered on its own facts.

As to the merits on the evidence of the acquittal with which we are now concerned it is unnecessary and in my opinion undesirable to express any decided opinion.

It is sufficient to show that the decision of the Magistrate is vitiated by a series of misconceptions which pervade his judgment.

He has misappreciated the whole of the evidence regarding the position of Chawk No. 3, and it is not enough to say that if we substitute Fulchara for Chawk No. 3 the error is corrected. That argument overlooks the contention that in Fulchara north of *dona* there is no grazing ground

Further, the Magistrate has laboured throughout under the impression that the lessee of grazing land is not entitled to impound cattle whose owner, while obstinately refusing to come to any arrangement with the lessee or to pay the customary or any fee, yet insist on feeding on the lessee's pasture. This under the provisions of section 10 of the Cattle Trespass Act the lessee is clearly entitled to do, and the fact that he may hope that in order to prevent the impounding the owners will make a payment does not make the lessee's conduct unlawful, nor convert the seizure, as the Magistrate seems to think, into an attempt at distraint. How far this misconception of the lessee's rights, the consequent erroneous view that even on his own showing the lessee's conduct was high-handed and the gratuitous assumption that pasture land is "waste" has coloured and vitiated the Magistrate's estimate of the value of the evidence we are not in a position to say.

There is a large body of positive evidence in support of the prosecution case that while complainant and his companions were engaged in rounding up the cattle grazing on the lessee's land the accused and others, some 100 or more in number, armed with spears, split bamboos and *lathis* assembled and attacked them, with the result that seven of the complainants' party were injured.

(1) 27 Ind. Cas. 183; 19 C. W. N. 154; 21 C. L. J. 53; 16 Cr. L. J. 122; 42 C. 612.

WAZUDDI *v.* RAHIMUDDI.

The Magistrate on his reading of the evidence has disbelieved the prosecution as to the site of the seizure. Apart from the misconceptions under which he was labouring, and certain suggestions seemingly unfounded against the conduct of the Police, the Magistrate has given no adequate reasons for this disbelief. Further, how far even on their own case and with knowledge of the fact that Police Officers were on their way to the spot the accused and their companions were justified in forming what was *prima facie* an unlawful assembly, and in their subsequent use of the weapons with which they were armed are matters which the Magistrate has apparently failed to take into his consideration. Still less has he considered the case of those who on the evidence inflicted individual injuries.

In short, in my view, everything in this case points to a serious miscarriage of justice, and for the reasons I have given I am satisfied that the case has not been properly tried. I am, therefore of opinion that the proper order is to make the Rule absolute, but as my learned colleague has on the merits intimated a different view, and as this is a case of acquittal I am not of opinion that I ought to insist upon a reference to a third Judge. I, therefore, assent to the discharge of the Rule.

HUDA, J.—This is a Rule issued at the instance of the complainant calling upon the District Magistrate of Noakhali and the accused to show cause why the order of acquittal under section 258 of the Criminal Procedure Code, passed by Babu Chandra Sekhar Mukherjee, first Class Magistrate, Noakhali, should not be set aside on grounds specified in the Rule.

Two questions arise for consideration, *viz.*:

(1) Whether the order of acquittal is wrong on the merits?

(2) Assuming that it is so, whether in the exercise of the discretion vested in this Court under section 439 of the Criminal Procedure Code, this is a fit case for our interference?

My answer to both the questions is in the negative. The facts are shortly these:—

There is a newly formed *char* called Char Afzaluddin belonging partly to Government and partly to Mrs. Delawney. The *char* is bounded on the north and west by a *dona*, on the east by a small river and on the south by the big Feni river. The accused are Bathanias, or owners of cattle who have their cattle sheds on land immediately to the north of the *dona* and themselves reside there during the grazing season with their cattle. Since July 1916, Government and Mrs. Delawney have been in possession of separate plots as representing their respective shares. Plot No. 3 among others is in possession of Mrs. Delawney and the plot to the east of it belongs to Government. The land of the whole *char* is of the same nature and seems only fit for pasturage (P. W. No. 2).

The story of the complainant as told in the first information was to the effect that complainant's master Minnat Ali had taken a settlement from Government of Char Afzaluddin in order to realise rent from those who grazed their cattle in the *char*, that he found great difficulty in realising such rent as the owners of cattle not only refused to pay rent but threatened Minnat Ali's men with violence whenever rent was demanded of them, that on the day of the occurrence Minnat Ali having first informed the Police of his difficulties and of his apprehensions of a breach of the peace, deputed some of his men, about 12 or 14 in number, including the complainant, to realise arrears of *gore-kati* or grazing rent, that with this object Minnat Ali's men surrounded about 250 or 300 heads of cattle in the *char* about 3/8ths of a mile to the south of the northern half of Char Afzaluddin, when some 200 men armed with *lathies* attacked them and began to snatch away the cows and buffaloes, that Minnat Ali's men thereupon raised a hue and a cry that the Police were coming and on hearing this the attacking party begun to run away and the complainant's party began to drive away some 20 or 25 heads of cattle, that at this stage Jaloo *chowkidar* belonging to the party of the accused came running and shouted "where is the Police? It is all false. Beat the *salas*." Upon this the rioters numbering about 50 or 60 men came back with *lathies*, etc., and snatched away the cattle after inflicting injuries on the men on complainant's side.

The accused persons, 16 in number, were accordingly placed on their trial, of whom 7 were discharged after the close of the evidence for the prosecution and the remaining 9 were charged under section 147, Indian Penal

Code with rioting with the common object of enforcing by use of criminal force their supposed right of grazing cattle free of rent and of preventing Minnat Ali from realising such rent from them.

The defence was that the accused had obtained the right of grazing cattle in the plots belonging to Mrs. Delawney, that they grazed their cattle on Mrs. Delawney's land but still Minnat Ali demanded rent from them but they refused to submit to the demand and on the day of the occurrence, hearing of the expected visit of the Police. they kept their cattle near their own houses on the north bank of the *dona* when at about 10 or 11 O'clock about 150 men, with the help of the Police, seized their cattle and carried them across the *dona* to the south, that a cow was killed and the other cattle were removed with the object of realising the arrears of grazing rent improperly demanded from them, that they opposed the seizure of their cattle and were beaten and they also in their turn beat the complainants' men.

The medical evidence shows that men on both sides had received injuries, two such injuries on each side being severe.

The Trying Magistrate has acquitted the accused finding—

(*a*) that the seizure of the cattle by the complainant's party took place on the north of the *dona* in plot No. 3;

(*b*) that the seizure was illegal as the complainant had no right to seize the cattle in order to realise arrears of grazing rent from their owners;

(*c*) that the accused were justified in using force to resist such seizure.

The first finding is vitiated by a misapprehension on the part of the Magistrate regarding the position of plot No. 3 which is to the south and not to the north of the *dona* and I do not rely on this finding. But an examination of the evidence convinces me that Minnat Ali's men in seizing the cattle did not confine themselves to those grazing in Government *khas* land but seized them indiscriminately including cattle grazing in plot No. 3. This plot is not separated from Government land by any *ails* and although it is demarcated by boundary pillars, the pillars are at considerable distance from one another and the two lands are, as I have already said, of the same nature and not distinguishable except by these distant pillars.

The evidence shows that Minnat Ali's whole object was to get hold of the cattle grazing in the *char*, irrespective of the place where at the time of the seizure they may have been grazing. The witnesses for the prosecution generally start their story by vaguely stating that on coming to the '*char*' they surrounded about 300 heads of cattle grazing in it. They speak of the settlement of Char Afzaluddin with Minnat Ali and try to ignore the distinction between the plots of *char* land belonging to Government and those belonging to Mrs. Delawney. In cross-examination they admit the existence of plots belonging to Mrs. Delawney and say they confined the seizure of cattle to Government *khas* land. Several prosecution witnesses had to admit in cross-examination that there were cattle grazing both over Government *khas* land and plot No. 3. The Police Sub-Inspector saw from a distance cattle scattered all over the *char*. As a matter of fact Minnat Ali's *kabuliyat* is for the whole *char* and ignores the *zemindar's* share in it. The same tendency to ignore the existence of land belonging to Mrs. Delawney is shown in the first information, as well as in Minnat Ali's application for taking proceedings against the owners of cattle under section 107, Criminal Procedure Code, and although this absurd claim was abandoned in Court by the witnesses for the prosecution, Minnat Ali himself was reluctant to give up his pretensions. In his evidence in Court he claimed the whole of Char Afzaluddin as included in his lease and said he did not know if any other person had any right to the land in this *char*. It is most likely, therefore, that Minnat Ali's servants and adherents did not in seizing the cattle observe any distinction between those grazing in Government land and those grazing in *zemindar's* demarcated share of the *char* of which plot No. 3 is the largest. I am, therefore, of opinion that the cattle were seized south of the *dona* indiscriminately and irrespective of the question whether they were grazing on Government land or *zemindar's* land, and that Minnat Ali was claiming rent for the whole *char*.

The next question is with what object the cattle were seized by Minnat Ali's men. The witnesses on the prosecution side have

generally stated that they surrounded the cattle in order to compel their owners to pay their grazing fees. The evidence to my mind is clear that there was no intention to take the cattle to a pound. This is clear from the first information also. The seizure of the cattle for the purpose of coercing their owners to pay the arrears of rent was clearly illegal and amounted to an attempt at theft. *Queen-Empress* v. *Sri Churn Chungo* (2), which the accused were entitled to resist by use of force. If this view is correct it is immaterial where the cattle were seized. Whether more force was used than was necessary I need not discuss. The charge of rioting under section 147 with the common object mentioned in the charge having failed, the order of acquittal is correct.

Except, therefore, as regards the place of occurrence I agree generally with the view of the case taken by the Trial Court and I need not repeat the reasons assigned by the Magistrate for disbelieving the story told by the prosecution.

For these reasons I do not think there has been any failure of justice in this case much less such a grave failure of justice as would, having regard to the ruling in *Faujdar Thakur* v. v. *Kasi Choudhuri* (1), justify this Court in interfering with the order of acquittal. The practice of this Court has always been to discourage such applications when presented on behalf of private parties and this practice should not, in my opinion, be departed from.

I would, therefore, discharge the Rule

Rule discharged.

(2) 22 C. 1017; 11 Ind. Dec. (N. s) 676.

PUNJAB CHIEF COURT.

CRIMINAL APPEALS NOS. 987 AND 899 OF 1916.

April 18, 19, 1917.

Present:—Mr. Justice Leslie Jones.

CR. A. No. 987 OF 1916.

SAHAI SINGH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR - RESPONDENT

AND

CR. A. No. 899 OF 1316.

BUDHA SINGH—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *s.* 352—*Trial in jail, legality of—Evidence Act* (*I of* 1872), *s.* 114, *ill* (b)—*Approver, material corroboration of statement of, necessity of—Corroboration, material and general—Accused found in company of approver shortly after commission of crime—Presumption—Identification of accused, evidence of, value of—Prosecution, duty of.*

Section 352 of the Criminal Procedure Code does not vitiate the whole trial in a jail when there is nothing to show that admittance was refused to any one who desired it, or that the prisoners were unable to communicate with their friends or Counsel. No doubt it is difficult to get Counsel to appear in jail and for that reason, if for no other, such trials are usually undesirable. [p. 821, col. 1.]

There is a difference between general and material corroboration of an approver. What is required is material corroboration, and by it is meant the evidence concerning participation of his companion in committing the crime. Being found in the company of the approver shortly after a dacoity is very strong indication of fellowship in the crime. [p. 826, col. 2.]

Wazir Khan v. *Emperor*, 5 P. R. 1902 Cr.; 57 P. L. R. 1902, distinguished from

The evidence of witnesses that they identified such and such accused first at the identification parades and then in Court, is valueless where the prosecution fails to prove conclusively that there was no possibility for the witnesses to have seen the features of the accused before he was placed in the parades. [p. 821, col. 1.]

Appeals from the order of a Magistrate, first class, exercising enhanced powers under section 30 of the Criminal Procedure Code, Lahore, dated the 14th August 1916, convicting the appellant.

Lala *Hukm Chand*, for all 3 Appellants, in Cr. A. No. 987 of 1916.

Mr. *Beechey*, for Harnam Singh and Sahai Singh, in Cr. A. No. 987 of 1916.

Messrs. *Oertel* and *B. N. Kapur*, for the Appellant, in Cr. A. No. 899 of 1916.

Lala *Niranjan Das*, R. B., (Public Prosecutor), for the Respondent, in all appeals.

JUDGMENT.

CR. A. No 899 OF 1916.

LESLIE JONES, J.—(*April 18th* 1917).—This judgment deals with Criminal Appeals Nos. 899, 900, 986, 987, 1028 and 1029 of 1916.

On the night of the 13th January 1916, two serious dacoities were committed in the village of Tung in the Gujranwala District. The dacoits first looted the house of a Jat named Jhanda Singh and then that of Gobind Ram, a Brahmin. Eventually two men Chanoon, a Kashmiri, and Barkat, a Teli, turned approvers. Eleven other persons were *challaned* and convicted of participation

in each dacoity. Of the convicts, six persons, namely, Allah Rakha, Karam Din, Jumma, Miru, Narain Singh and Bua Ditta, *i.e.*, four Musalmans, and two Hindus, preferred no appeal. The appellants are five Sikh Jats, namely, Harnam Singh, Sundar Singh, Buta Singh, Budha Singh and Sahai Singh.

It is necessary that I should first mention a contention that the whole trial is vitiated because it was held in the jail. Counsel for some of the appellants has referred to section 352, Criminal Procedure Code, but there is nothing to show that admittance was refused to any one who desired it, or that the prisoners were unable to communicate with their friends or Counsel. No doubt it is difficult to get Counsel to appear in the jail and for that reason, if for no other, such trials are usually undesirable, but in this case the Executive Authorities were of the opinion that it would be unsafe to hold the trial elsewhere.

The first report was made on the 14th January 1916, at the Muridke Police Station by Jhanda Singh and Gobind Ram. Jhanda Singh described how about ten men armed with *chhavis* or sticks entered his house in which he was sleeping with the other members of his family, both male and female, despoiled them of all their property, and then leaving a guard of four men over Jhanda Singh and the other inmates of the house went off to *loot* the house of Gobind Ram.

Gobind Ram told a similar story but stated that the dacoits who went to his house appeared to be about six or seven in number.

Both Jhanda Singh and Gobind Ram stated that the dacoits had muffled their faces and that they could not properly identify any of the offenders. Both of them, however, stated that one of the dacoits appeared to be a Muhammadan. Gobind Ram said that that Muhammadan was a man of fair complexion. Jhanda Singh added that from their general appearance the remainder of the dacoits seemed to be Sikhs.

The Sub-Inspector proceeded to the spot at once and recorded the statements of other members of both families. According to the Police diaries a number of people in both houses then stated that they would be able to identify those of the dacoits whom they had seen if they saw them again.

It would also appear that a tracker named Talia Muhammad was called in and covered no less than 41 tracks which were believed to be those of the dacoits, but no immediate clue was obtained. On the 16th January 1916, however, Chanoon, one of the approvers, Harnam Singh appellant and three other men, one of whom is said to have been Sundar Singh, appellant, arrived in a drunken condition at village Thethar in the Lahore District and created a disturbance there as the result of which four of them, including Chanoon and Harnam Singh, were arrested under the orders of Sardar Janmejha Singh, an Honorary Magistrate, who holds his Court at Thethar and is provided with a Police guard. The fifth man, who is said to have been Sundar Singh, escaped on a pony. It was as the result of the information obtained from Chanoon that the remaining accused were ultimately arrested on various dates. Five identification parades were held, two at the Naulakha *thana* and three at the central jail, Lahore, in the presence of European Officers before whom all the accused were identified by one or more of the members of the families of Jhanda Singh or Gobind Ram.

The occurrence of the two dacoities is not disputed and although no bodily injury was inflicted the dacoities were nevertheless of a most serious character. The approvers have described what occurred in full detail and the stories which they have told are in the main unquestionably correct. The general truth of what they have stated has much corroboration but what is required in this case is corroboration concerning the participation of each of the accused. The Magistrate appears to have confused general and material corroboration. In the case of two out of five appellants, namely, Buta Singh and Budha Singh, the only particular corroboration consists of statements of the inmates of the two houses. Concerning Harnam Singh and Sundar Singh there is also evidence of what happened at Thethar and a constable named

Iqbal Ali has further deposed to having seen Harnam Singh and Sahai Singh with a number of other dacoits when on their way to Tung before the dacoity.

It is evident, therefore, that as regards at least some of the appellants the matter of their identification by the inmates of the two houses is one of the utmost importance. Indeed if the evidence of identification by the inmates is reliable that is the end of the case, the evidence of the approvers quite apart. If it is not reliable, so far at least as some of the appellants are concerned, there is no sort of material corroboration of what the approvers have stated.

From the contents of the first report made by Jhanda Singh and Gobind Ram it would seem unlikely that either Jhanda Singh or Gobind Ram, or indeed any inmates of their houses, would have been able to identify any one beyond a Musalman with a fair complexion, and naturally great stress was laid by the defence on this feature of the report. The Magistrate has attributed the statements that Jhanda Singh and Gobind Ram would not be able to recognize any of the dacoits to the carelessness of the Sub-Inspector in taking down their report. The Sub-Inspector has deposed that Jhanda Singh and Gobind Ram were in a state of confusion and that they never said more than that they did not know the dacoits. It is not, however, denied that both Jhanda Singh and Gobind Ram stated that the dacoits were wearing *mundasas*, and when a man is said to be wearing a *mundasa* the usual meaning is that he has covered the greater part of his face with a cloth in order to prevent recognition. Jhanda Singh when asked in Court to say what he meant by saying that the dacoits were wearing *mundasas* explained then that they had merely tied on their turbans tightly with a separate piece of cloth in order to prevent them from falling off and that their faces were wholly exposed. This statement was recorded in somewhat unidiomatic English, but the learned Public Prosecutor who was present when it was made has explained that Jhanda Singh meant that the dacoits had tied on their turbans more tightly by passing an extra piece of cloth over the top of the turban and *behind the back of the neck.*

On the face of it that would seem to be a somewhat futile proceeding. If a man wants to tie on his turban tightly his more usual course is to tie under his chin.

I find it very difficult to believe this statement of Janda Singh. I have noticed that in another case, the Awandhaiwala dacoity committed by some of the same gang, a similar report was made at another *thana* in another district and that in the trial it was stated that all the dacoits had their faces uncovered. In that case no attempt was made to explain the first report. I have no doubt that in this case the first reports were correctly taken down as made and of course they created a most serious difficulty as regards the matter of any identification which might follow.

The learned Public Prosecutor points to the fact that although in making his first report Jhanda Singh stated that he would be unable to recognize any of the dacoits he nevertheless said that perhaps his mother (*Musammat* Har Kaur) or some of the people of the village might be able to identify them. That part of the statement according to the Public Prosecutor shows that even though at the time of making his report Jhanda Singh thought he himself might not be able to identify any of the dacoits, he nevertheless regarded it as quite in the bounds of possibility that they might be identified by his mother or people in the village and that he could not have contemplated that possibility at all if the dacoits had completely covered the lower parts of their faces.

It is, however, clear that Jhanda Singh and Gobind Ram themselves had just as much opportunity of seeing the dacoits, who entered their houses as any of the other inmates of their families, and it is difficult to understand why Jhanda Singh should imagine that his mother would be able to do what he could not do himself. It looks rather, therefore, as if this sentence on which the Public Prosecutor relies was put in as a saving clause.

As the result of the identification parades *Musammat* Har Kaur, the mother

of Jhanda Singh, identified ten out of thirteen dacoits, Jhanda Singh himself all thirteen, Gobind Ram eleven, and his aunt, another *Musammat* Har Kaur twelve. Other members of the two families identified from one to four of the dacoits.

Now in the initial report made by Jhanda Singh it is stated that four of the dacoits remained to keep guard over his house while the others went off to *loot* that of Gobind Ram and if that is correct, it is obviously impossible that Gobind Ram and his aunt, *Musammat* Har Kaur, who did not leave their house, could have identified more than nine of the dacoits instead of eleven; and if again, as would appear from the first report, Jhanda Singh did not leave his house, it is difficult to understand how he was able to identify all thirteen dacoits. The approver Barkat first stated that two of the dacoits, namely, Harnam Singh and Sundar Singh, did not enter the house of Jhanda Singh at all as they stayed outside in order to keep guard. It is true that at a later stage in his deposition (which was recorded on various dates) he said that these two men went in and out during the progress of the dacoity, but there is no explanation why they should have done that if they were put on a guard which was very necessary and Barkat's later explanation appears to me to be exceedingly lame.

It should be remarked, however, that although Jhanda Singh stated in his first report that he was kept on under a guard in his own house until the dacoits left the village he said in Court that he did not stay in his own house but was taken by the dacoits to the house of Gobind Ram as a hostage, the dacoits informing his family that if they made a noise Jhanda Singh would be killed at once. Nevertheless, after taking this precaution in order to prevent the rest of the villagers from becoming acquainted with what was going on, the dacoits then allowed Jhanda Singh to escape and raise the alarm. That again does not appear to me to be a convincing story and the record contains absolutely no explanation of the discrepancy between this story and that made in the first report. Counsel for the appellants urge that it is a sheer invention designed with the object of getting over the difficulty regarding the ability of Jhanda Singh to identify all the dacoits, and I have not been able to find any trace of the second story in the Police diaries, which contain no further statement by Jhanda Singh.

There is yet another difficulty created by the first report. If Jhanda Singh was afterwards able to identify all thirteen dacoits, of whom no less than six are Musalman, how is it that at the time when he made that report he stated that with the exception of one man all the dacoits appeared to be Sikhs and how is it too that Gobind Ram knew of but one Musalman? Surely, if these witnesses saw the faces of the dacoits well enough to be able to identify them months afterwards they must at least have known that there was more than one Musalman.

Nevertheless the fact remains that all these witnesses and other witnesses from Tung either at the Naulakha *thana* or at the Central Jail, Lahore, picked out the various accused whom they identified from a very large number of other persons and that at this stage of identification there was no possibility of fraud. The reply of the defence is that all the accused were kept in Police custody for a long time after their arrest and that previous to the identification which took place before the European Officers the witnesses from Tung were given ample opportunities of examining the features of the accused at a Police post in Lahore, which is known as the Tibbi Guard and at other places.

All the accused were in Police custody for a considerab'e time before the parades took place. No doubt the inmates of the two houses say that they were given no opportunity of previous examination of the accused whom they were expected to identify, but although allegations were certainly made in the Court of the Magistrate that the Police were taking such steps to ensure successful identification there is no statement by any responsible Police officer on this important point.

On the other hand, it has been shown that on the 27th April 1916, Bhai Hukam Chand, Counsel for Sahai Singh, who up to that date had not been arrested, put in a written petition in which he stated that his client

was prepared to surrender to the Court at once. He requested, however, that Sahai Singh on surrender might not be handed over to the Police but might at once be placed among fifty other persons for immediate identification by the prosecution witnesses.

On this petition the Magistrate noted that as Sahai Singh was not already present he would pass orders on his arrival.

Sahai Singh surrendered at the jail, where the trial was being held, the next day, the 28th April. The Police at once asked the Magistrate to hand over Sahai Singh to thier charge and this was at once allowed. No further order was passed on the petition put in by Counsel, and Sahai Singh was, as I have ascertained from the Superintendent, Central Jail, removed from the judicial lock-up on the 29th and handed over to the Police.

Bhai Hukam Chand has further stated before me that on the 2nd May he put in a petition in which he informed the Court that Sahai Singh was being exhibited to the prosecution witnesses at the City Police Station outside Delhi Gate. I have, however, been unable to find the original petition on the record any more than another similar petition said to have been put in on behalf of other accused of which one of the Counsel for the appellants holds a draft.

In a case where so much depended on the reliability or otherwise of the identification of the various accused, it is surprising that the Magistrate did not seize upon the opportunity which he was thus offered. The trial was being held in the Central Jail and it so happened that on the 28th April, the very date of Sahai Singh's surrender, one of these identification parades was being there held. Bua Ditta, one of the convicts who has not appealed, was the man who was being paraded and he was identified by Jhanda Singh, his mother *Musammat* Har Kaur, Gobind Ram, and by *Musammat* Har Kaur, the aunt of Gobind Ram. Now if on this occasion careful steps had been taken by responsible officers to ensure that Sahai Singh should not be seen previously by these four witnesses and if when he had been placed among a large number of other men all of the witnesses or even a few of them had been able to pick him out, we should have been provided with proof of the most convincing kind that the first reports made were incorrect and that the dacoits had not concealed their faces so as to preclude successful identification. If these witnesses had succeeded as regards Sahai Singh it would have been easy to trust them as regards the other persons whom they identify. But the opportunity was lost, or rather, as Counsel for the appellants put it, it was deliberately avoided by the Police because they were unable to face the results of an identification parade for which no previous preparation had been made. The Public Prosecutor explains the anxiety of the Police to get hold of Sahai Singh at once by saying that he was required for the purpose of furthering the investigation. The trial had, however, already begun on the 16th March, and we are not told what further information the Police expected to obtain by keeping Sahai Singh in their own custody. They had already obtained the fullest possible statements from the two approvers and the Police diaries do not disclose what was afterwards done with Sahai Singh. No further information was elicited as the result of this remand. But granting that a remand was necessary, it is clear that Sahai Singh both could and should have been paraded at once. He was not returned to the judicial lock-up until May the 2nd.

In examination of the Police diaries I have noticed that when the Police arrived in *Mauza* Tung, *Musammat* Har Kaur, the mother of Jhanda Singh, was the first person to be examined and that it is there recorded that she gave certain details concerning the appearance of some of the dacoits. She said it would appear that one of the dacoits was a Musalman of fair complexion and that his hair appeared to be close cropped. She also described his clothes carefully. When, however, her evidence was recorded in Court she was never asked which of the six Musalman accused was the man whom she had thus described.

She also gave details regarding some of the Sikhs. Thus she said that one of them had a noticeably fair complexion, and that another was tall and dark and had widely separated teeth. She mentioned that this man had a cloth tied round his *pugri*, a statement which so far as it goes corroborates the story of the *mundasas* as told in the first reports. Another Sikh, she said, was fair and of medium height. The record contains

nothing to show that any of the accused correspond in their appearance with these descriptions and the witness was not asked to state to which of the accused, if any, she had referred. If the necessary evidence had been taken as to the statement then made by *Musammat* Har Kaur and it had been shown that one of the Sikh accused was a tall dark man with widely separated teeth, we should have had a piece of evidence which might have been of great value, for it may well be that some of the dacoits exposed their faces through disarrangement of their *mundasas*. But it is very unlikely that all would have done so and it is noticeable that *Musammat* Har Kaur never pretended at the time of the investigation to describe all of them.

So far as can be seen from the Police diaries none of the other inmates of the two houses were asked during the course of the investigation for any details they might be able to give concerning any of the accused whom they thought they might be able to identify.

The result is then that the record contains nothing more than statements that various witnesses identified such and such accused, first at the identification parades and then in Court, but if the identification parades were preceded by preparation this evidence is valueless. In view of what happened in the case of Sahai Singh and the great difficulties which arise out of the first reports, I am unable to feel any confidence that there was no such preparation. Accordingly I feel bound to reject as worthless the evidence of identification given by the Tung witnesses.

In addition to the statements of the witnesses from Tung, there is another witness, Iqbal Ali, P. W. No. 40, who has deposed that he saw some of the accused at the Badami Bagh Railway Station when they were waiting for a train to take them to Kala Shah Kaku, the station for Tung. He noticed a man whom he identifies as Narain Singh, (one of the convicts who has not appealed) sitting with what appeared to be an instrument for house breaking in front of him. He inquired what the instrument was, and was told in reply by Narain Singh it was used for raising mill stones. This explanation allayed his suspicions but he had seen other members of the gang sitting near Narain Singh and also saw them get into a carriage in the train which went off to Kala Shah Kaku. In this way he was able to identify not only Narain Singh but also Bua Ditta, another convict who has not appealed, and of the appellants Harnam Singh and Sahai Singh as well as the two approvers.

I have no doubt that Iqbal Ali did, as he says, see Narain Singh with his jemmy and that he made inquiries about it. But he had no particular reason for closely scanning the faces of the companions of Narain Singh and from the statement of the approver, Barkat, it would appear to be at least doubtful if he got the opportunity of seeing so many of them together Barkat has mentioned that the gang when waiting at the station took care not to sit in a body but separated themselves and also that they got into separate carriages. He also said that Iqbal Ali, after kicking Narain Singh's jemmy and asking what it was, "passed on."

I cannot but think, therefore, that there is a great deal of exaggeration in the statement of Iqbal Ali I do not believe that he examined the companions of Narain Singh carefully even if he noticed them at all. In view of the impression which I have obtained regarding the other evidence of identification I should not feel prepared to place reliance on Iqbal Ali except perhaps as regards Narain Singh himself, but Narain Singh is not one of the appellants and I do not think it at all likely that even if Iqbal Ali had seen the others casually on the 13th January he would have been able to identify so many of them in March and April.

I have already referred to the fact that according to the contents of the Police diaries the tracks of the dacoits were found outside the village and that no less than 41 such tracks were covered in order to prevent their destruction. There is nevertheless no evidence concerning tracks on the record and the tracker Talia Muhammad was not produced. The Public Prosecutor explains that tracks had become obliterated long before the connection of any of the accused with the Tung dacoity was ascertained. In saying this he is probably quite correct but it seems to me, if I may make the suggestion, that it was not necessary to wait for the

arrest of the accused. If all those tracks had been carefully photographed at once and the photographs so obtained compared with the tracks of the accused which might also have been taken and photographed at the time of the trial, I think it possible that some very valuable evidence might have been obtained. I am afraid that when dealing with up-to-date criminals it will become increasingly necessary to use up to-date methods of investigation. In the present case as matters stand the tracks give no assistance.

There is, then, no reliable corroboration as against Buta Singh, Budha Singh and Sahai Singh.

The case of Harnam Singh and Sundar Singh stands on a different footing from that of the other appellants.

We know for a certainty that there were Sikhs engaged in these dacoities and we can be quite confident that the Musalman Chanoon would not be allowed to go off with a considerable quantity of the stolen property unaccompanied by some of the Sikhs. His story is that when he was arrested at Thether, he was carrying not only his own share of the booty but also that of Harnam Singh and Sundar Singh. It is much to his credit in this connection that he has not supported the Police story of the four bundles made to fit the four persons who were arrested at Thethar. Fatta and Bura, according to both approvers, had nothing to do with the dacoity, but at the time of their arrest the Police did not know that. Hence apparently the four bundles, although Chanoon states that the property which he was carrying was still undivided.

The story of Harnam Singh that he was not a member of Chanoon's party and the *alibi* of Sundar Singh are both palpably false, just as the contention of both of these that they were accused out of enmity by the approvers bears no examination.

Sundar Singh who absconded was fully identified before he escaped and I have no doubt that these two appellants were still travelling with Chanoon simply because their share in the property had not yet been divided.

The case against these two men is, I consider, stronger than that reported as *Wazir Khan* v. *Emperor* (1), both because the statements of the approvers are hardly open to any criticism and because the connection of Sundar Singh and Harnam Singh with Chanoon is very strongly indicative of fellowship in crime.

I acquit Buta Singh, Budha Singh and Sahai Singh, because as regards them there is no corroboration, though I do it reluctantly as I think it very probable indeed that they joined in the two dacoities. I maintain the convictions of Harnam Singh and Sundar Sihgh, and as there is no ground for interference in their sentences, I dismiss their appeals.

CR. A. No. 987 OF 1916.

LESLIE JONES, J.—(*April 19th*, 1917).—For reasons recorded in my judgment in Criminal Appeal No. 899 of 1916, I accept this appeal so far as to acquit the appellants Sahai Singh and Buta Singh and dismiss it as regards Harnam Sing, appellant, maintaining his conviction and sentence.

Appeals of Buta Singh, Budha Singh and Sahai Singh accepted.

(1) 5 P. R. 1902 Cr.; 57 P. L. R. 1902.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 233 OF 19 7.

July 3, 1917.

Present:—Mr. Justice Chapman.

GHASI RAM AND ANOTHER—PETITIONERS

versus

AMRIT MAL AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, object and scope of—Dispute as to management of property—Magistrate, jurisdiction of.

The object of section 145 of the Criminal Procedure Code is limited strictly to the prevention of violent self-help even by a true owner. The provisions of the section belong to the criminal and not to the civil law and should not be resorted to unless there is in fact a real apprehension of occurrence of offences against public order. [p. 827, col. 2; p. 828, col. 1.]

Under section 145, Criminal Procedure Code, the question in each case will be, *first*, whether the dispute is a dispute concerning land or water or the boundaries thereof, within the meaning of the section, and *secondly*, whether the acts found to have been exercised are such as to justify a finding of possession. The mere fact that the word management is

used to describe the acts of possession which each party claims to have exercised would not exclude the jurisdiction of the Magistrate. [p. 827, col. 2.]

Criminal revision from an order of the Magistrate, Behar, dated the 16th April 1917.

Sayed *Hassan Imam* (with him Mr. *Abani Bhusan Mukerji*), for the Petitioners.

Mr. *Manuk* (with him Messrs. *Haran Chandra Mitra* and *Bankim Chandra Dey*, for the Opposite Party.

JUDGMENT.—This is an application for the revision of an order under section 145 of the Code of Criminal Procedure declaring that whatever acts of management in the shape of repairs, etc., are exercised in regard to certain Jain temples on the chain of hills at Rajgir are exercised by one Amrit Mal on behalf of the Sweetambari Jains whose head-quarters are in Calcutta, and prohibiting the second party, namely, one Ghasi Ram and another who represent the Digambari Jains, whose head-quarters are in Bombay, from interfering in the acts of management of Amrit Mal until they get an order from a Court adjudging them to be entitled to do so.

The first ground taken before me is that the Magistrate is not competent to interfere under section 145 where the question is only one of management and the following reported cases are relied upon:—

Tarujan Bibee v. *Asamuddi Bepari* (1), *Empress* v. *Ganpat Kalwar* (2), *Nritta Gopal Singh* v. *Chandi Charan Singh* (3), *Manik Chandra Chakravarti* v. *Preo Nath Kuar* (4) and *Akaloo Chandra Das* v. *Mohesh Lal* (5).

On behalf of the opposite party on the other hand in support of the Magistrate's jurisdiction the following cases are relied upon:—*Sri Mohan Thakur* v *Narsing Moham Thakur* (6), *Bhaskari Kasavarayudu* v. *Bhaskaram Chalapatirayudu* (7), *Ram Saran Pattak* v. *Raghu Nandan Gir* (8).

(1) 4 C. W. N. 426.
(2) 4 C. W. N. 779.
(3) 10 C. W. N. 1088; 4 Cr. L. J. 215.
(4) 17 Ind. Cas. 533; 17 C. W. N. 205; 13 Cr. L. J. 789; 17 C. L. J. 397.
(5) 4 Ind. Cas. 696; 36 C. 986; 11 Cr. L. J. 28.
(6) 27 C. 259; 4 C. W. N. 420; 14 Ind. Dec. (N. S.) 171.
(7) 31 M. 318; 18 M. L. J. 343; 8 Cr. L. J. 205; 4 M. L. T. 301.
(8) 9 Ind. Cas. 6; 38 C. 387; 13 C. L. J. 445; 16 C. W. N. 574; 12 Cr. L. J. 3.

It is not possible to lay down any general rule on this subject. The question in each case will be, *first*, whether the dispute is a dispute concerning land or water or the boundaries thereof within the meaning of the section, and *secondly*, whether the acts found to have been exercised are such as to justify a finding of possession. The mere fact that the word management is used to describe the acts of possession which each party claims to have exercised would not exclude the jurisdiction of the Magistrate. In the present case the dispute originated in the following manner.

Amrit Mal, as manager on behalf of the Sweetambari Jains, began to collect bricks for the purposes of erecting a small rest house on the open platform of one of the Jain temples in the hills. The Digambari Jains, led by Ghasi Ram, then also began to collect bricks and contested the right of the Sweetambari Jains to make the erections they desired to make. There thus arose an apprehension of a breach of the peace, and in the case which ensued it became apparent that the quarrel really covered the entire rights of management over the Jain temples in the hills.

From these facts the first point which is apparent is, that it is not a dispute between rival managers; that is to say, it is not a dispute between two persons each of whom claims to manage on behalf of the same party or on behalf of one or more of the joint owners. The dispute is between Amrit Mal representing the Sweetambari Jains and Ghasi Ram representing the Digambari Jains.

It is contended that in disposing of the case the Magistrate has contravened the rule contained in sub-section 4 of section 145 which says that the dispute must be determined *without reference to the merits of the claim of any of the parties to a right to possess the subject of dispute.* These words appear to have been inserted in the section to fortify a Magistrate against a temptation to which he would naturally be inclined to yield in a case in which it appeared to him that the true owner had been dispossessed. The Magistrate is reminded that the object of the section is limited strictly to the prevention of violent self-help even by a true owner. But in a

In re MONGALU AORODHONO HATHI.

case in which there is no indication that the Magistrate's decision has been influenced by any sympathy with the true owner, I would not be disposed to interfere. The Magistrate in the present case has written a very full and able judgment, going back an indefinite period of time prior to 1902 when the Sweetambari Jains were declared to be in possession of the village temples. No doubt a possessory action is likely to lose some of its possessory characteristics if the parties are suffered to rely on ancient facts; see Pollock and Maitland on the History of English Law, Volume II, page 52.

The question whether there was in fact an apprehension of a breach of the peace in the present case was not raised before me, and no doubt there was an allegation made in the petition filed on behalf of the Sweetambari Jains that such an apprehension existed. At the same time though the existence of any ground, however slight, would exclude the jurisdiction of this Court to interfere, I think it desirable to remind the Magistrate that the provisions of section 145 belong to the criminal, not to the civil, law and should not be resorted to unless there is in fact a real apprehension of the occurrence of offences against public order. In Bihar there was at one time a tendency to resort to this procedure merely as a manœuvre in anticipation of civil litigation and in order to obtain for the purposes of that litigation the position of defendant, and thus lay the burden of proof on the other side. In Bengal the provisions of section 9 of the Specific Relief Act are more often applied. In Bihar that section is either not so well known or else it is not resorted to, because in order to bring a suit under that section it is necessary to allege that you have in fact been dispossessed, and there is a natural reluctance to admit any sort of dispossession as any such admission would endanger the loss of the position of defendant for which the manœuvre is intended. It might be worth considering whether, in order to relieve Executive Officers from the burden of cases under section 145, the provisions of section 9 of the Specific Relief Act might not be amended so as to enable a plaintiff to succeed upon an allegation that his possession had been threatened or disturbed without going to the length of admitting that he had been entirely dispossessed. It may be, however, that the completion and revision of the Record of Rights has already relieved Executive Officers of applications under section 145 and that no other remedy is required.

It is, however, when I come to the findings of fact that I feel constrained to interfere The Magistrate finds in regard to the hill temples and they are the real subject of dispute—

(1) that none of them had been recently repaired and that nothing had been done but whitewashing;

(2) that both the Digambaris and the Sweetambaris exercised unrestricted worship; and

(3) that the pathway on the hills was made when both sides were joint and that the removal of obstructions to the pathway is now done by both.

On these findings there was no basis for a finding of separate possession or for a final order under section 145. The order is set aside

I trust that the parties will be able to settle their differences and that the investigations of the Magistrate will assist them in attaining a result so desirable in the interests of both.

Application accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 63 OF 1917.
CASE REFERRED No. 6 OF 1917.
May 2, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

In re MONGALU AORODHONO HATHI
ACCUSED

Criminal Procedure Code (Act V of 1898), s. 238—Penal Code (Act XLV of 1860), ss. 147, 323, 448—Rioting—Acquittal—Conviction for criminal trespass and hurt, legality of.

An Appellate Magistrate cannot, when once he acquits persons charged with rioting and being members of an unlawful assembly of that offence, convict them of the minor offences of house trespass and hurt under sections 448 and 323 of the Indian Penal Code. [p. 829, cols. 1 & 2.]

In re KONGALU AORODHONO HATHI.

Eleven persons were charged with rioting and being members of an unlawful assembly before a second class Magistrate. They were convicted of offences under section 147 of the Indian Penal Code. On appeal the Appellate Magistrate acquitted seven of them and convicted the remaining four of offences under sections 448 and 323 of the Indian Penal Code:

Held, that the conviction was illegal and must be set aside. [p. 830, col. 1.]

Queen v. *Salamut Ali*, 23 W. R. Cr. 59; *Dasarath Mandal* v. *Emperor*, 34 C. 325; 5 Cr. L. J. 424, followed.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the Sessions Judge of Ganjam at Berhampur, in his letter No. 403, dated the 20th January 1917.

Mr. *P. R. Narayanaswamy Iyer*, for the Public Prosecutor on behalf of the Crown.

JUDGMENT.

ABDUR RAHIM, J.—The accused were tried on a charge under section 147 of the Indian Penal Code for being "members of an unlawful assembly and having in prosecution of the common object of such assembly, *viz.*, to enforce a right or supposed right to the barber's land in Sorobogodo Pubodo in Pattupur committed the offence of rioting at Pattupur" and were convicted of that offence by the Sub Magistrate. On appeal the Appellate Magistrate held that the charge under section 147 could not be sustained as he was unable to find that more than four persons were concerned in the occurrence but found the accused guilty of offences under sections 447 and 323 instead of the offence of rioting as found by the Trial Magistrate, and reduced the sentence from three months' to one month's rigorous imprisonment in the case of each accused. The learned Sessions Judge has referred the case to us for revision being of opinion that the Appellate Magistrate had no power to convict the accused under sections 447 and 323, offences with which they were not charged and for which they were never tried. I may mention that no appeal has been preferred by the Government against the acquittal of the accused with respect to the charge of rioting.

The point for consideration arises whether the convictions under sections 447 and 323 of the Indian Penal Code by an Appellate Court can be sustained by virtue of section 238 of the Code of Criminal Procedure. I am of opinion that they cannot. The common object of rioting as charged in the case was neither criminal trespass nor hurt nor any of the latter offences, a necessary ingredient of an offence under section 147 of the Indian Penal Code, so that it could not be said that the accused were charged with an offence "consisting of several particulars, a combination of some only of which constitutes a complete minor offence or that being so charged, facts have been proved which reduce it to a minor offence. The illustrations to section 238 show the class of cases comprehended by that section, and to convict the accused under sections 447 and 323 of the Indian Penal Code in this case would be to convict them of charges which they were never called upon to meet. The case of *Queen* v. *Salamut Ali* (1) is authority for the proposition that a man charged with rioting cannot be convicted of house trespass. Similarly in *Dasarath Mandal* v. *Emperor* (2) it was ruled that when certain accused persons were charged under sections 304 and 325 of the Indian Penal Code read with section 147 of the Indian Penal Code, that is, with offences of culpable homicide and grievous hurt as being members of an unlawful assembly in the prosecution of a common object of which those offences were committed, and the offence of unlawful assembly was not proved, they could not be convicted of an offence under section 323 of the Indian Penal Code with which they were not charged.

The conviction and sentence under sections 447 and 323 of the Indian Penal Code must, therefore, be set aside. There is, however, evidence which, if believed, would support these charges against the accused if they were properly tried. This order will not, therefore, prevent the Magistrate taking cognizance of a complaint or charge under sections 447 and 323 of the Indian Penal Code

NAPIER, J.—This case arises out of a disturbance that took place in a barber's main land in Pattupur village on the 27th June 1916. It arose out of a dispute as to the ownership of the land. The Karji reported to the Police that two parties

(1) 23 W. R. Cr. 59.
(2) 34 C. 325; 5 Cr. L. J. 424.

GORIE SANKER *v.* EMPEROR.

had gone to the land intending to fight there. Undoubtedly, the fight took place. Eleven persons who are charged in the present case were arrested by the Police on the spot and the persons belonging to the other party who are charged in the counter-case were likewise arrested at the same time. Thirteen sticks and two *khodnas* were seized from the accused party at the time. Seven persons received injuries and were sent to the medical officer one of the person so injured receiving twenty contused wounds and abrasions Both parties were charged and convicted of rioting by the second Class Magistrate of Aska town in Calendar Cases Nos. 47 and 48 of 1916. On appeal before the Deputy Magistrate, the accused in C. C. No. 48 of 1916 were acquitted on the ground that they exercised the right of self-defence, the Appellate Court being of opinion that the land was in their possession and the Magistrate obviously thinking that this finding was sufficient to dispose of the charge against them. Whether that view is correct or not, need not be considered here as there is no appeal by Government before us. With regard to the accused in Calendar Case No. 47 of 1916 the Magistrate, without giving any reasons for disbelieving the evidence of the Police Officer who says he arrested them on the spot, states that it is hard to say whether the accused other than Nos. 1, 2, 10 and 11 were really present or took any part in the affair, and so only convicts accused Nos. 1, 2, 10 and 11 who received injuries. He accordingly altered the conviction from one under section 147, Indian Penal Code, to one under sections 447 and 323, Indian Penal Code.

The Sessions Judge has now referred the case on the ground that the accused were not charged under those sections, and they having been acquitted of rioting, he is of opinion that the conviction should be set aside. There is, undoubtedly, authority for this position. But speaking for myself, I am not quite satisfied that the case does not fall within section 238, Criminal Procedure Code and that hurt is not a minor offence, the hurt being clearly proved in this case. As my learned brother takes a different view following the authorities, I will not press my doubts and I agree with my learned brother in the order proposed by him under which the matter can be further enquired into if thought necessary.

Petition allowed; conviction set aside.

V.R.P.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 83-B OF 1917.

June 1, 1917.

Present:—Mr. Justice Parlett.

GORIE SANKER—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 97, 99 (4)—Private defence, right of, extent of—Hurt, infliction of.

If two persons invade another's house in anger, the occupier is entitled forthwith to eject them and to use reasonable force for the purpose. He is not bound to leave them in his house and go off and complain to the authorities. His right of private defence extends to the causing of any harm other than death, subject to the restriction in section 99 of the Penal Code, which provides that only such harm should be inflicted as is necessary for the purpose of defence. [p. 831, col. 1.]

Review of the order of the Second Additional Magistrate, Rangoon, dated the 6th February 1917, passed in Criminal Trial No. 1631 of 1916.

Mr. *Vakharia*, for the Applicant.

ORDER.—The Magistrate has entirely disbelieved the complainant and his witnesses who say that the accused struck him three times with a stick in the street without provocation. He has held on the evidence that complainant and his father, Sheikh Sultan, entered accused's house; the door was shut and there was a struggle inside between accused and complainant in the course of which accused struck him on the head and on the shoulder, causing injuries amounting to simple hurt: apparently they might have been caused by a stick. The Magistrate appears to have held that complainant and his father took no weapon into the house.

He held that there was house trespass on the part of complainant and his son, but that accused had no right of private defence at all; just because he had time

to have recourse to the protection of the public authorities, and *secondly*, because he was under no reasonable apprehension of death or grievous hurt. For the first point he relies upon accused's own statement. Neither there nor elsewhere in the record I find any justification for this view, nor was any pointed out to me in the arguments. It appears to me quite obvious that if two persons invade another one's house, as it has been found that complainant and his father did here, the occupier is entitled forthwith to eject them and to use reasonable force for the purpose. It is idle to suggest that he should leave them in his house and go off and complain to the authorities: moreover, in the present case it is extremely doubtful if accused could have got out of the house sooner than he did. As to the second point it is true that accused's right of private defence did not extend to the length allowed by section 103, Indian Penal Code, namely, to the causing of death or of any other harm to the trespassers; but it did extend under section 104, Indian Penal Code, to the causing of any harm other than death, subject to the restriction in section 99 that it was limited to the inflicting of only such harm as was necessary for the purpose of defence. Here we have two men invading another's house, clearly in anger. A struggle ensues, in which he inflicted two simple injuries upon one of the trespassers. It appears to me that upon the findings of the Magistrate accused was acting within his right of private defence and was entitled to an acquittal. The conviction and sentence are reversed; accused is acquitted and the fine will be refunded to him.

Conviction set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 232 OF 1917.

June 27, 1917.

Present:— Mr. Justice Chapman.

MUSAN RAI—PETITIONER

versus

BIRICH ROY AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 439—Concurrent revisional jurisdiction of High Court and Sessions Judge—Practice.

If a remedy which is asked for in the High Court can also be obtained from the Sessions Judge, the High Court will decline to exercise jurisdiction unless there be special reasons to the contrary, and will relegate the party seeking relief to the lower Court. [p. 832, col. 1.]

Such is the established practice of the High Courts of Calcutta, Allahabad and Bombay, and should not ordinarily be departed from. [p. 831, col. 2; p. 832, col. 1.]

Criminal Revision against the order of dismissal of complaint under section 203, Criminal Procedure Code, dated 24th April 1917, passed by the Sudder Sub-Divisional Officer, Arrah.

FACTS appear from the judgment.

Mr. *Shiveshwar Dayal*, for the Respondent, took a preliminary objection that the application was not maintainable as it ought to have been in the first instance made before the Sessions Judge and he relied upon the following rulings: *Queen-Empress* v. *Reolah* (1), *Bhuyan Abdus Sobhan Khan, In re* (2), *Shafaqat Ullah* v. *Wali Ahmad Khan* (3), *Gullay* v. *Bakar Husain* (4) and *Queen-Empress* v. *Chagan Dayaram* (5).

Messrs. *Krishna Sahay* and *Nirsu Narayan Singh*, for the Petitioner, submitted that when the rule had been granted, it ought not to be thrown out on a technical ground.

[CHAPMAN, J.—It is not a purely technical ground. It is a matter of great convenience. Did the Judges granting the Rule know that you had not moved the Sessions Judge and did they knowinglygive you a Rule?]

This fact was not mentioned to them. In fact it did not strike any body.

JUDGMENT.—This is an application made to this Court under section 439 of the Code of Criminal Procedure in the matter of the dismissal of a complaint under section 203 of that Code by a Magistrate. It is conceded that the remedy which is asked for from this Court could also have been obtained from the Sessions Judge. Now it is the established practice of the High Courts of Calcutta, Allahabad and Bombay to decline to exercise the jurisdic-

(1) 14 C. 887; 7 Ind. Dec. (N. S.) 585.

(2) 2 Ind. Cas. 846; 13 C. W. N. 753; 36 C. 643; 10 Cr. L. J. 190.

(3) 30 A. 116; A. W. N. (1908) 25; 3 M. L. T. 124 7 Cr. L. J. 48.

(4) 28 A. 268; A. W. N. (1905) 279; 3 Cr. L. J. 53.

(5) 14 B. 331 at p. 342; 7 Ind. Dec. (N. S.) 681.

GOURI SANKER *v.* SHEIK SULTAN.

tion of this Court in cases in which the relief asked for can be given by a lower Court, that is to say the practice is one which is ordinarily followed unless there are special reasons for a departure from it. There are no special reasons in the present case. It is, however, contended that inasmuch as upon the first hearing of this application it was directed that notices should issue to the opposite party and that the record should be sent for, the rule of practice should be departed from and that I should dispose of the application. I do not think that that should be done. If it had been said that the omission to move the Sessions Judge had been mentioned to the learned Judges who directed that notices should issue, then I should consider myself bound by the exercise of their discretion and proceed to dispose of the application. The omission to move the Sessions Judge was not mentioned to the Judges in this particular case and there is, therefore, nothing to justify me in saying that they exercised their discretion in the matter. In these circumstances, I am of opinion that the rule of practice should be followed and that this application should be dismissed. It is, of course, open to the petitioner to move the Sessions Judge for a re-hearing of his complaints.

Application dismissed.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION NO. 85-B OF 1917.
June 1, 1917.
Present:—Mr. Justice Parlett.
GORIE SANKER—COMPLAINANT—APPPLICANT
versus
Sheik SULTAN AND ANOTHER— ACCUSED—RESPONDENTS

Penal Code (Act XLV of 1860), ss. 96, 97—Pricate defence, right of, extent of.

An act done in exercise of the right of private defence is not an offence (section 97 of the Penal Code) and does not, therefore, give rise to any right of private defence in return.

Revision against the order of the Second Additional Magistrate, Rangoon, dated the 9th February 1917, passed in Summary Trial No. 1645 of 1916.

Mr. *Vakharia*, for the Applicant.
Mr. *Bagram*, for the Respondents.

ORDER.—In this case Sheikh Sultan and his son Sheikh Ahmed have been convicted of house trespass and sentenced to imprisonment for what amounted to a few minutes. The complainant applies for an enhancement of sentence, and the accused have shown cause. The Magistrate has found that the accused entered the house to remonstrate with complainant over some damage done by his child and remained there with intent to annoy the complainant. A fight ensued but the Magistrate thought the accused's share in it was probably excused by the right of private defence, and as complainant caused simple hurt to Sheikh Ahmed he considered no further punishment of either accused was called for.

Now there is only a right of private defence at all against acts which are offences (section 97, Indian Penal Code). I have already held upon the findings in the criminal case of *Gorie Sanker* v. *Emperor* (1) that the assault upon Sheikh Ahmed was excused by the right of private defence, that is to say, that assault was not an offence, section 96, Indian Penal Code, consequently it could give rise to no right of private defence on the part of the accused. I am by no means satisfied that accused's intentions and actions when they entered the house were at all as specific as the Magistrate thought, and I consider his grounds for practically passing no sentence at all are not sound. I enhance the sentence upon each accused by the addition of a fine of Rs. 10 or in default one month's rigorous imprisonment, the fines if realised to be paid as compensation to Gauri Shanker.

Sentence enhanced.

(1) 41 Ind. Cas. 830.

SARAT CHANDRA ROY *v.* ABBAS ALI.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3275 OF 1915 AND 482 OF 1916.

May 25, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

SARAT CHANDRA ROY—PLAINTIFF—APPELLANT

versus

IN S. A. No. 3275 OF 1915

ABBAS ALI MONDAL—DEFENDANT—RESPONDENT.

IN S. A. No. 482 OF 1916

ABDUL GANI MONDAL—DEFENDANT—RESPONDENT.

Landlord and tenant—Construction of document—Rent payable partly in cash and partly in kind—Tenant's liability on failure to pay rent in kind—Res judicata.

Where a *patta* was granted fixing Rs. 6 as the annual cash rent and $5\frac{3}{4}$ *ari*s of paddy, the price of which was Rs. 11-8-0, as the paddy rent, in all Rs. 17-8-0, and the lease provided that upon the lessee keeping the boundaries of the land intact and paying cash rent in equal instalments as mentioned therein and delivering the paddy rent every year in the month of *Magh*, he, his sons, grandsons and heirs should continue to enjoy and possess the land in quiet happiness:

Held, that the tenant had not the option under the terms of the *patta* either to deliver the paddy or to pay the amount mentioned therein as its price but that in default of delivering the paddy he was liable to pay its market price. [p. 835, col. 2]

Cases like this turn on the words used in the lease, and there is no universal rule that if paddy is not delivered the tenant has the right to pay the amount mentioned for the paddy. [p. 834, col. 1.]

The fact that in a former suit between the parties the amount mentioned in the *patta* was taken as the basis of the amount of the rent payable in kind, cannot operate as *res judicata* in the subsequent suit. [p. 834, col. 2; p 835, col 1.]

Appeals against the decrees of the District Judge, 24 Perganahs, dated the 21st September 1915, affirming those of the Munsif, 1st Court, Barasat, dated the 11th September 1914 and 24th October 1914, respectively.

FACTS of the case appear from the judgment.

Babu *Amarendra Nath Bose*, for the Appellant:—These two appeals arise out of two suits brought by the plaintiff-appellant for the recovery of arrears of rent from the defendant-tenants. In the *patta* it was stipulated that the rent payable was to be paid partly in cash and partly in kind. There is no default clause in the *patta* or *kabuliyat*. The question for decision is what is the rate at which the price of the paddy is to be calculated. My submission is that the price of the paddy should be calculated at the rate of the market price of the paddy at the time of the institution of the suit for rent. See *Baneswar Mukherji* v. *Umesh Chandra Chakrabarti* (1) and *Basiruddin Baiddy* v. *Hari Mohan Ghose* (2).

Maulvi *A. K. Fuzlul Huq*, for the Respondent:—The question as to what amount should be paid by the tenants as the price of the paddy depends upon the wording of the lease. The lease provides that if the tenants do not deliver the rice they would pay only Rs. 11-8-0 to the landlord. The contention on behalf of the appellant that the value of the rice is to be calculated at its market price at the time of the institution of the suit has no foundation. The lease provides that so much amount is to be paid if the rice is not delivered. The landlord cannot claim anything more than that. If that were not so, why was the amount of Rs. 11-8-0 specifically stated in the lease?

JUDGMENT.

FLETCHER, J.—These two appeals are preferred by the plaintiff against a judgment of the learned District Judge of the 24-Perganahs, dated the 21st September 1915, affirming the decisions of the Munsif of Barasat. The suits out of which the present appeals arise were brought for rent under the terms of two leases, and the only question that arises in these appeals is with reference to the portion of the rent that was reserved to be paid in kind. The *kabuliyats*,* although in similar

**Maurasi Mukarari Patta* IN S. A. 482 OF 1916.

In favour of Sri Hanif Mandal, father late Taibulla Mandal of Goakhali, *Thana* Baraset, by caste Musalman, occupation cultivation.

Executed by Sri Sarat Chandra Roy, father late Iswar Chandra Roy of Chandigarh, *Thana* Baraset, by caste *Brahmin*, occupation service, etc.

For the 1 *bigha* 9 *cottas* and 1 *chittak* of land which has been in your *jote* and possession from before and which is the half of the 2 *bighas* 18 *cottas* and 2 *chittaks* of land described in the following schedule in five plots and which is situated in *Mouza* Kadambagachi under the Baraset Sub-registry and *Thana* in the district of 24 Pergannas, and which belongs to my purchased *maurasi mukarari ganti*

(1) 7 Ind. Cas. 875; 37 C. 626.
(2) 39 Ind. Cas. 720.

terms, were not in identical terms. The first lease stated that the *patta* was granted fixing "Rs. 6 as the annual cash rent and $5\frac{3}{4}$ *aris* of paddy whose price was Rs. 11-8-0 as paddy rent; in all Rs. 17-8-0. Then the lease provided that, upon the lessee keeping the boundaries of the land intact and paying cash rent in equal instalments as mentioned therein and delivering the paddy rent every year in the month of *Magh*, he, his sons, grandsons and heirs should continue to enjoy and possess the land in quiet happiness. Nothing was said in that lease as to the lessee having a right to pay an amount of cash in lieu of the paddy rent. Each of these cases turns on the words used in the lease. There is no universal rule that, if rice is not delivered, the tenant has the right to pay the amount mentioned for the paddy. It must depend on the words used in the lease and, in the first of these two cases the words "whose price is" mean "the present price of which is." There is nothing in the wording of this *patta* which would entitle the tenant to hand over to the landlord the sum of Rs. 11-8-0 in lieu of the rice. I think the present case is exactly on all fours with the case of *Baneswar Mukherji* v. *Umesh Chandra Chakrabarti* (1). In the other cases cited by Mr. Fuzlul Haq in support of his argument reported in the Calcutta Weekly Notes, the terms of the leases are not given in the reports and it is quite clear that the Court arrived at the conclusion in those cases that the tenants had an absolute right under the terms of the leases either to deliver the rice or to pay to the landlords the sums of money mentioned in the *kabuliyats*. In the present cases, I do not think the tenant had any such right.

The second case is a stronger case, because it states that the present market price of the paddy payable is Rs. 2-8-0. That obviously was not put in for fixing the rate that the tenant had the right to pay in default of handing over the rice. In this second case, another point has been urged that, in a former suit, the amount mentioned in the *patta* was taken as the basis of the amount of rent payable in

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jama, I grant you *maurasi mukarari patta* fixing Rs. 2-12-0 as the annual cash rent and $1\frac{1}{4}$ *ari* of paddy, whose price according to the present market rate is Rs. 2-8-0, as the annual paddy rent, in all Rs. 5-4-0 as the total rent, and taking Rs 5 as the *selami*. By keeping the boundary of the land intact as before, paying the cash rent in equal instalments every year in the months of *Bhadra* and *Pous* and delivering the paddy rent in one instalment in the month of *Magh* measuring the same in 5 seers *doan* and reaching the same at my house at your own cost and taking receipts for the cash rent and paddy rent, you, your sons, grandsons and heirs continue to enjoy and possess the same by living there, or by making gardens or digging tanks, by planting trees or by cutting down trees, by erecting buildings or by making bricks or reaping any crops that you like, being possessed of the right to sell or make a gift of the same. No abatement or increment of the fixed rent will ever be allowed. Plea of payment without receipt will never be allowed. On failure to pay any instalment of the rent you will have to pay interest at the rate of half-anna per rupee per month. In addition you will pay all taxes that are now imposed or will in future be imposed by Government. In these terms I grant you *maurasi mukarari patta*. Dated 15th *Kartick* 1305, 31st October 1898.

Maurasi Mukarari Patta IN S. A. No. 3275 OF 1915.

(To) Sri Sonaulla Mandal, father late Joki Mandal of Goakhali, *Thana* Baraset, by caste Musalman, occupation cultivation and land-holding.

Executed by Sri Sarat Chandra Roy, father late Iswar Chandra Roy of Chandigarh, *Thana* Baraset, by caste *Brahmin*, occupation service, etc.

For $6\frac{1}{4}$ *bighas* of land described by boundaries in the following schedule and situated in the village Kadambagachi under Baraset Sub-registry and *Thana* in the district of 24-Pergannas and within my purchased *maurasi mukarari ganti jama*, I am granting you *maurasi mukarari patta* fixing Rs. 6 as the annual cash rent and $5\frac{3}{4}$ *aris* of paddy, whose price is Rs. 11-8-0, as the paddy rent, in all Rs. 17-8-0 as the rent and taking Rs. 5 as the *selami*. Keeping the boundary of the land intact as before, paying the cash rent in equal instalments every year in the months of *Bhadra* and *Pous* and delivering the paddy rent every year in the month of *Magh* in one instalment measuring it in 5 seers *doan* and reaching it at your own cost and taking receipts, you, your sons, grandsons and heirs continue to enjoy and possess the said land in great happiness by living there or making gardens, digging tanks, planting trees or cutting down trees, making bricks or erecting buildings or reaping any crops that you like. No abatement or increment in the fixed land or rent will ever be recognized. Plea of payment without receipt will not be recognized. On failure to pay any instalment you will have to pay interest at the rate of half-anna per month per rupee. You will also pay in addition all taxes which are now imposed or in future will be imposed. Let it be further stated that this land has been in your *jote* and possession from before. In these terms I grant this *maurasi makarari patta*. Dated 15th *Kartick* 1305, 31st October 1898.

kind. That clearly is not a case of *res judicata* and not conclusive in this suit. The second point is that the Munsif thinks that the present price of rice is not greater than the amount mentioned in the *patta* as the value of the paddy payable and that, therefore, the amount due must be sufficient to meet the landlord's claim. But the point was not enquired into by the learned Judge of the Court of Appeal below and, if, in fact, the amount mentioned in the *patta* as the value of the paddy payable be sufficient to compensate the landlord as regards the paddy when default is made, of course, the landlord is not entitled to get anything more. All that we can say in the present cases is that the result arrived at by the learned District Judge on the construction of the leases is wrong and the cases must go back to the lower Appellate Court for the re-hearing on the footing that the tenants had not the right under the terms of the *pattas* either to deliver the rice or to pay the amounts mentioned therein. Costs will abide the result of the re-hearing by the learned District Judge.

NEWBOULD, J.—I agree.

Cases sent back.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 17 OF 1916.
June 11, 1917.
Present:—Mr. Justice Piggott and
Mr. Justice Walsh.
PURAN MAL AND OTHERS—DEFENDANTS—APPELLANTS
versus
BRIJ LAL—PLAINTIFF—RESPONDENT.

Partition—Trust—Temple—Right of management and superintendence—Suit for partition, maintainability of.

A suit for the partition of the right of management and superintendence in respect of property with regard to which none of the parties claim to have any personal pecuniary interest, *e.g.*, the property of a temple, is not maintainable. [p 836, col. 2.]

Sri Raman Lalji Maharaj v. *Sri Gopal Lalji Maharaj*, 19 A. 428; A. W. N. (1897) 103; 9 Ind. Dec. (N. S.) 276, followed.

First appeal from a decree of the Subordinate Judge, Muttra.

Mr. *Muhammad Yusuf*, for the Appellants.

Mr. *A. H. C. Hamilton*, for the Respondent.

JUDGMENT.—In this case Brij Lal sued his father Puran Mal and his brothers Budhua and Ram Chandar for partition. There were two schedules appended to the plaint. Schedule A purports to specify the property belonging to the joint family of which the parties are members. Schedule B is a list of property belonging to the deity (Sri Thakur Ganeshji Maharaj) as worshipped in a certain shrine in the district of Muttra, and in paragraph 4 of the plaint it is stated that the joint family of the parties has a right to perform worship at the temple aforesaid and to look after the property belonging to the said temple and entered in Schedule B. The relief sought, therefore, with regard to this property was a declaration that the plaintiff was entitled to perform worship at and manage the temple of Sri Thakur Ganeshji Maharaj and the property thereof to the extent of his one-fourth share by turns. The suit was contested on varius grounds and it may be noted at once that to a considerable extent the suit has failed even on the decree passed by the Court below. For instance the first three items specified in Schedule A consist of properties situated outside the limits of British India, and with regard to these the Court below has dismissed the plaintiff's suit, not upon a finding that they were not the joint family property of the parties, but upon a finding that the Court has no jurisdiction to partition property outside British India. Then again, with regard to most of the moveable properties specified in Schedule A, the plaintiff's suit has in substance been dismissed upon a finding that there is no satisfactory evidence as to the existence of the properties in question in the hands of the defendants, so that as far as the property in list A is concerned the suit has been decreed in respect of two items only. One is described as a grant of Rs. 25 a year made by the Kashipur State. The decree declares the plaintiff's right to receive one-fourth of this grant. Another part of the decree declares the plaintiff to be entitled to one-fourth share in certain books known as *birt jajmani bahis*, which are, as a matter of fact, books containing lists of the names of clients

who visit this temple and employ the se vices of members of this family for religious purposes. The decree of the Court below gives the plaintiff a right to one-fourth of the income derived by the joint family from this source, that is to say, from the offerings made by the pilgrims visiting the shrine. It purports to enforce the plaintiff's right by making over to him one-fourth of the *birt jajmani bahis*. This is a point which may perhaps be considered further when the final decree for partition comes to be prepared. It must, however, be pointed out at once that, although the appeal before us purports to be an appeal against the whole decree of the Court below, it can scarcely be said that any of the pl as taken definitely challenges any portion of the decree dealing with the property specified in Schedule A. At any rate, after hearing the arguments in support of the appeal, we are satisfied that no cause has been shown for modifying that portion of the decree. Although the written statement of the defendant did not in exp·ess terms admit the grant made by the Kashipur State and the income derived from the religious offerings of pilgrims to the shrine to be the property of the joint family and divisible as such, it by implication admitted this and the defendant Puran Mal did so more definitely in his statement when examined by the Court. He there tried to make out that he was taking no share in the *birt jajmani* offerings which his sons were, as a matter of fact, dividing amongst themselves. At any rate, so far as this appeal purports to be directed against that portion of the decree of the Court below, it cannot be seriously supported.

The real dispute in this Court, as in the Court below, is as to the property shown in Schedule B. Now that schodule contains four items. The first of these is the temple itself, and the fourth refers to certain utensils and cloths appertaining to the worship of the idol. These at any rate are properties in respect of which it cannot be suggested that the trustees or managers of the shrine had any personal pecuniary interest.

There remain only two items, one of which is a grove appertaining to the temple. It is not suggested in the plaint that any particular income is derived from this grove, although it may, of course, be used for the accommodation of pilgrims visiting the shrine. Therefore, substantially, this item of property stands on the same footing as the other two.

There remains then in Schedule B one item only, and this is a certain rent-free property in village Muraisi in the Muttra district, which is alleged to yield an annual profit of Rs. 1,765. Now if this income is shown to belong to the members of the joint family, in this sense that it forms their remuneration for looking after the shrine of Sri Thakur Ganeshji Maharaj and performing priestly services in connection therewith, then there seems to be no reason why this item of property should not have been included in list A and partition thereof claimed on the same footing. On the contrary in the plaint itself a clear distinction is drawn between this item of property and the other properties already referred to. The property in village Muraisi is specified in the plaint as belonging to the deity to which the temple is dedicated and there is no suggestion that the plaintiff claims to be entitled to a share in the enjoyment of its income. What the plaintiff says he wants is a share in the right to perform worship at the temple and to look after the property belonging to the said temple entered in Schedule B. On the pleadings, therefore, the list B property seems to come within the principle laid down by this Court in *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj* (1) and the suit becomes, to this extent, merely a claim for the partition of the right of management and superintendence in respect of property with regard to which none of the parties claim to have any personal pecuniary interest. In the case above referred to, it was held by this Court that such a suit is not maintainable. That decision has been discussed in more than one subsequent case in the Madras High Court; it is sufficient to refer to the case of *Ramanathan Chetty* v. *Murugappa Chetty* (2), in which the decision of the High Court was subsequently affirmed by the Privy Council on appeal, *vide Rama-*

(1) 19 A. 428; A. W. N. (1897) 103; 9 Ind. Dec. (N. S.) 276.
(2) 27 M. 192; 13 M. L. J. 341.

nathan Chetti v. *Murugappa Chetti* (3). In that case the principle laid down by the Allahabad High Court was discussed and approved of so far as it went. No doubt there is a certain difficulty about the present case, in which the claim for partition is composite, one portion of it dealing with property admitted to be the property of the joint family and not of the temple although some of it, not all of it, is obviously connected with the rights of the joint family as managers of the temple. The suit, however, can only be dealt with on the basis on which it has been brought and the claim, so far as the right of superintendence and management of the Schedule B property is concerned, is covered by the decision of this Court already referred to. I hold, therefore, that this appeal should be allowed to this extent, that the following words be removed from the decree of the Court below: "*a preliminary decree for managing the temple of Ganeshji and other property appertaining thereto specified in list B attached to the plaint one year in every four years.*" These words must be struck out and in place of these words the decree of the Court below should read, "as well as to one fourth of the property specified in list A at No. 4, namely, the grant made by the Kashipur State," and after these words the words, "*be also passed in the plaintiff's favour*" must be struck out and in the latter part of the decree the words "*and the years in which the plaintiff is to manage the temple*" will also be deleted. We leave undisturbed the order of the Court below as to the costs in that Court, and as regards the costs of this appeal we direct that the plaintiff-respondent do bear his own costs and half of the costs of the defendants-appellants.

Decree modified.

(3) 29 M. 283; 10 C. W. N. 825; 33 I. A. 139; 1 M. L. T. 327; 3 A. L. J. 707; 4 C. L. J. 189; 16 M. L. J. 265; 8 Bom. L. R. 498 (P. C.).

CALCUTTA HIGH COURT.

RULE *Nisi* No. 889 OF 1916.

April 25, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

NORENDRA NATH KUMAR AND ANOTHER —PLAINTIFFS—PETITIONERS

versus

ATUL CHANDRA BANDOPADHYA AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Bengal Tenancy Act (*VIII B. C. of* 1885), *s.* 148 *A*, *suit under, by co-*shebait, *maintainability of—Co-*shebaits, *whether co-sharers in* debutter *property—Trustees, joint, powers of.*

Co-*shebaits* are not co-sharers, but co-worshippers, and a family arrangement arrived at between them cannot entitle them to treat the *debutter* property as their personal property and to sue personally for their share of the rent payable to the idol. Therefore a co *shebait* cannot maintain a suit under section 148A, Bengal Tenancy Act, for the recovery of a share of the rent of the *debutter* property on the ground that by an amicable arrangement arrived at between him and his co-*shebaits*, he is interested in the *debutter* property to the extent of that share, and the other *shebaits*, who have been joined as *pro forma* defendants in the suit, in the remainder. [p. 838, col. 2.]

Joint *shebaits* are for many purposes joint trustees. [p. 838, col. 2.]

Ordinarily all the trustees should be co-plaintiffs and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being joined as plaintiffs. [p. 838, col. 2.]

Where the administration of a trust is vested in several trustees, they all form, as it were, but one collective trustee, and they must exercise the powers of their office in their joint capacity, and not separately. [p. 838, col. 2.]

Rule against the order of the Sub-Judge, first Court, Hooghly, in Rent Appeal No. 52 of 1915.

FACTS of the case appear from the judgment.

Babu *Mohesh Chandra Banerjee* for Babu *Jyotish Chandra Hazra*, for the Petitioners.—The Subordinate Judge was wrong in holding that the suit by the petitioners for the recovery of one-fourth share of the rent was not maintainable. The *pro forma* defendants who are co-*shebaits* not having joined with the plaintiffs in suing for the recovery of the rent of the *debutter* property, the plaintiffs alone brought this suit under section 148A, Bengal Tenancy Act, for the recovery of one-fourth share of rent payable by the tenants, as by amicable arrangement between the plaintiffs and the defendants, the plaint-

iffs are to recover one-fourth share of the rent, and the *pro forma* defendants the remaining three-fourths. The learned Subordinate Judge should have held that the suit as framed was competent because of the amicable arrangement between the parties, and it is by reason of that amicable arrangement that the plaintiffs are not in a position to sue for the entire rent.

Babu *Sasadhar Roy, I,* for the Opposite Party.—The Subordinate Judge rightly held that the suit was not competent because co-*shebaits* are not co-owners and they cannot treat the property as their personal property. Hence section 148A, Bengal Tenancy Act, has no application. Some co-*shebaits* can sue for the entire rent where the others refuse to join—see *Pyari Mohun Bose* v. *Kedarnath Roy* (1). As regards suits by *shebaits* and co-*shebaits*, see *Kokilasari Dasi* v. *Mohunt Rudranand Goswami* (2), *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (3), *Abdul Gafur Mandal* v. *Uma Kanta Pandit* (4). The amicable arrangement referred to in support of the plaintiffs' case is a nullity. Hence the plaintiffs cannot claim to recover one-fourth share of the rent from the tenants-defendants because they cannot be regarded as being interested in the *debutter* property to the extent of its one-fourth share.

Babu *Mohesh Chandra Banerjee* replied.

JUDGMENT.—This Rule raises the question, whether the Trial Court refused to exercise a jurisdiction vested in it by law, when it dismissed the claim on the ground that the suit was not properly constituted and could not be entertained. The plaintiffs and the *pro forma* defendants are joint *shebaits* of the property dedicated to an idol Damodar Jeo Thakur. The principal defendants are the tenants in occupation of the land. The plaintiffs instituted this suit under section 148A of the Bengal Tenancy Act for recovery of one-fourth share of the rent payable by the tenant defendants, on the allegation that they were interested to the extent of one-fourth in the dedicated property while the *pro forma* defendants were interested to the extent of three-fourths. The Court of first instance held that the suit as framed was not maintainable, and that view has been affirmed on appeal by the Subordinate Judge. The Subordinate Judge observes that the *shebaits* are not co-sharers but co-worshippers, and any family arrangement at which they may have arrived amongst themselves cannot entitle them to treat the *debutter* property as personal property and to sue personally for their share of the rent payable to the idol. He further holds that section 148A of the Bengal Tenancy Act contemplates the case of a co-sharer landlord who is entitled to sue for his share of the rent separately, and, consequently, cannot be applied to co-*shebaits* who have no personal interest in the *debutter* property and merely represent the idol for secular purposes. We are of opinion that the view taken by the Subordinate Judge in concurrence with the Court of first instance is well-founded on principle.

The true position of a co-*shebait* was explained by this Court in the case of *Kokilasari Dasi* v. *Mohunt Rudranand Goswami* (2). Where property belonging to an endowment is sought to be recovered from a third party who asserts that he is the owner thereof, all the trustees of the endowment should be made parties to the suit. Ordinarily all the trustees should be co-plaintiffs and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being plaintiffs. Where the administration of the trust is vested in several trustees, they all form, as it were, but one collective trustee, and they must exercise the powers of their office in their joint capacity. Their interest and authority being equal and undivided, they cannot act separately, but all must join. This principle in no way contravenes the decision of the Judicial Committee in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (3) and was applied to a suit for enhancement of rent in *Abdul Gafur Mandal* v. *Uma Kanta Pandit* (4), where it was pointed out that joint *shebaits* are for many purposes joint trustees. The same principle was recognized in *Kumban* v. *Moorthi* (5). In the case before us, it is

(1) 26 C. 409; 3 C. W. N. 271; 13 Ind Dec. (N. S.) 864.

(2) 5 C. L. J. 527.

(3) 32 C. 129; 31 I. A. 203; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).

(4) 24 Ind. Cas. 266; 19 C. W. N. 260.

(5) 7 Ind. Cas. 422; 8 M. L. T. 208; (1910) M. W. N. 359; 20 M. L. J. 951; 34 M. 496.

impossible for the plaintiffs to maintain the position that they have an interest in the land to the extent of one-fourth share and that on that basis they are entitled to collect one-fourth share of the rent from the tenant defendants. If the *pro forma* defendants declined to join with the plaintiffs in the institution of this suit, the proper course for the plaintiffs was to institute a suit for recovery of the entire arrears due. *Luke* v. *South Kensington Hotel Co.* (6). That a suit of this description is maintainable is clear from the decision of a Full Bench of this Court in *Pyari Mohun Bose* v. *Kedarnath Roy* (1). The plaintiffs are clearly not entitled to maintain a suit for one-fourth share of the rent and the Court below has correctly held that the suit as framed is not maintainable.

The result is that this Rule is discharged with costs. We assess the hearing fee at one gold *mohur*.

Rule discharged.

(6) (1879) 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W. R. 514.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 615 OF 1916.

June 29, 1917.

Present:—Mr. Justice Piggott and Mr. Justice Ryves.

LACHHMI NARAIN—DEFENDANT—APPELLANT

versus

SAJJADI BEGAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Annuity reserved for mortgagor—Equity of redemption, acquisition of, by mortgagee, effect of—Liability to pay annuity.

An annuity was reserved to be payable to the mortgagor under a mortgage. Subsequently the equity of redemption was sold by various auction sales, and finally the whole of it was acquired by the mortgagee:

Held, that the acquisition of the equity of redemption by the mortgagee did not extinguish the right of the mortgagor to receive the annuity reserved under the mortgage. [p. 842, cols. 1 & 2.]

Second appeal from a decree of the Additional Judge, Farrukhabad.

The Hon'ble Mr. *Motilal Nehru* and Mr. *Panna Lal*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *S. A. Haidar*, for the Respondents.

JUDGMENT.—In this case the plaintiffs came into Court as the heirs of one *Musammat* Turab-un-nissa. They claimed to recover from the defendant a certain sum of money as arrears of annuity, or *malikana* charge, alleged to be payable by the defendant as the successor-in-interest of the mortgagee under a certain mortgage-deed of December the 1st, 1870. The defendant resisted the claim on three grounds, with two of which we are no longer concerned. He said that one Bismilla Begam was a necessary party to the suit and also put the plaintiffs to proof of their title as heirs of Turab-un-nissa. These two points have been concluded against him. His third plea was to the effect that under a series of sale-deeds, beginning with the 3rd of November 1912 and ending with the 16th of November 1913, he had himself become the owner of the equity of redemption under the mortgage deed of December the 1st, 1870. He contended that the liability sought to be enforced against him attached to him only so long as he was in possession of the land as mortgagee and ceased from the date of his complete acquisition of the equity of redemption. The learned Munsif tried the case on issues appropriately framed, but soon found himself involved, as we ourselves have done, in certain questions as to the effect of the results of previous litigation on the position of the parties to the present suit. However, he came to the conclusion that there had been no previous decision, binding upon the parties, which prevented the defendant from asserting that his liability to pay this annuity came to an end from the date on which he completely acquired the equity of redemption. He then went on to hold that this plea, open to the defendant, was a good one in fact and in law. He held that there had been a complete merger of the interests of the mortgagor and mortgagee under the deed of December the 1st, 1870, and that all liability on account of this annuity came to an end from the date of such merger. He framed his decree accordingly, allowing a part of the claim of the plaintiffs and dismissing the rest.

The plaintiffs went in appeal to the Court of the District Judge. We have not found it at all easy to determine what the District Judge is to be understood as

having decided. He certainly has not dealt with the difficult question of law which arises on the first Court's finding that the equity of redemption under the mortgage of December the 1st, 1870, had been completely acquired by the defendant. Indeed he purports to reverse that finding. He says in so many words that the defendant has not purchased the whole of the equity of redemption; and, in another portion of his judgment, that some part of the mortgagor's equity of redemption is still with the plaintiffs. If we felt able to treat these expressions of opinion by the learned District Judge as clear findings of fact, we should have to accept them as decisive of this suit. It seems to us, however, that they proceed in part upon an erroneous view of the effect of a particular finding recorded in a suit between *Musammat* Turab-un-nissa and the present defendant, to which we shall have to refer at greater length. In part also they are based upon certain arguments as to an apparent discrepancy between the area shown in the two documents of title produced by the defendant with regard to that portion of the mortgaged property which is situated in a village called Dhelawal. These arguments we find ourselves quite unable to follow; indeed the learned Advocate for the respondents could only suggest that there must be some clerical error, either in the judgment of the learned District Judge, or in the documents referred to by him. We are not prepared, therefore, to deal with the case on this basis, that the appeal of the defendant is concluded by any finding of fact recorded by the lower Appellate Court. The judgment of that Court has not, as a matter of fact, been supported before us on the grounds on which it proceeds. We have, however, been asked to hold that, in any case, the decision of the Court of first instance, according to which the liability of the defendant in respect of the annuity claimed came to an end on the 16th of November 1913, is unsustainable upon legal grounds, in view of the results of the previous litigation in which these same parties had been concerned. We feel that this is substantially the point with which we have to deal.

The mortgage of December, the 1st, 1870, containing curious provisions as to the reservation of an annuity in favour of the mortgagor Maujud Ali Shah and his wife Abadi Begum, was eminently calculated to lead to misunderstanding and litigation between the parties concerned. The records of this Court show that it has had that result. What we are concerned with at present is a suit instituted in the year 1909 by *Musammat* Turab-un-nissa, the predecessor-in-title of the present plaintiffs. That was a suit against the same defendant who is now the appellant before us, and it is not denied that whatever was decided in that litigation is binding upon the parties to the present suit. *Musammat* Turab-un-nissa claimed to be entitled to recover from this defendant, as mortgagee in possession of the property referred to in the deed of December the 1st, 1870, a large sum of money on account of the arrears of the annuity thereby reserved. Her claim was based upon the allegation that she was the heir of the original mortgagor Maujud Ali Shah. The allegation was contested, but was finally decided in her favour after an order of remand by this Court. The principal defence to that suit was that the proprietary rights of Maujud Ali Shah in all the lands affected by the mortgage in question had been sold at successive auction sales in execution of decrees. It was contended that, inasmuch as no portion of the equity of redemption in the mortgaged property remained vested in Maujud Ali Shah, or in *Musammat* Turab-un-nissa as his heir, it followed that no claim on account of this annuity or *malikana* allowance was maintainable by the then plaintiff. This point was dealt with by the learned Subordinate Judge who first decided that case on the 16th of December 1909, and whose judgment is on the record now before us. The 7th issue framed by him was, "whether the equity of redemption has been sold? If so, what is its effect?" On this he found, to begin with, that only a portion of the equity of redemption had been sold. He then went on to say, referring to certain previous litigation which had taken place between the present defendant on the one side and the auction-purchaser of

a portion of the equity of redemption on the other, that the right to receive this allowance was not saleable and could not have passed to the auction-purchasers at any of the auction-sales. He decreed *Musammat* Turab-un-nissa's claim as brought. There was an appeal to the Court of the District Judge and the judgment of that Court is dated September the 12th, 1910. It is clear that before the District Judge the defendant then took the point that the whole of the equity of redemption in the mortgaged property had, as a matter of fact, been sold and no longer belonged to Maujud Ali Shah or his heirs, and from this allegation of fact asked the Court to draw the conclusion that *Musammat* Turab-un-nissa, as heir of Maujud Ali Shah, had no right to claim any portion of this annuity. The learned District Judge dealt with this plea on the assumption that the whole of the equity of redemption had as a matter of fact been sold prior to the institution of that suit. There has been some argument before us as to whether his remarks on this point can be treated as representing admissions made by both the parties at the hearing of the appeal, or findings of fact binding upon the parties. It was certainly the case for the present defendant, both in the suit brought by *Musammat* Turab-un-nissa and in the present suit, that the proprietary rights of Maujud Ali Shah in respect of all the property which formed the subject-matter of the mortgage of December the 1st, 1870, had been put up for sale in successive execution proceedings and had entirely passed into the hands of various auction-purchasers. In the case now before us the learned Munsif has found that this is what had taken place, and he gives certain dates according to which the last fragment of his proprietary rights in the mortgaged property passed from the hands of Maujud Ali Shah at an auction-sale which took place on the 3rd of January 1873. It does not seem to us that this finding of fact was seriously challenged in the appeal before the District Judge, and in any case we think that the present defendant at any rate has no ground for complaint if we assume the truth to be what we think it actually was, namely, that the proprietary rights of Maujud Ali Shah had been entirely sold up and had passed into the hands of various auction-purchasers long before *Musammat* Turab-un-nissa instituted her suit in the year 1909.

To return now to the finding of the District Judge in that suit; he starts, as we have said, with the assumption that "the mortgagor's equity of redemption" had been entirely sold away before the institution of that suit. He goes on to hold, however, that the right to receive the annuity, or *malikana* allowance, was a thing quite distinct from the equity of redemption strictly so called, that is to say, from the proprietary rights of Maujud Ali Shah in the mortgaged land. He holds that this allowance sought to be charged on the mortgaged property went with the land, so that the defendant, as successor of the transferee of the rights of the original mortgagee, was liable to pay it. He holds, further, that the right to receive this allowance was not saleable and as a matter of fact had never been put up for sale at any of the auction-sales held in execution against Maujud Ali Shah, in the course of which his proprietary rights had passed to various auction-purchasers. On this finding amongst others he based his decision dismissing the defendant's appeal and affirming the decree of the first Court in favour of *Musammat* Turab-un-nissa. The defendant came in second appeal to this Court, and the result is to be found in *Lachhmi Narain* v. *Turab-un-nissa* (1). A perusal of that judgment will show that the finding of the District Judge that the proprietary rights of Maujud Ali Shah had entirely passed to certain auction purchasers was not challenged, nor was any plea argued against the decision of the District Judge that the mere sale of the proprietary rights passed no title to the auction-purchasers to receive the *malikana* allowance and that the right to receive this allowance still inured in favour of the heirs of Maujud Ali Shah. A question of limitation was raised which found favour with this Court, to this extent that the sum decreed in favour of the plaintiff was considerably reduced.

A plea was also taken that the position of *Musammat* Turab-un-nissa as heir of Maujud Ali Shah was not satisfactorily established by the decision of the Courts below. An issue was remitted upon this

(1) 14 Ind. Cas. 505; 9 A. L. J. 297; 34 A. 246.

point, resulting in a finding in the plaintiff's favour. This Court thereupon decreed *Musammat* Turab-un-nissa's claim to such extent as it found to be unaffected by the Statute of Limitation. In view of the result of this litigation it is not open to us to go back to the beginning of things and examine the question of the precise nature of the rights which the mortgagor Maujud Ali Shah reserved to himself under the deed of December the 1st, 1870 We may note in passing, as one of the relevant facts of the case, that in the year 1881 the question was raised by an auction purchaser of a portion of Maujud Ali Shah's proprietary rights as to whether he himself, as such purchaser, was not entitled to receive from the mortgagee in question a proportionate share of the *malikana* allowance. This claim was resisted by the father of the present defendant, and was decided against the auction-purchaser by a judgment of November the 8th, 1881, which is on this record. This fact shows that the decision arrived at in the litigation of 1909 to 1911 in favour of *Musammat* Turab-un-nissa was not a new thing, but was as a matter of fact an affirmation of the position which the defendant had himself previously taken up. We must take it now as decided finally *inter partes*, as the result of the suit brought by *Musammat* Turab-un-nissa, that the auction-purchasers at the various sales, in the course of which different portions of Maujud Ali Shah's proprietary rights in the mortgaged property were put up to sale, did not by their auction-purchase acquire any portion of the right to receive the annuity or *malikana* allowance now in suit.

The final question which we have to determine now is whether the position has been altered by the fact that, since the final decree in favour of *Musammat* Turab-un-nissa, the present defendant has been round to the various auction-purchasers of Maujud Ali Shah's proprietary rights and has acquired from them, under a series of sale-deeds, whatever rights they themselves took by their auction-purchase. It seems to us impossible to hold that this circumstance distinguishes the position of the present plaintiffs from that of *Musammat* Turab un-nissa, so as to free the defendant from his liability. However anomalous the result may appear, and whatever arguments might be put forward against the soundness of that position, it has been definitely settled between the parties that in the year 1911 there were three distinct sets of persons who possessed rights in respect of the land dealt with by the mortgage-deed of December the 1st, 1870: (1) There was the present defendant, in possession as mortgagee. (2) There were a number of auction-purchasers who had acquired piecemeal the proprietary rights of Maujud Ali Shah in the different items making up the mortgaged property. (3) There were the heirs of Maujud Ali Shah entitled to receive an annuity or *malikana* allowance out of the income of the property in question. It is impossible to hold that a merger of the rights of the first and second of these categories of persons automatically extinguished the rights of the 3rd. There has been no complete merger in the person of the present defendant of all the rights created by the mortgage-deed of December the 1st, 1870: and until such complete merger has taken place, the heirs of Maujud Ali Shah are entitled to maintain their claim for this allowance, payable out of the profits of the mortgaged property by the person in possession and enjoyment of the same. The result is that this appeal fails and we dismiss it with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 21 OF 1915.

May 31, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

SHEIKH YAKUB AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TAZIMUDDI MULLICK AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 102—Appeal, second—Mesne profits, suit for, coupled with prayer for declaration—Suit, form of—Plaint, statement of claim in—Court, whether bound by technicalities.

A Court should not be bound by any technicalities with regard to the form of the statement of claim in a plaint. [p. 844, col. 2.]

SHEIKH YAKUB *v.* TAZIMUDDI MULLICK.

Plaintiffs brought a suit asking for a declaration of their title to, and confirmation of possession of, a plot of land and also for a sum of Rs. 49-8-0 by way of mesne profits; in the alternative they claimed that if it be adjudged by the Court that they had been dispossessed or were not in possession, after the institution of the suit, a decree might be passed for *khas* possession. It appeared that the amount claimed as mesne profits was made up of the amount which was awarded against the plaintiffs in a previous Small Cause Court suit by the defendants on the ground that the plaintiffs had deprived the defendants of the crops grown on the land in suit in the previous year:

Held, (1) that a decree for mesne profits could be made in the suit inasmuch as there was an alternative claim for possession; [p. 844, col. 2.]

(2) that a second appeal lay against the decree of the lower Appellate Court disallowing mesne profits, inasmuch as the suit, being one for a declaration of title to land, was not cognizable by a Small Cause Court. [p. 844, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Mullick, dated the 28th January 1915, in Appeal from Appellate Decree No. 3634 of 1910, against the decree of the Officiating Additional Subordinate Judge, Faridpur, modifying that of the Munsif, 1st Court, Bhanga, dated the 5th August 1909.

FACTS appear from the following judgment of

MULLICK, J.—The Munsif decreed the plaintiffs' suit for declaration of title, for confirmation of possession and for mesne profits in respect of the year 1907 which were assessed at Rs. 49 8 0. The defence was that the land belonged originally to the *jote* of the plaintiffs but had been given to the predecessor of the defendants in exchange for another plot. This defence was disbelieved. On appeal the learned Subordinate Judge set aside the decree so far as it related to mesne profits but confirmed it so far as it related to declaration of title and possession.

Second Appeal No. 3634 of 1910 is preferred by the plaintiffs on the ground that the learned Subordinate Judge should have decreed mesne profits as well. The claim for mesne profits is put in this way. It is said that in 1907 the defendants sued the plaintiffs in the Small Cause Court alleging that the plaintiffs had cut crops grown on the land and claiming as the value of these crops the sum of Rs. 49-8-0, that suit was decreed. Therefore, it is maintained that the plaintiffs are entitled in the present suit to the amount which they paid into Court in order to satisfy that Small Cause Court decree. In the face of the plaint, however, in the present suit, the claim for mesne profits cannot lie. The suit is professedly one for confirmation of possession. But I am asked by the learned Vakil for the appellants in Appeal No. 3634 to read into the plaint the allegation that the plaintiffs were dispossessed in 1907 and that somehow or other they resumed possession in 1908. It is impossible to read this allegation into the plaint when the plaint itself is distinctly one for confirmation of possession. It is not sufficient to say that pleadings in this country are to be liberally construed and that the Courts should give reliefs not so much upon the plaint as upon the facts proved.

In the next place even if the plaint were construed in the manner in which the plaintiffs ask, there is no second appeal in respect of the amount disallowed; for the amount is below Rs. 100 and under section 102 of the Code of Civil Procedure a second appeal does not lie.

Some attempt has been made to distinguish between a claim for mesne profits as an ascertained sum and a claim to be determined upon an account. But the case of *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (1) is clear authority for holding that when the amount of mesne profits decreed is less than Rs. 500 no second appeal lies. Appeal No. 3634 of 1910 is, therefore, dismissed with costs.

I now come to Appeal No. 3771 of 1910, in which the defendants attack the decree so far as it relates to the declaration of title and confirmation of possession.

The first point urged in this appeal is that the lower Appellate Court has wrongly rejected certain survey papers filed before the Settlement Officer. But there is nothing to show that these papers were ever tendered before the Munsif nor that this alleged rejection of evidence was ever made a ground of appeal before the Subordinate Judge.

It is next argued that the Court of Appeal below has arrived at its finding by wrongly

(1) 23 C. 884; 12 Ind. Dec. (N. S.) 587.

placing the onus upon the defendants. It appears, however, from the perusal of the judgment of the Munsif and the judgment of the Subordinate Judge, which is a judgment of affirmance, that the evidence on both sides was considered and that the finding was arrived at upon the balance of evidence. The Munsif in his judgment after dealing with the evidence of the defendants deals with the evidence of the plaintiffs and finds clearly that the plaintiffs were in possession of the disputed lands in the manner and at the time alleged. The learned Subordinate Judge accepts this finding and there is nothing to support the contention that he wrongly placed the onus upon the defendants. There is, therefore, no substance in the grounds urged by the Vakil for the appellants and the result is that this appeal is also dismissed.

Babu *Rupendra Kumar Mitter*, for the Appellants.

Babu *Jnanendra Nath Sircar*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—In this case the suit was brought by the plaintiffs asking for a declaration of their title, and also that their possession should be confirmed, and further that a decree might be passed in their favour for a sum of Rs. 49-8-0 by way of mesne profits: and, then the plaintiffs went on and claimed in the alternative that if for any reason the Court adjudged the plaintiffs to be dispossessed, or not in possession after the institution of the suit, a decree might be passed for *khas* possession; and, finally they prayed for any relief which the Court might find them entitled to according to the principles of equity.

In my judgment the rights of the parties in this case are plain: It appears that the Courts in this case have decreed the plaintiffs' title and there is no dispute about that matter. The present defendants in the year 1907 brought an action against the plaintiffs on the ground that the present plaintiffs had taken away the crops which the defendants had grown. That action was brought in the Small Cause Court and the present defendants obtained a decree for a sum of Rs. 43-8-0, on the ground that the present plaintiffs had deprived the present defendants of the crops in question. Then the present plaintiffs brought this suit in the following year.

The learned Judge of this Court has held that inasmuch as the claim was not for possession but was for confirmation of possession, the amount of mesne profits which the first Court had awarded, namely Rs. 49-8-0, could not be decreed. I may here say that the sum of Rs. 49-8-0 was made up of the Rs. 43-8-0 and, I suppose, interest from the time it was paid until the institution of this suit.

Now, my first observation about that part of the learned Judge's judgment is that there was in the suit an alternative claim for possession, and, therefore, it cannot be said that the plaintiffs' claim was confined to confirmation of possession. But, in my judgment, when we look at the facts of the case, we find that the plaintiffs claimed Rs. 49-8-0 as mesne profits, and their claim to that must have been based upon the allegation that the defendants had been in possession during the year 1907 and had been growing crops on the land and had received the value of the crops, namely Rs. 43-8-0, and had not paid any rent to the plaintiffs. That is really the gist of the case; and, I think, it would be wrong for us to be bound by any technicalities with regard to the form of the statement of claim, even if the plaintiffs were debarred by the form of the statement of claim, which, I think, they are not.

The learned Judge went on to say that there was no second appeal in this case, because section 102 of the Civil Procedure Code provided that in such a case there would be no second appeal. As has already been pointed out by my learned brother Mr. Justice Mookerjee during the course of the argument, with great respect to the learned Judge, there is really nothing in that point. That section says: "No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees." This was a suit in which the claim was, amongst other things, for a declaration of title and being a suit for a declaration of title, it could not be

brought in the Small Cause Court. Therefore, section 102 has no application to it.

For these reasons I think that this appeal should be allowed, and the decree of the Court of first instance restored, that is to say, the plaintiff's title to the disputed land should be declared and his possession of it should be confirmed, and a decree for the amount of Rs. 49-8-0 should be awarded to them.

The plaintiffs are entitled to their costs in all the Courts, including the costs of this appeal.

MOOKERJEE, J.—I agree.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 230 OF 1914.

April 13, 1917.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Heaton.

CHANBASAPPA DODAPPA DESAI—DEFENDANT NO. 1—APPELLANT

versus

KALIANADAPPA AYAPPA DESAI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 118, 144—Hindu Law—Adoption—Death of adopted son—Second adoption during lifetime of first adopted son's widow—Suit for recovery of estate by first adopted son's reversioner—Adverse possession—Limitation.

D. died in 1878 leaving property consisting of Deshgat and Gaudki *vatans* and some non *vatan* property. In 1880 *D.'s* widow adopted a son *M.* and the latter's name was entered as holder of both classes of *vatans*. The widow was appointed *M.'s* legal guardian under Act XX of 1864 and managed his property. In 1886, on the application of the widow, *M.'s* name was removed from the Deshgat *vatan* register on the ground that he was not a *bhauband* of *D.* in whom under the *sanad* the *vatan* would vest. *M.* died a minor in 1895, leaving a widow who was entered as holder in the Gaudki *vatan* register. In 1899 the widow of *D.* got the name of *M.'s* widow removed from the register. In 1901 *D.'s* widow purported to adopt the defendant as son to *D.* and put him in possession of the whole property. *M.'s* widow died in 1903. In 1912, the plaintiff claiming as the nearest reversionary heir of *M.* sued to recover the estate of *D.*:

Held, (1) that time began to run against the plaintiff from the date of the death of *M.'s* widow and that, therefore, there had been no adverse possession sufficient to bar his suit; [p. 846, col. 1.]

(2) that the suit was, however, barred by Article 118 of Schedule I of the Limitation Act, inasmuch as the defendant enjoyed his possession of the estate as son of *D.*, and as the plaintiff could not challenge th defendant's adoption the latter must be taken to be the brother of *M.* and, therefore, a nearer heir than the plaintiff; [p. 846, col. 1]

(3) that even if defendant's adoption was invalid under the Hindu Law and although the power of adoption of *D.'s* widow had been exhausted before she purported to adopt him, yet the law of limitation was an effective bar to the plaintiff's suit. [p. 846, col. 2.]

Musammat Bhoobun Moyee Debia v. *Ram Kishore Acharj Chowdhry*, 10 M. I. A. 279 at p. 311; 3 W. R. (P. C.) 15; 19 E. R. 978; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111, distinguished.

Mohesh Narain Munshi v. *Taruck Nath Moitra*, 20 C. 487; 6 Sar. P. C. J. 261; 17 Ind. Jur. 164; 10 Ind. Dec. (N. S.) 330; 20 I. A. 30 at p. 33, relied upon.

First appeal from the decision of the First Class Subordinate Judge, Bijapur, in Civil Suit No. 90 of 1912.

Mr. *Setlur* (with him Mr. *M. V. Bhat*), for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.—The property to which this appeal relates is chiefly *vatan* property which consists of Deshgat and Gaudki of Patilki *vatans*. This appeal also relates to certain non-*vatan* property specified in Schedule C to the plaint. Until his death in or about 1878 the property was held by Dodappa Desai. He left two widows and a daughter but no son. In 1880 Malkamma the senior widow adopted a son Madivallappa and the Collector in consequence entered the name of Madivallappa as holder of both classes of *vatans*.

In or about 1886, on the application of Malkamma, Madivallappa's name was removed from the Deshgat *vatan* register on the ground that he was not a *bhauband* of Dodappa in whom under the *sanad* the Deshgat *vatan* would vest. Prior to this event Malkamma had been appointed legal guardian of Madivallappa's property under Act XX of 1864 and managed both classes of *vatan* property till after his death a minor in 1895. He left a widow who became entitled on his death as his heir and was entered as holder in the Gaudki *vatan* register.

In 1898, Malkamma (the 2nd defendant) applied to the Collector and got the name of Madivallappa's widow removed in October 1899.

On the 14th of December 1901, Malkamma purported to adopt the 1st defendant as son to Dodappa and from that date the Trial Court finds that the 1st defendant has been

in possession of both classes of *vatan* property and also the property described in Sehedule C. Madivallappa's widow died in 1903.

This suit was instituted on the 2nd of July 1912 by the plaintiff, claiming as the nearest reversionary heir of Madivallappa.

The adoption of Madivallappa is not disputed in this appeal. The learned Trial Judge has decided the case as to the *vatan* lands in favour of the plaintiff.

Two points only have been argued in appeal both based upon the law of limitation, *first*, that the plaintiff's claim is barred by adverse possession; *secondly*, that the plaintiff cannot obtain relief without challenging the adoption of the 1st defendant upon which the latter's enjoyment rests and that it is now too late to do so having regard to Article 118 of the Indian Limitation Act: for the plaintiff knew of the 1st defendant's adoption not later than the 11th February 1902 as is shown by his application of that date, Exhibit 154 D.

As regards adverse possession we think the learned Judge was right in holding that time would begin to run against the plaintiff from the death of Madivallappa's widow in 1903 and that, therefore, there has been no adverse possession sufficient to bar the plaintiff's suit.

The plea that the suit is barred under Article 118 is more serious.

It is contended for the plaintiff that he claims as reversionary heir of Madivallappa and not of Dodappa and that the adoption of the 1st defendant to Dodappa, who was not the last male holder, is negligible and does not concern the plaintiff. It concerns him, however, in two ways; first, because the 1st defendant enjoys his possession, which is challenged by the plaintiff, as son of Dodappa and not otherwise; and secondly, because if the plaintiff is barred by time from suing to challenge the defendant's adoption, the defendant must be taken to be the brother of Madivallappa and, therefore, a nearer heir than the plaintiff.

It has been argued that the decision in *Musammat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1) shows that the widow of Dodappa had no authority to make an adoption after the estate had vested in Madivallappa's widow. That, however, was not a case in which the law of limitation came up for consideration. The adoption of the defendant may be clearly invalid by Hindu Law and Malkamma's power of adoption may have been already exhausted, nevertheless the law of limitation will effectively defeat the plaintiff's claim: see *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (2).

In answer to the argument that the plaintiff is not concerned with an adoption to Dodappa who was not the last male holder, it is to be observed that the property in dispute is an ancestral estate and that Dodappa as well as Madivallappa was an ancestor of the plaintiff. The remarks of Lord Hobhouse in distinguishing *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (3) from *Raj Bahadoor Singh* v. *Achumbit Lal* (4), which was relied on for the plaintiff here, are in point. He said "to apply the remarks there made, in somewhat general terms, to a case in which the heir cannot possibly get at the ancestor's property without disturbance of a title... founded on adoption to that ancestor, is to put upon them a meaning they were never intended to bear."

We set aside the decree of the lower Court and dismiss the suit with costs throughout.

Appeal allowed; *Decree set aside.*

(1) 10 M. I. A. 279 at p. 311; 3 W. R. (P. C.) 15; 19 E. R. 978; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111.

(2) 20 C. 487; 6 Sar. P. C. J. 261; 17 Ind. Jur. 164; 10 Ind. Dec. (N. S.) 330; 20 I. A. 30 at p. 33.

(3) 13 I. A. 84 at p. 96; 13 C. 308; 4 Sar. P. C. J. 715; 10 Ind. Jur. 307; 6 Ind. Dec. (N. S.) 705.

(4) 6 I. A. 110; 6 C. L. R. 12; 4 Sar. P. C. J. 15.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3095 OF 1914.

June 28, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

MIA RAJA PATWARI AND ON HIS DEATH HIS HEIR AND LEGAL REPRESENTATIVE NOA RAJA PATWARI—PLAINTIFF—APPELLANT

versus

RAM KUMAR DE AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B.C. of 1885), ss. 49 (b), 85, sub-secs. (2), (3)—*Under-ryoti lease for more than nine*

years created prior to Act, whether becomes invalid after expiry of nine years from passing of Act.

A sub-lease for a term exceeding nine years, granted by a *ryot* prior to the passing of the Bengal Tenancy Act, does not become void after the expiry of nine years from the passing of the Act, but remains valid and operative as against the *ryot*, who, therefore, has no right, (before the term of the sub-lease has expired , to eject the under-*ryot* under the provisions of section 49 (*b*), Bengal Tenancy Act. [p. 848, col. 1.]

Appeal against the decree of the District Judge, Tipperah, dated the 24th June 1914, affirming that of the Munsif, 4th Court, Chandpur, dated the 16th July 1913.

Babu *Upendra Kumar Ray* (for Babu *Bipin Chandra Bose*), for the Appellant.

Dr. *Sarat Chandra Basak*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by the plaintiff who is a *raiyat* to eject the defendant, an under *raiyat*, under the provisions of section 49 (*b*) of the Bengal Tenancy Act, on the ground that the lease, granted to the latter on the 14th July 1879, was void after the expiry of 9 years from the passing of the Bengal Tenancy Act.

The Courts below concurred in dismissing the suit and the plaintiff has appealed to this Court.

The judicial decisions on the question whether a sub-lease granted by a *raiyat* for a period of more than 9 years without the landlord's consent is void not only against the superior landlord but also against the *raiyat* himself, have not been uniform. There is no dispute that such a sub-lease, if granted without the consent of the landlord, is not valid as against him as expressly provided by sub-section (1) of section 85. Sub-section (2) of that section provides that "a sub lease by a *raiyat* shall not be admitted to registration if it purports to create a term exceeding 9 years," and it has been held in *Jarip Khan* v. *Durja Bewa* (1) and *Telam Pramanik* v. *Adu Shaikh* (2), that a sub-lease granted in contravention of the provisions of sub-section (2) of the section is void even against the *raiyat* himself.

In the first case, it was pointed out that a sub-lease, if it purports to create a term exceeding nine years, cannot be admitted to registration, and under the rules of the Registration Department when such a lease is presented for registration it should be returned at once with a note recorded on its back to the effect: "Not admissible under sub-section (2) of section 85 of the Bengal Tenancy Act"; and it was observed that "had the law been obeyed, the document would not have been registered. If it had not been registered, then under section 49 of the Registration Act not only would it not affect any immoveable property comprised therein but it could not be received as evidence of any transaction affecting such property, so that for the purposes of this litigation the document, if not registered, would have been as though it did not exist." It was further observed that it did not make any difference that the sub-lease was registered in contravention of the section and that in fact it must be treated "as though it was not registered," the result being that there was "no proof of the document and as a consequence no proof of the title on which the party claiming the sub-tenancy rests." The same view was taken in the second case as to the effect of registration of a sub-lease in contravention of the terms of sub-section (2), the learned Judges being of opinion that a permanent sub-lease registered in contravention of the statutory provision is inadmissible to prove the tenancy. In both these cases, however, the sub-lease was executed after the passing of the Bengal Tenancy Act and the provisions of sub-section (2) of section 85 had, therefore, a very material bearing upon the question.

In the present case, the sub-lease was executed on the 14th July 1879 before the passing of the Bengal Tenancy Act With reference to such a case, the provision of sub-section (3) of section 85 is applicable. That sub-section says: "Where a *raiyat* has, without the consent of his landlord, granted a sub-lease by an instrument registered before the commencement of this Act, the sub lease shall not be valid for more than 9 years from the commencement of this Act." So far as the construction of this sub-clause is concerned, there does not appear to be any conflict of authority.

One of the earliest cases on the subject in which the question was discussed is

(1) 15 Ind. Cas. 476; 17 C. W. N. 59; 16 C. L. J. 144.

(2) 18 Ind. Cas. 791; 17 C. W. N. 468.

Gopal Mondal v. *Eshan Chunder Banerjee* (3). The learned Judges, Ameer Ali and Pratt, JJ., pointed out that "that sub-section (2) has no connection with sub-section (3), as it necessarily deals with sub-leases granted after the passing of the Act; for it directs that no sub-lease should be admitted to registration, if it purports to create a term exceeding nine years", and with reference to the contention that sub-section (3) must also be read in the light of sub section (2) so that a sub lease granted before the passing of the Act should be absolutely invalid not merely as against the superior landlord but also against the *raiyat* himself, the learned Judges observed: "If this contention be correct, the result would be that a *raiyat*, who has obtained any benefit under the lease in the shape of a bonus, would be entitled to retain the same, although the lease in consideration of which he has received the same will be set aside at the end of 9 years." The difference in the position of an under-*raiyat* taking a sub-lease for a term of 9 years before the passing of the Bengal Tenancy Act and a sub-lease granted subsequent to the passing of the Act is pointed out by the learned Judges at page 153 of the report. The case was followed in two later cases, namely, *Madan Chandra Kapali* v. *Jaki Karikar* (4), and *Bipin Behari Hati* v. *Amrita Lal Bhattacharji* (5).

We have been referred to the cases of *Srikant Mondul* v. *Sarola Kant Mondul* (6), *Ramgati Mandul* v. *Shyama Charan Dutt* (7) and *Basarutulla Mundle* v. *Kasirunnessa Bibi* (8). In all these cases, it was held that a sub-lease granted for more than 9 years is void not only against the landlord but also against the *raiyat*. In the first case, however, the suit was directed both against the *raiyat* as well as against the superior landlord. In the second and third cases the sub-leases were executed after the passing of the Bengal Tenancy Act which would, therefore, attract the provisions of sub-section (2). The provisions of sub-section (3) had not to be considered in those cases.

In the case of *Manik Borai* v. *Bani Charan Mondal* (9) it was held that the question of the invalidity of a sub-lease granted in contravention of the provisions of sub-sections (1) and (2) of section 85 can be raised only by the landlord of the *raiyat*. The learned Judges expressly stated that it was not necessary in that case to consider sub-section (3) which deals with an instrument registered before the commencement of the Bengal Tenancy Act, so that so far as sub-section (3) is concerned, there is no conflict of authority.

The present case is governed by the decision of Ameer Ali and Pratt, JJ., in *Gopal Mondal* v. *Eshan Chunder Banerjee* (3), and we are of opinion that the plaintiff is not entitled to eject the defendant.

The appeal must be dismissed with costs.

Appeal dismissed.

(3) 29 C. 148.
(4) 6 C. W. N. 377.
(5) 3 Ind. Cas. 685; 9 C. L. J. 76.
(6) 26 C. 46; 13 Ind. Dec. (N. S.) 633.
(7) 6 C. W. N. 919.
(8) 11 C. W. N. 190.
(9) 10 Ind. Cas. 463; 13 C. L. J. 649.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 66B OF 1915.

October 22, 1916.

Present:—Mr. Prideaux, Offg. A. J. C.

BALWANT—PLAINTIFF—APPELLANT

versus

DEORAO—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch I, Art. 120, applicability of—Suit to recover village profits from co-sharer—Limitation—Burden of proof.

A suit by a co-sharer to recover his share of the village profits from the managing co-sharer is governed by Article 120 of the Limitation Act. [p. 849, col. 2.]

In a suit for the recovery of village profits the plaintiff must not only plead but adduce evidence that the defendant's negligence was responsible for short collections. [p. 849, col 2.]

Appeal against the decree of the District Judge, East Berar, dated the 29th September 1914, modifying that of the Subordinate Judge, Yeotmal, dated the 24th February 1914.

Messrs. *S. K. Barlingay* and *V. V. Chitale*, for the Appellant.

Rao Bahadur *D. N. Khare*, for the Respondent.

BALWANT *v.* DEORAO.

JUDGMENT.—This appeal arises from a suit filed by the appellant, a two-annas sharer in the *jagir* village of Mouza Wanoj, to recover his share of the village profits for the six years ending 1911-12 from the defendant Deorao, an eight-annas sharer in and the manager of the said village Rupees 2,168-1-3 with interest are claimed.

The appellant's right to claim profits of a two annas share was admitted but it was pleaded, *inter alia*, that the claim as regards the profits of the first three years in suit was time-barred. The suit resulted in a decree for Rs. 2,162-5-0 being passed in plaintiff's favour.

On appeal the District Judge, East Berar, has held that Article 62 and not 121 of the Limitation Act applies and has, therefore, confined the suit to the last three years. He has for this and for other reasons reduced the amount due to the plaintiff to Rs. 857-15-9.

Against that decision the present appeal has been filed. The 2nd and the 8th grounds of appeal have not been pressed and need not, therefore, be considered. Of the remaining grounds the main ground is that which questions the period of limitation found by the lower Appellate Court to be applicable. In cases for village profits arising in the Central Provinces, the six years' rule is invariably applied on the authority of *Mohammad Farrukh* v. *Birdhichand Oswal* (1). The learned District Judge avoids following this case principally on the ground that it has been customary in the past in Berar to hold that Article 62 of the Limitation Act governs these cases. There is authority for this view, for Elliot, J. C., in Regular Appeal No. 160 of 1899, reported at page 109 of 5 Berar Law Journal, dealing with the case of a half sharer in an Izara village claiming profits from a managing co-sharer, holds that Article 62 is the one to be applied.

No reasons are given for this decision, and with all respect to the learned Judicial Commissioner who decided that case, I find myself unable to agree with him. For the respondent it is contended that neither Article 62 nor yet Article 120 governs the case but that it falls under Article 89 of the Limitation Act. It seems to me that there is no force in this contention. It is clear that the defendant manages the village, that he collects rents from the tenants, pays quit rent to Government for the village, and pays also the *patel*, *patwari* and *jaglia*. He defrays the customary expenses of various festivals in the year and after allowing for the rent of land in the possession of each co-sharer, makes up accounts and finds what share of the net profits is due to each.

It cannot be said that the moneys received by him were for the plaintiff's use within the meaning of Article 62. Neither is Article 89, which applies to suits by a principal against his agent applicable. The agency wanted for this Article is missing. The present case, to quote *Mohammad Farrukh* v. *Birdhichand Oswal* (1), is not a question of merely suing for money received. It cannot be said that immediately each tenant pays his rent, the plaintiff can claim his share thereof. The defendant is entrusted with the general management of the village and has to spend as well as to receive money. I hold that Article 120 of the Limitation Act applies and have less hesitation in holding this to be the case, as my decision brings the law in force in Berar in conformity with that obtaining in the rest of the Province and increases the period of limitation hitherto held to have governed such cases in the first mentioned part of the Province. The case must, therefore, go back to the lower Appellate Court to determine the amount due to the plaintiff as his share of village profits for the first three years in suit.

I still hold to the view expressed in *Balkrishna* v. *Deorao* (2), decided on 10th July 1914, that the plaintiff in these cases has not only to plead but to adduce evidence that the defendant's negligence was responsible for short collections. I did not, however, intend to convey the impression formed by the lower Appellate Court that village officers' emoluments in these suits should invariably be calculated according to rates prevailing in Khalsa villages. Section 6 of the Berar Patel and Patwari Law deals with the Deputy Commissioner's

(1) 10 C. P. L. R. 98.

(2) Second Appeal No. 118-B of 1913.

Advocate High Court
Jammu & Kashmir

powers with regard to the payment of these village officials in a *jagir* and it can be gathered from the section that their emoluments can be settled by mutual agreement between them and the *jagirdar*. In default of payment, where the rate is so settled, the Deputy Commissioner is empowered to enforce payment at that rate; but where it has not been so agreed to, he fixes a fair rate, but a rate not higher than that payable in a Khalsa village.

The same principle can with advantage be followed in these suits. Where the managing co-sharer has fixed the rate and this is proved, it should be allowed. Where it has not been fixed, the Court is justified in allowing emoluments to the extent allowed in Government villages. The defendant in the present case has charged Rs. 200 per annum for the *patel* and *patwari*. This seems less than the amount that would be paid yearly under the scale laid down in Appendix B of V-1 of the 2nd Volume of the Berar Revenue Manual. If this is so, it must be held to represent the amount paid to these village officials for the work done by them and the defendant cannot claim more than that sum per annum.

I can find nothing to warrant the lower Appellate Court's assumption that the yearly disbursement of Rs. 200 for a *dewanji* refers to the *patwari's* remuneration. As the *patwari*'s emoluments are included in the sum of Rs. 200 charged yearly for the *patel* and *patwari*, it seems to me clear that the amount claimed as paid to the *dewanji* or clerk is a separate item. Whether the defendant is entitled to the sum claimed under this head is matter yet to be decided by the lower Appellate Court.

The Rs. 35 claimed annually on account of paper is clearly the amount for the *patel* and *patwari's chillar*. The rate for *chillar* in Khalsa villages is settled by the Appendix to the Berar Revenue Manual already referred to. If it works out to more than Rs. 35 for the two village officers, the excess cannot be allowed, for the defendant's statement is that only Rs. 35 a year were so spent. Should the rate in the Khalsa village work out to less than Rs. 35 per annum, then I do not think that the defendant should be given more than would be allowed for this purpose in an ordinary village.

With these remarks I remand the case to the lower Appellate Court for a fresh decision. A refund certificate will issue and other costs will abide the result.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2313 OF 1915.

July 27, 1917.

Present—Mr Justice N. R. Chatterjea and Mr. Justice Newbould.

JNAN CHANDRA DAS AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

RAJANI KANTA PAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution - Judgment-debtor in possession of land under contract of sale—Land, whether can be sold in execution—Judgment-debtor, position of.

The plaintiff got into possession of a piece of land on payment of the entire consideration for its purchase under a contract of sale. Before the conveyance was registered, however, the land was sold and was purchased by the defendant in execution of a money decree against the plaintiff:

Held, that the plaintiff at the date of the auction-purchase by the defendant had acquired a right to the land which passed to the defendant under the sale in execution, so that the plaintiff could not contend that he had no interest in the property which could be purchased by the defendant at the execution sale, and that he was not entitled to recover the property from the defendant on getting a registered conveyance from its former owner after the defendant's purchase. [p. 851, col. 2.]

Appeal against the decree of the Sub-Judge, Dacca, dated the 8th June 1915, reversing that of the Additional Munsif, Naraingunj, dated the 30th November 1914.

Babu *Gobinda Chandra De Roy*, for the Appellants.

Babu *Birendra Chandra Das*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was one to recover possession of the lands in dispute under the following circumstances. The lands belonged originally to the plaintiff. They were sold in execution of a decree for money against him and purchased by on

Debendra in March 1905, and symbolical possession was taken by him in March 1906. Debendra agreed to convey the lands to the plaintiff in consideration of a sum of Rs. 232 and actually executed a conveyance on the 27th March 1906, but it was not registered as plaintiff paid only Rs. 200 out of the consideration. The plaintiff, however, was allowed to remain in possession. On the 17th July 1907 the lands were sold in execution of another money decree against the plaintiff, and were purchased by the defendant No. 1, who obtained possession of the lands. The plaintiff on the 29th November 1907 obtained a second *kobala* from Debendra which was duly registered. It is upon the strength of this second *kobala* that the plaintiff brought the present suit for declaration of his title by purchase from Debendra and for possession against the defendant No. 1, on the ground that at the time of the purchase by the latter, he, the plaintiff, had not acquired any interest which could be purchased by the defendant No. 1, the title to the lands being still then with Debendra as no registered conveyance had been executed until the 29th November 1907, *i.e.*, after the purchase by the defendant No. 1.

As there was no clear finding whether the balance of the purchase money had been paid to Debendra before the purchase at the execution sale by the defendant No. 1, and also upon the question whether the plaintiff was in possession at the date of the said purchase, we sent back the case to the lower Appellate Court for findings on those points. The Court has found that the whole of the purchase money had been paid by the plaintiff to Debendra before the purchase by the defendant No. 1, and that the plaintiff was in possession at the date of the auction purchase by the defendant No. 1.

Upon the findings the position appears to be this. At the date of the purchase by the defendant No. 1 at the execution sale (17th July 1907), the plaintiff had paid the entire consideration money (Rs. 232) to Debendra who had purchased his rights at a previous execution sale, and who had agreed to convey the property to him, and the plaintiff was allowed to remain in possession of the property. In the circumstances stated above, plaintiff undoubtedly could have sued Debendra for specific performance, and he could have successfully resisted a suit by Debendra if the latter sued the plaintiff for possession of the property, although there was no registered conveyance executed by him. The argument founded upon section 54 of the Transfer of Property Act that in the absence of a registered instrument the transaction was a nullity was relied on by Cox, J., in the case of *Puchha Lal* v. *Kunj Behary Lal*(1), but was overruled by the Court of Appeal (Jenkins, C. J., and Mookerjee, J.) relying upon the principle laid down in *Walsh* v. *Lonsdale* (2). Jenkins, C. J., observed in that case, "There is no invasion or evasion of the Registration Act. It is merely securing to a party those rights to which he is entitled apart from the Acts—rights to which he has a good title in Courts to which the abiding direction has been given to proceed in all cases according to equity and good conscience." The principle was followed in the case of *Khagendra Nath Chatterjee* v. *Sonatan Guha* (3), in which the decision of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (4) was also relied upon Having regard to those decisions we think that the plaintiff at the date of the purchase by the defendant No. 1 had acquired a right to the property and that as Debendra could not, at that date, enforce any right against the plaintiff, the plaintiff cannot contend that he had no interest in the property which could be purchased by the defendant No. 1.

It is contended that the defendant No. 1 cannot avail himself of any equity which could be enforced by the plaintiff, but the defendant No. 1 as the purchaser of the rights of the plaintiff can do so. It is contended further on behalf of the plaintiff-respondent that the view taken in the cases

(1) 20 Ind. Cas. 803; 18 C. W. N. 445; 19 C.L.J. 213.
(2) (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109.
(3) 31 Ind. Cas. 987; 20 C. W. N. 149.
(4) 28 Ind. Cas. 930; 42 I. A. 1; 19 C. W. N. 250; 17 Bom. L. R. 420; 42 C. 801; 21 C. L. J. 231; 28 M. L. J. 548; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621 (P. C.).

of *Tuchha Lal* v. *Kunj Behary Lal* (1) and *Khagendra Nath Chatterjee* v. *Sonatan Guha* (3) must be taken to have been overruled by the decision of the Judicial Committee in the recent case of *Maung Shwe Goh* v. *Maung Inn* (5). In that case it was found that the mortgagor had subsequent to the mortgage agreed (on the 4th April 1906) with the mortgagee to sell the property mortgaged to the latter on or before the 6th July 1906 for one lac of rupees, if he failed to pay the mortgage money (Rs. 50,000) with interest. He failed to do so and a decree was passed for specific performance of the contract to sell. The mortgagee entered into possession of the property on the 24th March 1911 though no proper conveyance of the equity of redemption had been executed and on an application which was in form for execution of the decree for specific performance, a question arose as to the manner in which the purchase money payable under the contract for sale was to be calculated. The mortgagee contended that interest continued to run upon his mortgage until the date when he entered into possession and that consequently the principal sum of Rs. 50,000 together with the agreed interest up to that date ought to be deducted from the one lac of rupees which was the purchase price, and the balance only should be paid by him. It was held by the Chief Court of Burma that he was entitled to bring into account the amount due for principal and interest up to the 6th July 1906.

The Judicial Committee pointed out that the foundation of that judgment of the Chief Court depended upon the application to the contract of the 4th April 1905 of the well-known principle by which the rights of vendors and purchasers are regulated in England, and under which a contract for sale of real property makes the purchaser the owner in equity of the estate, and from that principle it followed that "Where the rights as to payment of interest on the purchase money are not regulated by the terms of the contract the purchaser is deemed to be entitled to the rents and profits of the property, as from the time when he did take or could safely have taken possession, and interest on the purchase money runs in favour of the vendor from that time," and observed: "It has been pointed out to their Lordships that the underlying principle, upon which this rule depends, has no application to the sale of real estate in Lower Burma, since by section 54 of the Transfer of Property Act, 1882, (a Statute made applicable to Lower Burma), it is expressly provided that such a contract creates no interest in or charge upon the land. If, therefore, the contract was silent in dealing with the question of interest, their Lordships think that the appellant would have strong ground for contending that the reasoning in the Court of Appeal could not be supported." But apart from that consideration their Lordships held that the appellant must succeed upon the construction of the contract itself.

Now section 54 of the Transfer of Property Act expressly lays down that a contract for the sale of immoveable property does not of itself create any interest in or charge on such property, and to that extent it differs from the rule of English Law, and this is all that was pointed out by the Privy Council.

The question whether the equitable doctrine of part performance, which arises from the fact that the vendee has paid the full purchase money and has obtained possession of the property agreed upon to be sold, is inapplicable by reason of the provisions of section 54 of the Transfer of Property Act was not considered nor decided by their Lordships. In the present case the defendant No. 1 does not rely upon the mere contract of sale, which by itself (as laid down by section 54 of the Transfer of Property Act) does not create any interest in the property. He relies upon the fact of the entire purchase money having been paid and possession obtained by the plaintiff under the contract of sale. The Judicial Committee in an earlier case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (4) cited above, referring to the case of *Maddison* v. *Alderson* (6), observed: "Their Lordships do not think that there is anything either in the law of India or of

(5) 38 Ind. Cas. 938; 21 C. W. N. 500; 21 M. L. T. 18; 15 A. L. J. 82; (1917) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 5 L. W. 532, 44 C. 542; 10 Bur. L. T. 69 (P. C.).

(6) (1883) 8 A. C. 467; 52 L J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit said Lord Salborne, in *Maddison* v. *Alderson* (6) founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow."

In the present case the person who disputes the right of the defendant No. 1 is the plaintiff himself whose interests were purchased by the former. No question, therefore, arises of any third person having acquired any rights in the property and we are not pressed with any considerations of the policy of the Registration Act.

We are of opinion that the interests of the plaintiff in the property passed to the defendant No. 1 under the sale in execution. The decree of the lower Appellate Court must, therefore, be set aside and that of the Court of first instance restored. The appellant will be entitled to his costs.

Decree set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 104 OF 1916.

January 10, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

MAHARAJ BAHADUR SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

INDER CHAND BOTHRA—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 248—Order on application for transmission of decree, whether order on application for execution—Notice—Execution of decree, order for, without notice, validity of.

Where a notice is necessary to be issued under section 248, Civil Procedure Code, 1882, any order for execution made without such notice is without jurisdiction and consequently a nullity. [p. 856, cols. 1 & 2]

Per *Sanderson, C. J.*—An order granting an application of a decree-holder for transmission of the decree to another Court for execution is not an order passed on a previous application for execution within the meaning of section 248, Civil Procedure Code of 1882. [p. 856, col. 1.]

Per *Mookerjee, J.*—A notice, given to the representatives of a judgment-debtor, of the decree-holder's application for transmission of the decree for execution to another Court cannot be treated as a notice given upon a previous application for execution within the meaning of section 248 of the Code of 1882. [p. 857, col. 1.]

Appeal against the following order of Mr. Justice Chitty, dated the 29th August 1916, sitting on the original side:—

"In this case a question arose whether the decree was barred by limitation; in other words, whether there had ever been any revivor. The decree was passed on 19th June 1896 for Rs. 13,150-1-0 in favour of Kapoor Chand Kharrar. Kapoor Chand Kharrar died and on 18th August 1907 Surajmull, purporting to be the only son of the decree-holder, applied to this Court for transmission of this decree to the Murshidabad Court for the purpose of enforcing it against Maharaj Bahadur Dhunput Singh, who was the only son of the judgment-debtor who had also then died. Notice was issued under section 248 (*a*) and (*b*), because not only had more than a year elapsed but enforcement of the decree was applied for against the legal representatives of the judgment-debtor. That notice was duly served and a question arose as to whether Surajmull required a succession certificate before he could be allowed to execute the decree. The matter was referred to the Judge in Chambers by consent of both parties and on 23rd August 1907, Mr. Justice Harington passed an order under section 248 against Maharaj Bahadur Dhunpat Singh as the legal representative of the deceased judgment-debtor. The present application was made on 11th August 1916. It is, therefore, within twelve years of 23rd August 1907, the date of Mr. Justice Harington's order. This fact appears to me to distinguish this case from the case of *Chutterput Singh* v. *Sait Sumari Mal* (1). There was a judicial pronouncement by Mr. Justice Harington under section 248, that the decree was capable of execution. It is clear that by that order a revivor of the decree would take place.

(1) 36 Ind. Cas. 602; 43 C, 903; 23 C. L. J. 645; 20 C. W. N. 889.

A further point was taken with regard to the right of the present assignee of the decree to execute it. It appears that Surajmull in 1907 falsely represented that he was the only son of the decree-holder, who had left another son Hari Charan. The family was a joint Mitakshara family and the question of the necessity for Surajmull taking out a succession certificate was dealt with by Mr. Justice Harington in the presence of the judgment-debtor. The other brother does not seem to have taken any part in the execution of this decree, but he is said to have joined in the sale to the present applicant; we find that the judgment-debtor has on several occasions appeared before this Court in the matter of execution and has never raised the objection that Hari Charan was a necessary party to any of those applications. As a matter of fact it does not appear that he was a necessary party. The whole decree descended by survivorship to Surajmull as well as to Hari Charan and Surajmull would be entitled to apply for execution. It is unnecessary to consider whether Hari Charan has lost any right which he might have had under the decree, inasmuch as the decree has been transferred by both the brothers to the present applicant. I think that the decree is not barred by limitation and that the present applicant should be allowed to proceed with the sale of the property No. 58 Burtolla Street, which sale was ordered by the Court but eventually adjourned *sine die* on 28th August 1910. The application will, therefore, be allowed with costs. The order will be in terms of the prayer of the petition."

Against this order, the judgment-debtor appealed.

Sir *S. P. Sinha* and Messrs. *N. Sarkar* and *B. L. Mitter*, for the Appellant.

Mr. *S. K. Chakrabarty*, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of Mr. Justice Chitty, whereby he allowed the application of Inder Chandra Bothra to be at liberty to proceed with the sale of premises No. 58 Burtolla Street in the town of Calcutta, attached in execution of the decree in question. In order to state the point it is necessary to examine the facts. It appears that on the 19th of June 1896 one Kapoor Chand Kharar obtained a decree against Maharaj Bahadur Dhunput Singh for Rs. 13,150. The application in this case was made by the holder of the assignment from the sons of the original creditor and the opposite parties are the sons of the original debtor. On the 18th of May 1907, an application was made by the son of the decree-holder for transmission of the decree to the District Court of Murshidabad for the purpose of having the decree executed. On the 28th of August 1907, an order for transmission was made by Mr. Justice Harington. The matter came before Mr. Justice Harington in this way. It appears that the matter having come before the Registrar, an objection was taken that no succession certificate had been produced by the applicant, and the Registrar consequently referred the matter to Court, and Mr. Justice Harington was the learned Judge who disposed of it. The facts are stated by Mr. Justice Chitty in his judgment. Having stated that notice was duly served and that a question arose as to whether Surajmull required a succession certificate before he could be allowed to execute the decree, he says: "The matter was referred to the Judge in Chambers by consent of both parties and on the 23rd of August 1907 Mr. Justice Harington passed an order under section 248 against Maharaj Bahadur Dhunpat Singh as the legal representative of the deceased judgment-debtor." That decree was not transmitted, and, on the 4th of September 1907 an application was made by the same parties for the attachment and sale of certain premises in Calcutta, namely, No. 58 Burtolla Street. In the application it was stated that the property was inherited by Maharaj Bahadur Singh as the sole heir under the Mitakshara Law from the deceased defendant Rai Dhunput Singh Bahadur. In respect of that application no notice was issued to the representatives of the deceased judgment-debtor, the Registrar in his order expressing the view that no notice was necessary either under section 232, Civil Procedure Code, or under section 248 (*a*), Civil Procedure Code, the decree having been transferred to the applicants by operation of law and the Court having in a previous application ordered execution against the same person as legal representative of the deceased

judgment debtor. On the 17th of September an attachment was made of the property in Calcutta, and on the 29th of July 1908 an order for sale was made. Both these orders, as I understand, were made without notice to the representatives of the deceased judgment-debtor. After that, apparently, the holders of the decree changed their mind; they did not proceed with the order for sale, but another application was made for transmission of the decree, and that was made on the 25th of August 1908. The Master, dealing with this application in the ordinary course, made an order that the decree should be transmitted. On the 17th of May 1909 the learned District Judge of Berhampur returned the decree to the High Court with a note that the matter had been dismissed for want of prosecution. Then on the 12th of March 1910 the holder of the decree applied to proceed with the order of 29th of July 1908 which, it will be remembered, was the order for the sale of the premises in Calcutta Then on the 21st of April 1910 the Master made an order for the sale of the premises, and it will be noted that that order was made when the Master was acting under the old rules of the Code, the new rules, as pointed out by the learned Advocate General, not having come into force until the 15th of April 1914. I might incidentally mention here—although I do not think it is necessary for my judgment in this case as at present advised – that that order of the Master would be without jurisdiction.

The property was advertised for sale and a date was finally fixed for the sale of the property on the 25th of August 1914. Then the representative of the judgment-debtor came upon the scene again and applied to have the attachment of September 1917 set aside on the ground that the property was trust property: and—as I understand—the application was made in his capacity as trustee. Then the holder of the decree came upon the scene again, and upon his application the sale was adjourned *sine die*. That was in August 1914. Nothing happened then until two years later, when on the 29th of August 1916 the present applicant, Inder Chand Bothra, having obtained an assignment of the decree from the sons of the decree-holder made this application to the Court, and, as I have already stated that was an application for leave that he might be allowed to proceed with the sale of the said attached property in terms of the order of the 29th July 1914. Now, those are all the facts—which I think necessary to state for the purpose of my judgment. The matter really is within a narrow compass.

The learned Advocate-General argued first of all that inasmuch as there was no notice of the application dated the 4th of September 1907, which was for the attachment of the premises in Calcutta, served upon the representatives of the judgment-debtor, the subsequent proceedings in respect of that application, namely, the attachment of the 17th of September 1907, and the order for sale of the 29th of July 1908, were both invalid, inasmuch as they were made without jurisdiction. That depends upon section 248 of the Civil Procedure Code which was then in force That section says as follows:

"The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him (*a*) if more than one year has elapsed between the date of the decree and the application for its execution, or (*b*) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made." (*b*) certainly applies to this case; (*a*) also applies to this case. There is a proviso to the section which runs as follows: "Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed, or of the last order against the party against whom execution is applied for, passed on any previous application for execution." If the order for transmission which was made by Mr. Justice Harington on the 23rd of August 907, was an order passed on a previous application for execution, then no notice under the proviso to the section

would be necessary in respect of the application of the 4th of September 1907. On the other hand, if the order of the 23rd of August 1907 of Mr. Justice Harington was not an order passed on a previous application for execution, then notice in respect of the application of the 4th of September 1907 ought to have been given, and if such notice was necessary and if it was not in fact given, then the attachment and the order for sale were made without jurisdiction. Therefore, the question to be considered is whether the order made by Mr. Justice Harington was passed on a previous application for execution. In my judgment it was not such an order. Having regard to the decision of a Full Bench of this Court in *Chutterput Singh* v. *Sait Sumari Mal* (1) it is necessary for us to look at the substance of the application and the order that was made on it. There is no doubt that the application was merely an application that the decree should be transmitted by this Court to the District Court of Murshidabad, and whatever form may have been used in the course of the proceedings, the learned Judge in effect was deciding that the order asked for, namely, that the decree should be transmitted to the District Court, should be made. Having regard to the Full Bench decision, that was not an order passed on a previous application for execution, and, consequently I am of opinion that notice of the application of the 4th of September 1907 was necessary under section 248 of the Civil Procedure Code then in force, and inasmuch as no notice was in fact given the attachment and the order for sale of the 29th July 1908 were made without jurisdiction, as it was made *ex parte*. Therefore, when the applicant in this case, Inder Chand Bothra, comes to the Court and asks for leave to carry out the order of the 29th of July 1908, he is asking this Court to carry out an order which was made without jurisdiction. That application, therefore, ought to be refused.

There is one other matter which I may mention. I say nothing as to whether the application of the 4th of September 1907 still is one, of which the applicant in this case can avail himself. It may be that he can avail himself of the proceedings which were started by that application, or it may be that he cannot avail himself of the proceedings started by that application; and, I say nothing to intimate what view ought to be taken by a Court, supposing any further application were to be made by the applicant in this case in respect of such proceedings.

For these reasons I think the appeal ought to be allowed and the learned Judge's order set aside and the application dismissed with costs both in the Court of Appeal and the Court of first instance.

MOOKERJEE, J.—I agree that the order of Mr. Justice Chitty cannot be supported.

On the 1st September 1914 the respondent took assignment, from the representatives of Kapur Chand Kharar, of a decree for money made on the 19th June 1896 on the Original Side of this Court against Rai Dhanpat Singh Bahadur, the predecessor-in-interest of the appellant. On the 29th August 1916, the respondent, as such assignee, applied to this Court to carry out an order for sale of immoveable property made so long ago as the 29th July 1908 after attachment had been effected *ex parte* on the 17th September 1907, on the basis of an application for execution dated the 4th September 1907. Mr. Justice Chitty has granted this prayer, and the question for determination is, whether this order can be supported.

On behalf of the judgment-debtor appellant, the Advocate-General has argued that the order for sale, as also the antecedent order for attachment, were made without jurisdiction and no further proceedings can be taken on the basis thereof. The reason assigned for this contention is that the attachment and the consequent order for sale were made without the requisite notice to the judgment-debtor under clauses (*a*) and (*b*) of section 243 of the Civil Procedure Code of 1882, then in force. The argument in substance is that if a notice was requisite the order for execution made without notice must be deemed to be a nullity, as is shown by the decision of the Judicial Committee in *Raghunath Das* v. *Sundar Das Khetri* (2) which confirms the view taken in

(2) 24 Ind. Cas. 304; 42 C. 72; 20 C. L. J. 555; 41 I. A. 251; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 814; 13 A. L. J. 154 (P. C.).

a long series of cases in India reviewed in *Desoo Venkatesa* v. *Srinivasa Ranga Rou* (3) and *Syam Mandal* v. *Sati Nath Banerjee* (4). The question consequently arises, whether notice under section 248 was requisite in the circumstances of this case. The decree-holder was dead: so also was the judgment-debtor; and more than one year had elapsed from the date of the decree when the application for execution was made on the 4th September 1907. Consequently, *prima facie*, notice under section 248 was requisite; but no such notice would be essential, if the requisite notice had been given upon a previous application for execution. The only previous notice to which reference has been made was a notice given upon an application made on the 18th May 1907 for transmission of the decree, and granted by Mr. Justice Harington on the 23rd August 1907. This, however, is plainly not a notice as contemplated by section 248, Civil Procedure Code. The fundamental distinction between an application for transmission of a decree and an application for execution of a decree was fully analysed and examined in the case of *Sripati Charn* v. *Belchambers* (5), and was also incidentally explained by the Full Bench in *Chutterput Singh* v. *Sait Sumari Mal* (1). That view has now been confirmed by the decision of the Judicial Committee in *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (6). Consequently, the notice given to the representatives of the judgment-debtor of the application for transmission of the decree cannot rightly be treated as notice given upon a previous application for execution within the meaning of section 248 of the Code of 1882. The true position then is that notice under section 248 was requisite upon the application of the 4th September 1907, that such notice admittedly was not given, that the orders of the 7th September 1907 and the 29th July 1908 were made without jurisdiction, and that consequently, no legal proceedings can be taken on the basis thereof.

It has been argued, however, that this contention is not open to the appellant by reason of certain proceedings which took place in 1910, and may be briefly described. On the 12th March 1910 the decree-holder made an application for sale. The usual order was made by the Master on the 21st April 1910. No further action appears to have been taken on the basis of this application. But on the 27th August 1914, the appellant in his character as trustee of the estate of his grandfather appeared in Court and contended that the property sought to be sold was trust property and was not liable to be seized in execution of a decree obtained against his father. Mr. Justice Chitty on the 27th August 1914 overruled this objection. The contention of the respondent is that this order attracts the operation of the rule laid down by the Judicial Committee in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (7). That case, however, can have no possible application to the circumstances of the present litigation, for there was no determination by Mr. Justice Chitty, directly or by implication, on the 27th August 1914, that the order for attachment made on the 27th September 1907 and the order for sale made on the 29th July 1908 were valid and legal orders. In my opinion the point taken by the appellant is open to him and really concludes the matter. In these circumstances I need not express an opinion upon the question whether the application for execution made on the 4th September 1907 may be deemed as still pending and whether an application to revive it and to carry on proceedings on the basis thereof may still be entertained by this Court on the principle recognized by the Judicial Committee in *Qamar-ud-din Ahmad* v. *Jawahir Lal* (8), or is liable to be refused as an abuse of the process of the Court. I agree that this appeal must be allowed and the application dismissed with costs throughout.

Appeal allowed.

(3) 4 Ind. Cas. 306; 33 M. 187; 7 M. L. T. 32.

(4) 38 Ind. Cas. 493; 24 C. L. J. 523; 21 C. W. N. 776.

(5) 8 Ind. Cas. 22; 15 C. L. J. 123; 15 C. W. N. 661.

(6) 36 Ind. Cas. 682; 21 C. W. N. 162; 24 C. L. J. 478; 31 M. L. J. 300; 39 M. 640; 18 Bom. L. R. 909; 14 A. L. J. 1129; 20 M. L. T. 472; 4 L. W. 558; (1916) 2 M. W. N. 541; 1 P. L. W. 26 (P. C.).

(7) 8 C. 51; 8 I. A. 123; 11 C. L. R. 113; 4 Sar P. C. J. 249; 4 Ind. Dec. (N. S.) 32.

(8) 32 I. A. 102; 27 A. 334; 1 C. L. J. 381; 2 A L. 397; 9 C. W N. 601; 15 M. L J. 258; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).

JAGDISH SINGH *v.* RAM ADHIN SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 279 OF 1916.

March 26, 1917.

Present:—Mr. Lindsay, J. C.

JAGDISH SINGH—PLAINTIFF—APPELLANT

versus

RAM ADHIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 181, *applicability of—Civil Procedure Code* (*Act V of* 1908), *O. XXXIV, r.* 5 (2), *application under—Limitation, commencement of—Mortgage—Decree for sale—Application for decree absolute—Appeal, effect of.*

An application for a decree absolute made under Order XXXIV, rule 5, sub-rule (2), of the Civil Procedure Code, is an application under the Code and is governed by Article 181, Schedule I, of the Limitation Act. [p. 858, col. 2.]

Under the provisions of Order XXXIV, rule 5, Civil Procedure Code, the right to make an application begins as soon as the period limited in the decree expires and once time begins to run it must continue running, so that if an appeal is preferred against the decree, the limitation for making an application for a decree absolute is not thereby extended. [p. 859, col. 1.]

Madho Ram v. *Nihal Singh*, 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 985, followed.

Appeal against the decree of the District Judge, Lucknow, dated the 19th April 1916, reversing that of the Sub Judge, Unao, dated the 24th January 1916.

Messrs. *Ishwari Prasad* and *Ram Bharose Lal*, for the Appellant.

Messrs. *Puttoo Lal* and *Makund Bihari Lal*, for Respondents Nos. 1 to 3.

JUDGMENT.—The question raised in this appeal is one of limitation. In my opinion it has been rightly answered by the lower Appellate Court and the appeal must be dismissed. The appellant before me is a person who obtained a decree for sale upon a mortgage. The time for payment limited by that decree expired on the 18th of October 1912. One of the defendants in the case, a man named Sheogobind, preferred an appeal against this decree. That appeal was dismissed on its merits by the District Judge of Hardoi on the 23rd of January 1913. This present appeal has arisen out of an application made by the plaintiff-appellant for a final decree under the provisions of Order XXXIV, rule 5, sub-rule (2). This application was made either on the 3rd or 26th of November 1915 (both dates are recorded on the petition). It was met with an objection that it was barred by time and in this connection the opposite party relied on Article 181 of the Schedule to the Limitation Act. The Court of first instance rejected the plea of limitation. It has, however, been accepted in the lower Appellate Court and the application has been dismissed. In appeal here it is argued that Article 181 does not relate to an application of this kind. To my mind the whole question is settled by an abundance of authority which cannot be disputed. One case which was relied upon by the Court below is a decision of a Bench of the Allahabad High Court reported as *Madho Ram* v. *Nihal Singh* (1). That case exactly covers the case which we have before us now. I may further refer to a decision of the Patna High Court reported as *Bala Ram Naik* v. *Kanhai Bharan* (2). There the authorities are discussed and it was held that Article 181 governs applications for a final decree for foreclosure or sale, that is to say, applications made under Order XXXIV, rule 3, or Order XXXIV, rule 5, both of which expressly require applications to be made. I have listened to a long argument, which has been put forward by the appellant's learned Counsel and in the course of which he has referred me to numerous decisions. One on which he laid particular stress is reported as *Madha Moni Dasi* v. *Pamela Lambert* (3). The authority of that case, however, has been shaken by subsequent decisions of the Calcutta High Court, of which I need only mention *Amolak Chand Parak* v. *Sharat Chandra Mukherjee* (4). This latter case I may observe was affirmed by their Lordships of the Privy Council in *Munna Lal* v. *Sarat Chunder* (5). The authorities of the Allahabad and Patna High Courts are also supported by a decision of the Bombay Court which is reported as *Datto Atmaram Hasabnis* v. *Shankar Dattatraya* (6).

(1) 30 Ind Cas. 494; 38 A. 21; 13 A. L. J. 985.
(2) 38 Ind. Cas. 385; 1 P L. J. 364.
(3) 6 Ind. Cas. 537; 37 C. 796; 12 C. L. J. 328; 15 C. W. N. 337.
(4) 11 Ind. Cas. 943; 38 C. 913; 16 C. W. N. 49.
(5) 27 Ind. Cas. 683; 42 C. 776; 17 M. L. T. 120; 21 C. L. J. 118; 2 L. W. 282; 19 C. W. N. 561; 28 M. L. J. 470; 17 Bom. L. R. 408; 42 I. A. 88 (P. C.).
(6) 21 Ind. Cas. 318; 38 B. 32; 15 Bom. L. R. 841.

It seems to me to be clear on all hands that Article 181 must govern an application of this kind. It is not to be doubted that an application made under Order XXXIV, rule 5, sub-rule (2), is an application under the Code of Civil Procedure and that being so, I am unable to imagine how it is to be removed from the operation of Article 181. The reasoning in the cases which I have just cited appears to me to be unanswerable. Having now decided that Article 181 applies, the next point for argument is, from what date limitation began to run. I have already mentioned that the first decree of the Appellate Court was passed on the 23rd of January 1913. The appellant claims that in any case limitation could only begin to run against him from this latter date The argument on the other hand is that on the language of Article 181 the right to make the application first accrued on the expiry of the time which was limited in the Original Court's decree. The time limited in that decree expired on the 18th of October 1912 and, therefore, it is said that three years' limitation provided in Article 181 began to run from this date. I think this argument must be accepted. It is the argument which was adopted by the Bench of the Allahabad High Court in the ruling reported as *Madho Ram* v. *Nihal Singh* (1). I am unable to accept the contention that in a case of this kind the date of an appellate decree gives a fresh starting point for limitation. The language of the third column of the Schedule in Article 181 lays down that the period begins to run from the time "when the right to apply accrues." There can be no doubt in my mind as to when this right does accrue, for under the provisions of Order XXXIV, rule 5, the right to make an application begins as soon as the period limited in the decree expires and once time begins to run it must continue running. I am unable to entertain the argument, therefore, that the appellant was entitled to limitation starting from the date of the Appellate Court's decree. That argument might have been a sound one if we were dealing now with an application for execution of decree to which the terms of Article 182 would apply, but as has been pointed out, applications of the nature contemplated in Order XXXIV, rule 5, are not applications for execution of decree, they are applications for an order for a final decree. The same line of argument, therefore, cannot be followed as in cases where the application is for execution of decree. I am satisfied that the decision of the lower Court on the question of limitation is correct and I dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1454 OF 1915.

July 5, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

BHUPENDRA NARAIN DUTT AND OTHERS —DEFENDANTS—APPELLANTS

versus

Kumar MANMOTHA NATH MITTER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 60—Landlord and tenant—Co-sharer landlord, right of, to maintain separate suit for share of rent—Registration of co-sharer's name under Land Registration Act (VI B. C. of 1876).

A co-sharer landlord who has been duly registered under the provisions of the Land Registration Act, is entitled to maintain a separate suit for his share of the rent, as under the provisions of section 60 of the Bengal Tenancy Act the tenant is prohibited from setting up the title of a third party to receive the rent sued for. [p. 862, col. 1.]

Appeal against the decree of the Additional District Judge, 24-Pergannahs, dated the 8th March 1915, reversing that of the Additional Subordinate Judge, Alipur, dated the 21st July 1913.

FACTS of the case will appear from the following extracts of the judgment of the lower Appellate Court:—

"In this case the plaintiff sued to recover rent for the years 1314 to 1317 in respect of a fractional part of a tenure which was held by defendants Nos. 1 to 3 and 15, the other defendants being co-sharer landlords.

The plaintiff's case is that he is a co-sharer landlord in Lot No. 41, *Towzi* No. 1466, which comprised three villages Shamnagar, Gobindapur and Kamalpur, and that by purchase from one Surendra Nath Datta he has acquired 16-annas interest in Gobindapur and

Kamalpur, these two villages having been allotted to Surendra Nath Dutt exclusively. As to Shamnagar it was originally owned by a number of co-sharers, Duttas of Mazilpur. Surendra Nath Datta had 3 annas 15 *gandas* 3/4 *danti* and 3 *kags* share in this village. Preo Nath Mitra and his brother had 2 annas 7 *gandas* 2 *karas* share.

Plaintiff's case is that by a *kobala* dated 6th *Sraban* 1313, he purchased this share of Surendra with his other property and that on the 19th *Magh* 1314 he purchased the interest of Preo Nath Mitra and his brother in the name of his *amla* Braja Bandhu Mitra and had his name registered under Act VII for both the shares. His case is that Sukhamoyee was the grandmother of defendants Nos. 1 to 3 and great-grandmother of defendant No. 15 and that she held a tenure of 900 *bighas* in Shamnagar at a rental of Rs. 4-0. These defendants were also landlords and so were defendants Nos. 4 to 14. Surendra Nath and Preo Nath used to realise their rent separately and so the plaintiff claims to realise his share separately too but, if it is not established that there were separate collections, he claims to receive rent jointly with the other co-sharer landlords.

The defence set up is that Sukhamoyee's tenure was one of 1,302 *bighas* at a rental of Rs. 607-9-12 *gandas*, * * * * * * * * that Sukhamoyee had been holding the land in both these estates at one consolidated rent, there being no separate payment of rent for any separate tenancy within Lot No. 41, distinct from the tenure in Estate No. 425. The defendants also disputed the share of the plaintiff. There were also claims by the defendants by way of set-off and plea of limitation.

The learned Subordinate Judge found that the plaintiff was, by virtue of his purchase, a co-sharer landlord with the Duttas of Mazilpur. He did not find that the claim was barred by limitation and found that the plaintiff had been registered, though he did not decide the exact share which he held. The claim for set-off was rejected, the defendants not having paid the requisite Court fees, but finding that Sukhamoyee had only one *jama* and that the land now claimed was only a part of that *jama*, he dismissed the suit. The plaintiff, therefore, appeals, * * * *

I must, therefore, hold that Sukhamoyee's holding within Lot No. 41 must all along be considered to have been separate from her holding in Estate No. 425. I, therefore, disagree with the learned Subordinate Judge in holding that there was no separate tenure in respect of the land within Lot No. 41 only. * * * * * * * * * * *. As to the share of the plaintiff he has been registered for the share he claims. The present suit is a rent suit and not title suit. He is, therefore, entitled to rent for the share for which he is registered. As to whether there was a separate collection, the very plea that there had been adjustments of rent between the different members of the Dutt family shows that each party received his separate share of the rent for his own benefit. * * * * *".

Dr. *Dwarkanath Mitter* (with him Babu *Bijoy Coomar Chatterji*), for the Appellants.—The point to be considered in this case is whether the plaintiff alone can maintain this suit. The plaintiff says that he sues for rent for 900 *bighas* which forms a separate tenure. He says he is a co-sharer, but has a separate collection. If it is a part of a larger tenure, all the co-sharers must join in the suit. We are not only tenants, we are also co-sharer landlords. There was an adjustment of rent of different tenancies and so the Judge says that that was equal to separate collection. There is no evidence properly so called as regards separate collection. Government created Lot No. 41 (the present estate) by excess lands in Nos. 425 and 427 and then settled No. 41 jointly with the owners of Nos. 425 and 427. The owners of No. 425 transferred their shares to different people. All owners of No. 425 are not impleaded in this litigation.

[Babu *Mohendranath Roy*, for the Respondents, refers to section 60, Bengal Tenancy Act, and section 78, Land Registration Act.]

Admissions by themselves do not create a title. If I have got title on basis of an original instrument, my afterwards saying that I have no title cannot unmake my title. Reads section 60, Bengal Tenancy Act. The Courts could have gone behind the land register. Simply being true owner would not do, he must be a registered owner too, *Ramkristo Dass* v. *Sheikh Harain* (1), *Alimuddin Khan* v. *Hira Lall Sen*

(1) 9 C. 517; 12 C. L. R. 141; 4 Ind. Dec. (N. S.) 993.

(2). Refers to section 78, Land Registration Act. Either section 60, Bengal Tenancy Act, or section 78, Land Registration Act, could not create a title in the owner simply by registration, *Ram Bushan Mahto* v. *Jebli Mahto* (3).

[Babu *Mohendranath Roy* refers to *Girish Chandra Chongdar* v. *Satish Chandra Sarkar* (4).]

Refers to *Durga Das Hazra* v. *Samash Akon* (5). The Bengal Tenancy Act does not apply to the present case as the document here is dated 1855.

Since we are co-sharers also, the decision in this case may amount to *res judicata*.

Babu *Mohendranath Roy* (with him Babus *Narendra Chandra Bose* and *Satyendra Nath Mitter*), for the Respondents was not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants Nos. 1 and 3 against a judgment of the learned District Judge of the 24-Pergunnahs reversing the decision of the learned Additional Subordinate Judge of the same place. The suit was a suit for the recovery of certain rent in arrears and it was brought by the plaintiff as a co-sharer of a tenure of 900 *bighas* of land held out of Lot No. 41 in Touzi No. 1466 in the Sunderbunds. Two points have been raised in this appeal. The first point is that there was no evidence on which the learned District Judge could find that it was a separate tenure of 900 *bighas* held out of lot No. 41 at an annual rent of Rs. 420. We have been taken through a considerable amount of documentary evidence which has been read before us. The question in a case like this is not whether we should arrive at the same conclusion as the learned Judge, but the question is whether the learned Judge had before him evidence which entitled him to arrive at the conclusion that there was a separate tenure of 900 *bighas* held out of Lot No. 41 at a rent of Rs. 420 per annum. It is quite clear that there was a considerable body of evidence before the learned Judge and amongst that evidence there were admissions in writing made by the appellants before us. The learned Judge acting on that evidence made a clear finding that there was the separate tenure of 900 *bighas* held out of Lot No. 41 at a rent of Rs. 420. There is nothing to say on that. I cannot see any reason on which the finding of the learned Judge can be disturbed. Dr. Mitter says that there are some reasons why this should not be treated as a separate holding but ought to be treated as one holding with the original holding of 1,302 *bighas*. Those considerations cannot weigh with us.

The other point that has been raised is on the finding of the learned District Judge that the plaintiff as a co sharer is entitled to maintain a separate suit for his share of the rent on the ground that he having been registered under the provisions of the Land Registration Act, the provisions of section 60 of the Bengal Tenancy Act do not permit, in a suit by a landlord to recover rent, the entry in the register to be challenged by the tenant. Dr. Mitter has put forward the case that his clients, the tenants, are also co sharer landlords and the case may involve a considerable hardship on the ground that the decision in this case may amount to *res judicata*. Clearly it will not amount to *res judicata*. If the Statute prohibits this matter to be enquired into in a rent suit, it cannot be judicially determined as between the plaintiff and Dr. Mitter's clients, and cannot be determined except in a proper suit. It seems to me that the view that the learned District Judge has taken is clearly right. Under the sections of the Land Registration Act, apparently registration is not conclusive so as to prohibit the tenant from setting up the right of a third party in a rent suit and the reports of the cases in this Court show that the tenants have resorted to that right. But it was intended by the Legislature in the Bengal Tenancy Act, that, in a rent suit where the only point can be as to the tenant's acquittance for the rent, registration should be taken as conclusive and that the tenant should not in a rent suit be entitled to set up that the rent is due to a third party. Section

(2) 23 C. 87 at p. 107; 12 Ind. Dec. (N. S.) 59.
(3) 8 C. 853; 4 Ind. Dec. (N. S.) 550.
(4) 12 C. W. N. 622.
(5) 4 C. W. N. 606.

60 of the Bengal tenancy Act says this in clear and unmistakable terms. If the Statute says this, we ought to give full effect to the words of the Statute. It is said that the decision of this Court in the case of *Durga Das Hazra* v. *Samash Akon* (5) is the other way. That was a decision of Mr. Justice Morris and Mr. Justice Gordon, and what they decided in that case was that the facts found by the learned Judges took the case out of section 60 of the Bengal Tenancy Act. It is quite clear that that case is not an authority for stating that, in a suit for rent, the tenant can challenge the title of the landlord duly registered under the provisions of the Land Registration Act. In this case, any rights that the appellants have as co-sharers as against the plaintiff, of course, they will be able to enforce such rights in a properly constituted suit; but in a suit for rent, it seems to me quite clear under the provisions of section 60 of the Bengal Tenancy Act that the tenant is prohibited from setting up the title of a third party to receive the rent sued for. I agree in the conclusion arrived at by the learned District Judge. The present appeal, therefore, fails and must be dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 373 OF 1916.

June 12, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

BIHARI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ADYA NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Adverse possession of limited interest—Acquisition of mortgagee rights by prescription.

Where a person has been in possession of land in the open assertion of a definite and specific right as mortgagee, it is not open to the owner of the land to question his right after the expiry of more than twelve years from the date when such open assertion was made within his knowledge or within the knowledge of his predecessor-in-title. [p. 863, col. 1.]

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 25th July 1916, confirming that of the Additional Munsif, Sultanpur, dated the 6th March 1916.

Mr. *A. P. Sen*, for the Appellants.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to certain plots of land, of which the plaintiffs claimed to be the owners by virtue of a decree for pre-emption obtained by them against the original proprietors. The defendants claimed to be in possession of the said plots as mortgagees and are entered as such in the revenue papers. In 1913 the plaintiffs applied for the amendment of the *khewat*, alleging that the defendants merely held the said plots as tenants. But the application was rejected on the 10th August 1914. The present suit was then filed by the plaintiffs for a declaration that the defendants held no mortgagee rights over the plots in dispute. The Courts below dismissed the claim, holding that, though no mortgages were established of the kind set up by the defendant, the claim of the plaintiff was barred by Article 120 of the Indian Limitation Act (IX of 1908). They further held that the defendants had been setting up their rights as mortgagees from as far back as 1879 and that the claim was, therefore, also barred by Article 144 of the said Act.

In appeal it is contended on behalf of the plaintiffs that Article 120 of the Indian Limitation Act has no application, because, if the title of the plaintiffs subsists, it is open to them to sue for a declaration that the defendants do not hold the status which they arrogate to themselves, whenever that status is asserted, and reliance is placed in support of that contention on the decisions in *Jevanand* v. *Beni Madho* (1) and *Chukkun Lal Roy* v. *Lolit Mohan Roy* (2). But this contention can be of no avail to the plaintiffs, if the defendants have succeeded in establishing, as the Courts below have found, their right to hold the plots in dispute as mortgagees by reason of their adverse possession of such

(1) 4 Ind. Cas. 159; 12 O. C. 320.
(2) 20 C. 906; 10 Ind. Dec. (N. S.) 609.

limited interest from more than twelve years. It appears that in 1879 the predecessor-in-title of the plaintiffs issued a notice of ejectment against the predecessor-in-title of the defendants in respect of the plots in dispute. The latter contested the validity of the notice on the ground that he held the said plots in his possession as mortgagee under four different mortgages, executed between the years 1804 and 1816 *Sambat* for an aggregate sum of Rs. 50-4, and that he had also made certain improvements in the mortgaged property. On the 7th August 1879 the notice was cancelled. In 1893 the predecessor-in-title of the defendants applied for the entry of his name as a mortgagee of the plots in dispute in the revenue papers. The agent of the then superior proprietor admitted that he was mortgagee, the Revenue Court accordingly directed the entry of his name as such in the revenue papers. The defendants have thus been in possession of the plots in dispute in the open assertion of their right as mortgagees, and it is not open to the plaintiffs to question their right after the expiry of more than 12 years from the date when such open assertion was made within their knowledge or within the knowledge of their predecessor-in-title. The right, set up by them, is sufficiently definite and specific. It is unnecessary to determine whether those mortgages now subsist or not. The Courts below have rightly dismissed the claim for the declaration asked for.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3324 OF 1914.

July 19, 1917.

Present:—Mr. Justice Walmsley and Mr. Justice Greaves.

KASESWAR MUKERJEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

ANNODA PROSAD PATRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 23—Easement—Natural right to discharge water on to lower lands—Obstruction, whether constitutes continuing cause of action.

Owners and occupiers of higher lands have the right to discharge surface water of their lands on to the contiguous lower lands not only in the dry season but in all seasons of the year. [p. 866, col. 1.]

This right is not curtailed by any natural changes such as the silting up of an adjoining river, in consequence of which the burden of the lower ground is enhanced [p. 866, col. 2.]

An obstruction to the discharge of surface water constitutes a recurring cause of action, so that no question of limitation can arise in regard to a suit for the removal of the obstruction. [p. 866, col. 1.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 12th of August 1914, modifying that of the Munsif, Amta, dated the 31st of May 1909.

FACTS of the case appear from the judgment.

Babu *Ram Chandra Majumdar* (with him Babu *Hira Lal Chakrabarty*), for the Appellants.—The respondents' villages were on a higher level. The waters of respondents' villages passed through a channel into the appellants' *mouzas*, spread over their fields and passed through a channel into the Banspati Canal. The bed of the said canal having silted up it was incapable of draining all the water. The appellants raised *bunds* at both the channels and had stopped the alleged natural drainage from the respondents' villages for the last ten years. The lower Appellate Court found that the respondents had a right to drain water but allowed the *bands* to be removed only during the winter season, because the Banspati *Khal* having silted up the appellants' *mouzas* would otherwise be flooded in the rainy season. Against this decree of the lower Appellate Court the plaintiff No. 1 preferred an appeal which has been dismissed under Order XLI, rule 11, and the defendants also preferred an appeal, while the tenant plaintiffs filed a cross-objection to the defendants' appeal.

My first submission is that natural rights are not recognised here to such an extent as to prevent the proprietor of the lower lands from raising protective works on his own land so as to stop the drainage. The view taken by the lower Appellate Court is wrong inasmuch as there cannot be any such natural right of drainage. See *Mahamahopadyaya Rangachariar* v. *Municipal Council*,

Kumbakonam (1), *Smith* v. *Kenrick* (2), *Greyvensteyn* v. *Hattingh* (3).

My next submission is that even if the natural right existed, it has become extinguished by reason of the silting up of the canal. The canal cannot discharge all the waters and if the respondents be allowed to drain the waters of their villages into the appellants' villages, the latter villages would be completely destroyed, especially as the waters do not run in defined channels.

Then the next point is that the lower Appellate Court has found non-user for ten years. The right of the plaintiff to sue for an order directing the *hana* to be opened is barred because it was closed more than six years before the institution of this suit. The wrong cannot be said to be a continuing wrong. See *Brojendra Kishore Roy* v. *Bharat Chandra Roy* (4) When resulting damage is not an essence of the tort then only is a continuous wrongful act a continuing wrong. Actual damage is necessary to support an action for disturbance of easement. See Goddard on Easements, page 441; *Earl of Harrington* v. *Corporation of Derby* (5). Hence *Rajrup Koer* v. *Abul Hossein* (6) is distinguishable. Article 120 of the Limitation Act is the proper Article applicable to this case. Section 23 of the Limitation Act has no application.

As regards the cross-objection, if it is allowed there would be an anomaly, inasmuch as the previous order of dismissal under Order XLI, rule 11, Civil Procedure Code, would be rendered nugatory.

Babu *Mohendra Nath Roy* (with him Babus *Hara Kumar Mitter* and *Rupendra Kumar Mitter*), for the Respondents.—The lands of a higher level have a natural right of discharging water on to the lower lands, and the proprietors of the lower lands have no right to obstruct the drainage. The question is whether the plaintiffs as owners and occupiers of the higher ground are entitled to discharge surface water on to the contiguous lower ground. *Hameedoonnissa* v. *Anundamoyee Dossee* (7), *Kopil Pooree* v. *Manick Sahoo* (8), *Imam Ali* v. *Poresh Mundul* (9), *Abdul Hakim* v. *Gonesh Dutt* (10). The existence of a definite channel in the lower lands is not necessary in the case of a natural right. See *Ramadhin Singh* v. *Jadunandan Singh* (11). Even in the case of an easement to drain water the existence of a defined channel in the servient tenement is not necessary. See *Munshi Misser* v. *Bhimrajmam* (12). The law has been settled by the Full Bench ruling in the above case. The natural right cannot be extinguished because there is an alteration in the level of the appellants' land. Whether there has been an alteration in level beyond the appellants' lands is immaterial.

Then the suit is not barred by limitation. The authorities referred to in support of the appellants' case do not directly touch the point in controversy now. The wrong is a continuing wrong and limitation runs *de die en diem*. See section 23, Limitation Act of 1908; *Rajrup Koer* v. *Abul Hossein* (6). Article 120 of the Limitation Act has no application to the facts and circumstances of this case because a natural right cannot be extinguished. It can only be suspended by the acquisition of an easement. See Peacock on Easements, page 258. See also Goddard on Easements; *Ramphul Sahoo* v. *Misree Lall* (13). Hence nothing short of twenty years' complete interruption can be sufficient to extinguish the plaintiffs-respondents' natural right to discharge surface water over adjacent lower lands. The argument put forward in support of the appellants' case and based on the change in the Banspati has very little force, inasmuch

(1) 29 M. 539 at p. 547; 1 M. L. T. 333; 16 M. L. J. 582.

(2) (1849) 7 C. B. 515; 18 L. J. C. P. 172; 13 Jur. 362; 137 E. R. 205; 78 R. R 745.

(3) (1911) A. C. 355 at p. 359; 80 L. J. P. C. 158; 104 L. T. 360; 27 T. L. R. 358.

(4) 31 Ind. Cas. 242; 20 C. W. N. 481 at p. 484; 22 C. L. J. 283.

(5) (1905) 1 Ch. 205 at pp. 226, 227; 74 L. J. Ch. 219; 92 L. T. 153; 69 J. P. 62; 3 L. G. R. 321; 21 T. L. R. 98.

(6) 6 C. 394 at p. 404; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257.

(7) W. R. Full Bench Rulings 25.

(8) 20 W. R. 287 at p. 288

(9) 8 C. 468; 10 C. L. R. 396; 4 Ind. Dec. (N. S.) 299.

(10) 12 C. 323 at p. 326; 6 Ind. Dec. (N. S.) 220.

(11) 27 Ind. Cas. 268; 19 C. W. N. 54.

(12) 18 Ind. Cas. 824; 40 C. 458; 17 C. W. N. 306; 17 C. L. J. 368.

(13) 24 W. R. 97.

as the plaintiffs have never done anything by which the burden of the defendants, the owners of the servient tenement, has been enhanced. Under the above circumstances the plaintiffs still possess the right which they are claiming, and their claim is not barred.

With regard to the cross-objection the lower Appellate Court appears to be clearly wrong in holding that it is only in the dry season of the year that the plaintiffs shall be entitled to exercise their right to discharge water on to the defendants' lands. The qualified right given in the decree is no right at all. When once the Court came to the finding that the natural right of the plaintiffs existed it cannot fetter the exercise of that right in the way in which it has done.

[GREAVES, J.—Your contention is that the decree of the lower Appellate Court should be modified.]

Yes.

[GREAVES, J.—In what way?]

The decree should be modified to the effect that so far as the tenants (plaintiffs) and their successors-in-interest are concerned, they shall be entitled to exercise their right at all times of the year and that the defendants shall open the *hana* within a certain time and failing that the plaintiffs will open the *hana* at the cost of the defendants, and also a permanent injunction should be issued upon the defendants restraining them from closing the *hana*.

Babu *Ram Chandra Majumdar* replied.

JUDGMENT.

WALMSLEY, J.—The plaintiff No. 1 is the proprietor, and the other plaintiffs are tenants, under him, of two villages Khasnan and Bishubera. To the east of these villages lie the villages of Sonamni and Gazipur, owned by the defendants. It is conceded that the plaintiffs' villages are higher than the defendants' villages, and that the natural flow of surface water from the former is eastwards over the latter. Formerly the surface water of the four villages found an outlet into a stream called the Banspati on the east of defendants' villages, but the bed of this stream has gradually risen until it is above the level of the fields lying to the west of it. A *band* separates Bishubera from Gazipur and Sonamni, called the *pakband*, and another *band* lies between the two latter villages and the stream on the east. In each of these *bands* is a 'hana' or opening through which the water used to flow: but both *hanas* were closed by the defendants several years ago. The plaintiffs sued for a declaration of their right to discharge their surface water over the defendants' villages, for a direction upon defendants to open the *hanas*, for a permanent injunction upon the defendants restraining them from closing the *hanas*, and for compensation.

The defendants denied the assertions made by the plaintiffs, but that attitude has been given up, and they now resist the plaintiffs' claim, on the grounds that the plaintiffs had no right to discharge the water on to their lands, that any right the plaintiffs may have had has been extinguished by the defendants' right to block the water exercised for a number of years, that the plaintiffs have lost the right to sue for the enforcement of their right, and that the silting up of the stream has so changed the natural features of the 4 villages that the plaintiffs cannot discharge their surface water eastwards without ruining the defendants' villages.

The Court of first instance dismissed the suit; the Appellate Court decreed it in part. On appeal to this Court, the judgment of the Appellate Court was set aside and the appeal was remanded to be re-heard.

The Appellate Court has again decreed the suit in part, awarding to the plaintiffs a declaration that they have a right to discharge water from their villages to the east during the dry season, but denying them the right to keep the *hanas* open throughout the year.

Against this decree the plaintiff No. 1 preferred a second appeal, but it was dismissed under Order XLI, rule 11. The defendants also preferred a second appeal, and in response the tenant plaintiffs filed a memorandum of cross objection under Order XLI, rule 22. We are now concerned with this appeal, and the cross-objection.

The first question for decision is whether the plaintiffs as owners and occupiers of the higher ground had the right to discharge surface water on to the contiguous lower

ground. On behalf of the appellants-defendants it is urged that there cannot be any such natural right. This contention, I think, is opposed to the view which has been taken by, this Court in a number of cases, *viz.*, *Hameedoonnissa* v. *Anundamoyee Dossee* (7), *Kopil Pooree* v. *Manick Sahoo* (8), *Imam Ali* v. *Poresh Mundul* (9) and *Abdul Hakim* v. *Gonesh Dutt* (10). Without alluding to these cases in detail it is enough to say that they distinctly recognize the right of the owner of higher land to discharge surface water over adjacent lower land, or as it is expressed in one of the judgments, a servitude of lower lands to receive the natural drainage of adjoining lands on a higher level. English cases have been quoted, but it is unnecessary to refer to them as the view taken in this country seems so well established. The only case mentioned before us which lends any support to the defendants is a Madras case, *Mahamahopadyaya Rangachariar* v. *Municipal Council, Kumbakonam* (1), but the circumstances were very different and I do not think that any help can be derived from that decision.

In my opinion, therefore, the plaintiffs had this right. It is urged, however, that even if they once had it, they have lost it. In the *first* place, it is said that the defendants have acquired by prescription a right to close the *hana* and keep the water from coming on their land. This argument fails on the finding of the lower Court; the closing of the *hana* is too recent for the defendants to have acquired such a right. *Secondly*, it is said that the plaintiffs cannot now sue for an order directing the *hana* to be opened, because it was closed more than six years before the institution of the suit. To this the answer is that the closing of the *hana* constitutes a recurring cause of action. *Thirdly*, it is said that the change in the bed of the Banspati river has made it impossible for defendants' land to receive the water without very serious loss, and, therefore, the plaintiffs' right ought to be regarded as extinguished. In this connection it is pointed out that plaintiffs speak of their right as a right to discharge their surface water on to defendants' land through the *pakband hana* and then through the *hana* in the second *band* into the Banspati. If that were really the right belonging to the plaintiffs, the change in the bed of the Banspati would affect it very materially. But I think too much is being made of mere words: it is quite clear that the plaintiffs claimed the right to discharge their surface water into defendants' land, and then went on to state that, as a matter of fact, such water found its way through a second *hana* into the Banspati. I may add that it is for this reason that I have spoken of the *pakband hana* in these remarks, and that I think the decree should be limited to the opening of the *pakband hana*. If we leave out of consideration this quibble about the phrasing of the plaint, there is no force in the argument based on the change in the Banspati. It is very unfortunate for the defendants but the burden is not enhanced by anything that the plaintiffs have done, and, therefore, the plaintiffs still have the right which they claim.

The arguments put forward on behalf of the defendants are not tenable, and their appeal must be dismissed with costs.

With regard to the objection filed by the plaintiffs it is urged that the plaintiffs' right is not curtailed because natural changes have taken place. It is certainly difficult to understand how a Court can declare that they have a right to discharge water on to the defendants' land but that they may exercise it only in the dry season. The plaintiffs have not contributed in any way to the changes which have taken place, and they are entitled to continue the exercise of their right. It is for the defendants to take such steps as may be advisable to deal with the difficulties created by the rise in the bed of the Banspati. The decree must, therefore, be modified, but as the landlord's appeal was dismissed the declaration must be limited, so as to be for the benefit of the tenants and their successors-in-interest so long only as the tenancies exist.

I think, therefore, that the tenant plaintiffs' cross objection should be allowed as indicated above.

The decree will be to this effect, that the right of the plaintiffs to discharge water from the villages of Khasnan and Bishubera through the *pakband hana* on to the defendants' villages Sonamni and Gazipur is declared; that so far as the plaintiffs-tenants and their successors-in-

interest are concerned, this right may be exercised at all times of the year so long as their tenancies continue to exist; and that the defendants be directed to open the *pakband hana* within fifteen days from the date of this decree, and that if they fail to do so the plaintiffs-tenants be authorized to do so, at the expense of the defendants, and to recover the cost of doing so from the defendants; and that a permanent injunction be issued upon the defendants restraining them from closing the *pakband hana*. The plaintiffs-tenants will recover their costs in the cross-objection from the defendants.

GREAVES, J.—I agree.

Appeal dismissed; Cross objection allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 452 OF 1916.

June 28, 1917.

Present:—Mr. Justice Piggott and Mr. Justice Ryves.

ILIAS AHMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

BULAQI CHAND—PLAINTIFF—RESPONDENT.

Partition Act (IV of 1893), s. 4, scope and object of—Decree, form of.

The object of section 4 of the Partition Act is to provide in certain cases an alternative course, by which a plaintiff claiming partition by metes and bounds may be compelled, at the option of the defendant, whether he himself likes it or not, to forego his legal right to such partition and to accept pecuniary compensation in lieu thereof. [p. 868, col. 1.]

This section involves a statutory interference with the legal rights of the plaintiff in a partition suit, and it should, therefore, be strictly construed so as to limit that interference. The words "*shall undertake*" in the section mean that there must be something more than a mere offer to purchase by the defendant. There must be an undertaking to do so, which means an unconditional offer from which the person making it will not be permitted to resile, and on such undertaking being given, the Court is bound to direct a sale. [p. 868, cols 1 & 2.]

A decree passed under section 4 of the Partition Act should be one which has the effect in law of transferring the ownership of the plaintiff's share to the defendant who has undertaken to purchase it, that is to say, which gives the defendant a good document of title against the plaintiff. [p. 868, col. 2.]

Semble.—Under section 4 of the Partition Act the Court should pass a decree compelling the plaintiff to execute a deed of sale in favour of the defendant, in the same manner as is done in the case of a suit for the specific performance of a contract of sale. After the execution of such a document by the plaintiff, or by the Court in his behalf, in the event of his declining to do so, the defendant would become liable to the plaintiff for the unpaid purchase-money and the plaintiff would be entitled to maintain a suit for the recovery of the same if it were not paid. [p 868, col. 2.]

Second appeal from a decree of the Subordinate Judge, Moradabad.

Mr. *S. M. Sulaiman*, for the Appellants.

Mr. *Gokul Prasad*, for the Respondent.

JUDGMENT.—Putting on one side a small matter of detail which is not in issue now before us, the essential point to be determined in this second appeal is the following. The plaintiff-respondent and the defendants-appellants are the joint owners of a certain house, the plaintiff's share being $\frac{5}{8}$ths and that of the defendants-appellants $\frac{3}{8}$ths. The plaintiff sued for partition of his share. His suit was resisted upon a variety of grounds; but in paragraph 7 of the written statement the defendants did claim the benefit of section 4 of the Partition Act, IV 1893, and did make an unconditional offer to purchase the plaintiff's share. The Court of first instance decreed a partition by metes and bounds, and it would seem that a final decree was actually passed. The defendants went up in appeal against that decree and obtained its reversal, on the ground that they had claimed the benefit of section 4 of Act IV of 1893 and were entitled to a decree for the sale to them of the plaintiff's share. On this the first Court proceeded to value that share at Rs. 1,062-3-8 and after certain further complications, a decree was passed which, in form, is a simple money-decree in favour of the plaintiff for the sum awarded on account of compensation for the house together with the costs of the suit. To avoid misunderstanding we may note that the decree actually passed was for a sum of Rs. 1,020-7-8 and costs, the award having been slightly reduced in consequence of an agreement come to by the parties upon a question of detail. Against this decree the defendants appealed, and in their memorandum of appeal they took a number of objections to the amount awarded to the plaintiff as compensation but they took no objection against the form of the decree passed. The learned Subordinate Judge

went thoroughly into the questions raised by the memorandum of appeal before him, decided them all against the defendants, and dismissed their appeal, affirming the decree of the first Court. The defendants now come to this Court in second appeal, contending that the form of the decree passed is wrong, and that there should have been a conditional decree for sale subject to payment by the defendants of Rs. 1,020-7-8 within a period to be fixed by the Court, with an alternative provision that, in the event of the defendants failing to pay this sum, the plaintiff shall be entitled to proceed to the partition of his share by metes and bounds. In substance, therefore, the defendants claim that they should be allowed an opportunity of resiling from the offer made by them to purchase the plaintiff's share at a valuation. We might perhaps dispose of this matter by saying that the point is one which the defence, if it intended to raise at all, ought to have taken before the lower Appellate Court, and that we are not disposed to entertain it at the stage of second appeal. The matter has, however, been argued out before us as a question of law, and we feel bound to say that, in our opinion, there is no force in the main contention on which this appeal is based. The question can only be decided with reference to the provisions of section 4 of Act IV of 1893. The object of that section is to provide in certain cases an alternative course, by which a plaintiff claiming partition by metes and bounds may be compelled, at the option of the defendants, whether he himself likes it or not, to forego his legal right to such partition and to accept pecuniary compensation in lieu thereof. It may be quite true, as has been argued before us on behalf of the present appellants, that this section was enacted for the benefit of the defendants in a partition suit; but it is equally true that it involves a statutory interference with the legal rights of the plaintiff, and it is not unreasonable that it should be strictly construed so as to limit that interference. The section says that under certain circumstances, if the defendant to a partition suit "*shall undertake*" to buy the share sought to be partitioned, then the Court shall direct a sale of such share to the person who gives the undertaking. The words as they stand seem to admit of only one interpretation. There must be something more than a mere offer to purchase. There must be an undertaking to do so, which means presumably an unconditional offer from which the person making it will not be permitted to resile, and on such undertaking being given the Court is bound to direct a sale.

There is one point, however, in connection with the decree passed in this case about which we entertain some doubts. We are satisfied that the Court was bound under the circumstances to pass a decree which would have the effect of transferring to the present defendants-appellants the $\frac{5}{8}$ths share in the house in suit which belongs at present to the plaintiff, for a sum of Rs. 1,020-7-8. It seems to us difficult to hold that the decree actually passed has this effect, and we feel some doubt as to the precise form of decree which the Legislature intended to be passed in such a case. It is conceivable that the intention of the Legislature was that the Court should pass a decree compelling the plaintiff in a case like the present to execute a deed of sale in favour of the defendants, in the same manner as is done in the case of a suit for the specific performance of a contract of sale. After the execution of such a document by the plaintiff, or by the Court in his behalf in the event of his declining to do so, the defendants would become liable to the plaintiff for the unpaid purchase money and the plaintiff would obviously be entitled to maintain a suit for the recovery of the same if he were not paid. As the point has not been raised in the memorandum of appeal before us we do not desire to pronounce a final opinion as to the form of decree which should be passed in a case to which section 4 of Act IV of 1893 is applicable. It is perhaps doubtful whether the Legislature intended a procedure so cumbrous as that above suggested; but at any rate the decree passed should be one which has the effect in law of transferring the ownership of the plaintiff's share to the defendants who have undertaken to purchase it, that is to say, which gives these defendants a good document of title as against the plaintiff. We feel it incumbent upon us to modify the decree in the present case, at any rate to such extent as seems to us absolutely necessary in order to produce that effect. We direct, therefore, that the decree be amended so as to run in this form, that the

plaintiff is entitled to recover from the defendants Rs. 1,020-7-8, together with such costs as may be awarded to him in all three Courts, and that the Court shall put the defendants in possession of the undivided $\frac{5}{8}$th share of the house in dispute at present belonging to the plaintiff and declare them to be the owners of the same. We do not think that the defendants are entitled to any indulgence in the matter of costs. Their appeal is dismissed, except in so far as the decree of the Court below has been directed to be modified, and the defendants will pay the costs of this appeal.

Decree varied.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 630 OF 1917.

July 3, 1917.

Present:—Mr. Justice Marten.

SIR DORABJI JAMSHEDJI TATA, KT. —PLAINTIFF

versus

EDWARD F. LANCE AND OTHERS—DEFENDANTS.

Contract Act (IX of 1872), s. 30 - Bombay Act III of 1865, s. 1—Lottery—Agreement to purchase ticket in lottery sanctioned by Government, validity of—Injunction in support of void contract, whether can be granted.

The defendant Club organised a lottery with the sanction of Government. Plaintiff purchased, through the admitted agents of the Club, a ticket in the lottery bearing a particular number. He paid the price of the ticket which was promised to be delivered to him. Subsequently, the ticket was by mistake sold and issued to the third defendant. The matter being brought to the notice of the Club, the latter decided to withdraw that ticket altogether and to substitute another ticket bearing a different number in its place. They returned the money paid by the plaintiff, and wrote to the third defendant saying that if the substituted ticket was successful in the lottery the amount thereof would be paid to him. The third defendant approved of the arrangement. The plaintiff then sued the defendants, praying that the first and second defendants, representing the Club, may be restrained by an injunction from withdrawing the ticket bearing the number purchased by the plaintiff from the lottery, and that pending the decision of the suit they may be restrained from paying the amount of any prize drawn by that ticket or any ticket substituted in place thereof to the third defendant:

Held, (1) that the agreement entered into by the plaintiff with the Club was an agreement by way of wager and that consequently it was void both under the first part of section 30 of the Contract Act and of the first part of section 1 of Bombay Act III of 1865; [p. 871, cols 1 & 2]

(2) that the effect of the Government having sanctioned the lottery was that no prosecution would lie in respect thereof, but that the sanction did not affect the Civil Law on the subject of lotteries, inasmuch as Government has no power to overrule an Act of the Legislature by correspondence; [p 870, col. 2.]

(3) that no injunction could be granted in support of a void contract. [p. 871, col. 2.]

Mr. *C. H. Setalvad*, Mr. *Strangman* (Advocate-General) and Mr. *Tarapurvalla*, for the Plaintiff.

Mr. *Weldon*, for Defendants Nos. 1 and 2.

JUDGMENT.—This is a notice of motion for an injunction and order in terms of prayers (*c*) and (*e*) of the plaint. Those prayers are: (*c*) that the first and second defendants (who represent the Western India Turf Club) may be restrained by an order and injunction of this Court from withdrawing ticket No. 15315 from the lottery, and (*e*) that pending the decision of this suit the first and second defendants may be restrained by an order and injunction of this Court from paying the amount of any price drawn by the ticket No. 15315 or any ticket substituted in place thereof to the third defendant.

Put shortly the facts are these: The plaintiff purchased through the admitted agents of the defendant Club a ticket bearing the number 15315. Those agents were Messrs. Thomas Cook & Son of Bombay. They had the disposal of this ticket and they gave a receipt to the plaintiff for the Rs. 10 paid in respect of that particular ticket bearing that particular number. But it appears that at that moment the book containing the ticket had not been sold down to that number and so Messrs. Thomas Cook & Son agreed actually to hand over the ticket itself when they got to the particular number in the book. Messrs. Thomas Cook & Son are not before me, but they seem by some mistake to have sent the ticket in question to another part of India where it was eventually issued and delivered by another branch of theirs to the third defendant.

Correspondence took place between the plaintiff and Messrs. Thomas Cook & Son, and it appears from that correspondence or from other parts of the evidence that

some offer was made by or on behalf of the plaintiff to the third defendant for this ticket. There was a counter-offer made by the third defendant which was refused: so there would appear to be some value attached to this particular ticket by the plaintiff and the third defendant over and above its face value. Then the plaintiff, being unable to obtain the ticket he thought he had bought, applied to the Turf Club and the decision the Turf Club came to was this. They decided to withdraw this ticket 15315 altogether, to return the plaintiff's money paid in respect of that ticket and to issue a new ticket 15315A to the third defendant. They wrote to the third defendant at the same time asking for his approval which I understand was subsequently given and telling him that if ticket No. 15315A was successful in the lottery the amount thereof would be paid to the third defendant. Thereupon the plaintiff brought this action.

I should say that the letter of the Club announcing what it had done was written on the 21st June and that this action was not brought till the 29th. But the explanation of that delay which might possibly have been serious is this that the plaintiff was in Kashmir at the time and that accounts for the delay of a week in taking action. Formal evidence as to this is to be put in by the plaintiff.

As regards the action itself, one can understand the plaintiff feeling that the Club had acted arbitrarily in deciding the dispute substantially in favour of one of the parties without giving either of them an opportunity of being heard and also in doing an act which the lottery conditions did not empower them to do, *viz.*, to cancel a particular ticket, and that consequently he had been rather harshly treated in the matter. Apart from this factor, I find it strange that parties should attach so much value to a particular ticket so as to come here with a law suit of this nature.

But the point which I have to deal with is really in the nature of a preliminary objection to the whole action on the ground, stated shortly, that the contract on which the plaintiff professes to sue is in the nature of a gaming and wagering contract, and, therefore, no action will lie on it in this Court. It is really unnecessary for me to refer to any Act or authorities for the proposition that apart from some special sanction given by the Government or the Legislature recently, no such action would lie. The Courts of this country do not exist for the purpose of helping gaming and wagering transactions and they resolutely set their faces against any attempts of that sort. But in the present case the lottery prospectus issued by the Turf Club is headed: "Sanctioned by the Government of India" and it was not until this morning that I saw what this sanction really consists of. Nobody suggests there is any further sanction than what is contained in this document now before me, *viz.*, a letter written by the Secretary of the Bombay Government, Judicial Department, No. 1943, dated the 26th March 1917, and addressed to the Chairman, Bombay Citizens Executive Committee, Indian War Loan. It is to the following effect:—

"SIR,

"With reference to your letter, dated the 15th March 1917, I am directed to inform you that the Government of India have approved of the organization by the Western India Turf Club of the proposed War Loan Bond sweepstake. With the approval of the Government of India, I am accordingly to convey the sanction of the Government of Bombay to this lottery as a special case."

This letter is not in the defendants' evidence and I have accordingly directed it to be exhibited to a further affidavit. Now this letter, it is quite clear, would stop the lottery being a Criminal offence under the Indian Penal Code. A lottery, unless authorized by Government, renders parties liable to certain punishment by the Criminal Law. That letter is an authority by Government and it would clearly at any rate have this effect that no prosecution under the Criminal Law would lie. But the question of the Civil Law is something entirely different. There one has to see what is prohibited or made void by the Civil Law, and unless you have some qualifying words of the like nature as those found in the Indian Penal Code, *viz.*, "not authorized by Government," the Government has no power to overrule the Imperial Act or the Acts of the Indian Legislature by correspondence. Indeed it is not attempted to argue in this case that they have any such

power. So really, therefore, one has to consider whether this action is covered either by section 30 of the Indian Contract Act or by section 1 of the Bombay Act III of 1865.

As regards section 30 of the Indian Contract Act, that provides that "agreements by way of wager are void": and it goes on to provide that "no suit shall be brought for recovering anything alleged to be won on any wager," etc. In my view these two portions of the section are independent. In other words, I am entitled to take the first part alone, *viz.*, "agreements by way of wager are void", and I have no hesitation in saying that the contract entered into in this case was an agreement by way of wager and that consequently it is void.

In that view it is really immaterial to consider whether this present suit also falls within the latter part of the section, *viz.*, "no suit shall be brought for recovering anything alleged to be won on any wager." It is, however, said this is not a suit brought for recovering anything alleged to be won, because it is only to recover something in the contingent event of the draw resulting in the plaintiff's favour. Now, I have got to remember the foundation of this suit. It is not, in my opinion, the practice to grant specific performance of a contract for merely a piece of paper. In substance the object of this action is to recover the prize, if any, which this particular number, if inserted in the lottery, shall win, and even if the suit at the present moment does not come precisely within the latter portion of section 30, it undoubtedly falls within the spirit of it and I should not grant specific performance in a suit of that nature.

Then as regards the Bombay Act III of 1865 it is said boldly by Mr. Setalvad that this Act was *ultra vires* of the Bombay Legislature and is not binding on parties so far as it purports to affect the High Court. But he admits very frankly that the *ultra vires* portion of the argument applies only to what is stated in section 1 with respect to not allowing certain suits in any Court of Justice for recovering any sum of money paid or payable in respect of a wagering contract. But if section 1 is split up into two portions in a similar way to that in which I have split up section 30 of the Indian Contract Act, then this particular contract would fall within the first portion of section 1 of the Bombay Act and the *ultra vires* argument would not affect it.

Now, I do not propose to decide, particularly on a motion, whether this Act is or is not *ultra vires* of the Local Legislature as regards the latter portion of section 1. I have heard no argument on that point and so I will say nothing further about it. But I am quite satisfied that the fair way of reading section 1 is to say that all contracts of a certain character therein mentioned are null and void. I have equally no doubt that the contract sued on in the present case is one of the character mentioned in the first portion of section 1.

Now, what is the result of that? It is this, that I find and hold that under two Acts, one the Indian Contract Act, and the other the Bombay Act III of 1865, the agreement in this case is a void agreement. Under these circumstances, I think, it follows that I cannot grant an injunction which, if granted, depends on the validity of the contract. Obviously I cannot grant an injunction in support of a void contract. That being so, this motion must be dismissed and the *interim* injunction granted yesterday must be dissolved.

As regards the costs, I have to bear in mind that this technical point was not mentioned in the evidence and was not raised till the last minute and I think the plaintiff has some ground for thinking that he has been treated rather harshly by either the Club or its agents. Under these circumstances, I think the fair order will be to dismiss the motion without costs.

Motion dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1199 OF 1915.

May 3, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

BANESWAR PRAMANIK AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TARAPADA BHATTACHARJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor, decree against, without appointment of guardian ad litem, *whether operative—Decree, cancellation of, effect of.*

A minor, against whom a decree is made in a suit in which though joined as defendant he is not represented by a guardian *ad litem*, occupies the same position as if he were not a party to the litigation. [p. 873, col. 1.]

A mortgage suit instituted against the representatives-in-interest of the mortgagor, who were minors, was decreed without any guardian *ad litem* being appointed for them. In a suit by the representatives to set aside the mortgage decree:

Held, that the decree made in the mortgage suit was not operative against the minor representatives and must stand cancelled, with the consequence that the mortgage suit would be revived and the mortgagee would be entitled to proceed therewith in accordance with law. [p. 873, col. 1.]

Appeal against a decree of the Sub-Judge, Burdwan, dated the 18th February 1915, reversing that of the Munsif, Katwa, dated the 26th February 1914.

Babu *Hemendra Nath Sen*, for the Appellants.

Babus *Biraj Mohan Majumdar* and *Hira Lal Sanyal*, for the Respondents.

JUDGMENT.—This is an appeal in a suit to set aside a mortgage-decree and the execution sale consequent thereupon, on the ground that the decree was made under circumstances which render it inoperative as against the plaintiffs appellants. There is no dispute as to the facts which have given rise to this litigation. The defendants instituted a suit against the plaintiffs to enforce a mortgage-bond alleged to have been executed by their father. When the suit was instituted on the 25th May 1905, the present plaintiffs, then defendants, were infants. The Court directed the plaint to be registered. As the defendants were infants and as the plaintiffs had proposed their mother for appointment as guardian *ad litem*, the Court recorded an order to the following effect: "Issue notice to the minors and the guardian, fixing the 17th July for appointment of the guardian." On the 17th July, the mother did not enter appearance or signify her willingness to accept the office of guardian *ad litem* of her infant sons. The Court thereupon proceeded to record the following order: "The defendants are absent. Protap Chunder Mozumdar witness for the plaintiffs is examined and Exhibit I is used as evidence on behalf of the plaintiffs. According to the reasons given in the judgment, the suit is decreed with costs." To use the words of Mr. Justice Trevelyan in *Dakeshur Pershad Narain Singh* v. *Rewat Mehton* (1), it is difficult to conceive of a case where the formalities of law have been more neglected than in the present instance. When the proposed guardian did not enter appearance and accept the office, the duty of the Court was to appoint one of its officers to act as guardian *ad litem* for the infants. The Court not only omitted to take this essential step, but proceeded to decide the case, although the 7th July 1905 had been fixed, not for the disposal of the suit, but for the appointment of a guardian *ad litem* for the infants. In execution of the decree so made, the properties of the infants were subsequently brought to sale and were purchased by the decree-holders themselves. The plaintiffs now seek to have the decree and the execution sale cancelled on declaration that the decree was inoperative as against them. In our opinion, there is no answer to the suit.

The Subordinate Judge has placed reliance upon the decision of the Judicial Committee in the case of *Walian* v. *Banke Behari Pershad Singh*(2), which is clearly distinguishable. There the Judicial Committee held that the proceedings in the earlier litigation showed, on the face of them, that the infants were represented by a properly appointed guardian, although no recorded order of appointment could be traced. In these circumstances, and in the absence of the records of the earlier suit (which had apparently been destroyed), the Judicial Committee ruled that the mere absence of an order to the effect that the mother was appointed guardian *ad litem* did not invalidate the proceedings. In the case before us, on the other hand, the facts are well established.

(1) 24 C. 25; 12 Ind. Dec. (N. S.) 631.
(2) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).

MANGER CHAMAR *v.* GAJAI SINGH.

The mother was never appointed guardian *ad litem* of the minor; indeed, she never entered appearance; and the Court proceeded to decide the suit on a date which had been fixed for the appointment of a guardian and not for the final disposal of the suit. In our opinion, this decree must be treated as a decree made against persons who were not represented in the suit and who consequently occupy the same position as if they were not parties to the litigation. This view is supported by the decision of this Court in *Narsing Narain* v. *Jahi Mistry* (3) and is also in conformity with the decision of the Judicial Committee in *Rashid-un-nisa* v. *Mahammad Ismail Khan* (4). The latter case shows that where infants have not been represented by a guardian duly appointed and competent to represent them for the purposes of the litigation, the decree made against them must be deemed inoperative in law.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed with costs in all the Courts. It is declared that the decree made in the mortgage suit is not operative as against the plaintiffs-appellants and must stand cancelled. The consequence will be that the mortgage suit will stand revived and the mortgagee will be entitled to proceed therewith in accordance with law. The sale consequent on the decree will also stand cancelled and the plaintiffs will be forthwith restored to possession of the property in suit, in execution of the decree of this Court.

Appeal allowed.

(3) 13 Ind. Cas. 414; 15 C. L. J. 3.

(4) 3 Ind. Cas. 864; 10 C. L. J. 318; 13 C. W. N. 1182; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631 (P. C.).

ALLAHABAD HIGH COURT.
CIVIL REVISION NO. 107 OF 1917.
July 7, 1917.
Present: - Mr. Justice Piggott.
MANGER CHAMAR AND ANOTHER - DEFENDANTS—APPLICANTS
versus
GAJAI SINGH—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (*IX of* 1887), *s.* 25—*Object of Act—Procedure—Arbitrary decision—Revision—High Court, power of interference of.*

The Provincial Small Cause Courts Act proceeds upon the very reasonable view that cheap and speedy justice in petty cases, without a right of appeal, is in the main of advantage to the public, even though a certain amount of risk is taken of erroneous decisions. The procedure provided for Courts of Small Causes leaves a great deal to the discretion of the Court, and the revisional jurisdiction of the High Court must be limited, as far as possible, to insisting upon such observance of rules of procedure, as is necessary to ensure to both parties a fair opportunity of laying their case before the Court, and to protecting the public against the risk of arbitrary decisions. [p. 874, col. 2.]

Where the judgment of a Court of Small Causes is not based upon any reasoned consideration, either of the pleadings or of the evidence, and does not proceed upon any allegation made by the plaintiff or upon any admission made by the defendant or upon the evidence of either party, it is a purely arbitrary decision and the High Court will interfere with it in revision. [p. 875, col. 1.]

A Court of Small Causes must place on the record just enough materials to make it clear to the High Court, in the event of an application for revision, what the grounds really are on which its decision proceeds. [p. 875, col. 1.]

Civil Revision from an order of the Second Additional Munsif, Jaunpur.

Messrs. *Gulzari Lal* and *Iqbal Ahmad*, for the Applicants.

Mr. *J. Nehru*, for the Opposite Party.

JUDGMENT.—This is an application by two defendants against the decree of a Court of Small Causes, by which the plaintiff was awarded a sum of Rs. 30 out of Rs. 80 claimed by him The decree moreover allows the plaintiff his full costs. The suit was a somewhat peculiar one. The plaintiff describes himself as one of the proprietors of two villages, while the defendants are Chamars, residing in one of the said villages. The plaintiff alleges that at a certain time there was an epidemic of cattle disease in that village, in consequence of which sixteen head of cattle belonging to the plaintiff died. He then offered the defendants the hides of these animals on a charge of Rs. 5 each. The defendants accepted this offer and removed the hides of the carcasses; but they subsequently declined to fulfil their contract of payment to the plaintiff. The defendants replied, first, by denying all the allegations of fact made in the plaint. They said that the plaintiff never owned as many as sixteen head of cattle, that there had been no

epidemic of cattle disease in their village at or about the time stated, that no carcasses of cattle belonging to the plaintiff had ever been flayed by them, that they had never received any hides from the plaintiff and had never agreed to pay for any. They pleaded, further, that according to village custom, they as resident Chamars had a right to flay any animal dying a natural death within the boundaries of the village and to remove the hides for their own benefit. The services which they render in return for this privilege they suggest to be (1) the disposal of the carcass of the animal and (2) certain customary services rendered by them at weddings and on similar occasions. They added that the hide of any animal which had died of epidemic disease was absolutely useless for any purpose, and that, even though entitled to do so without payment, they would not take the trouble of flaying any such animal for the sake of its hide. These pleas were obviously put forward with a twofold objec': —(1) as arguments against the truth of the allegations made in the plaint; (2) by way of an alternative defence, in the event of the Court's finding upon evidence that they had actually flayed the carcass of some animal or animals belonging to the plaintiff, and had removed the hide or hides thereof. The trial in the Court below was unquestionably unsatisfactory. In the first place a single issue was fixed, namely, what sum, if any, was due from the defendants to the plaintiff, a sort of issue which might be fixed in almost any possible suit brought before a Court of Small Causes. A little evidence was then taken, and that of a somewhat curious nature. The plaintiff, having first given evidence in support of his own case as brought, finished up with a vaguely worded statement, to the effect that he was really entitled to Rs. 3 and not Rs. 5 for each hide. He seems to have amended his plaint accordingly. He never said or suggested that any lesser number of carcasses than sixteen had been made over by him to the defendants, nor was any such suggestion made by the one witness who supported the plaintiff's case. The Court took the trouble to examine the *patwari* of the village and ascertained from him that there had been no such epidemic of cattle disease as was alleged in the plaint. It is a curious circumstance, and one which suggests a very perfunctory sort of trial, that when the *patwari* was in the witness-box no question was put to him as to the local custom in the matter of the disposal of the carcasses of cattle. The statement of the defendants was not, so far as my experience goes, at all an extraordinary or unusual one, and the allegations of the defendants on this point had a direct bearing upon the truth or otherwise of the plaintiff's story.

On the other side, one of the defendants went into the witness box and one witness was called on their behalf. These gave evidence of a somewhat general character in support of the defendants' case. On this the only finding recorded was that the defendants owed the plaintiff Rs. 30 and there was a decree for this amount with full costs. There was no reason given why the plaintiff was awarded his costs in full, and there is no explanation of the manner in which this sum of Rs. 30 was arrived at. So far as I am personally concerned, I am most anxious to restrict the interference of this Court in revision under section 25 of the Provincial Small Cause Courts Act within narrow limits. I fully recognize that the enactment in question proceeds upon the very reasonable view that cheap and speedy justice in petty cases, without a right of appeal, is in the main of advantage to the public, even though a certain amount of risk is taken of erroneous decisions. I recognise also that the procedure provided for Courts of Small Causes leaves a great deal to the discretion of the Court, and I am most anxious not to be regarded as imposing upon a Court of Small Causes requirements in the matter of procedure beyond what the Legislature has seen fit to lay down. The revisional jurisdiction of this Court I have always endeavoured to limit as far as possible to insisting upon such observance of rules of procedure as is necessary to ensure to both parties a fair opportunity of laying their case before the Court, and to protecting the public against the risk of arbitrary decisions. There may be a few cases in which this Court is bound to interfere with the decision of a Court of Small Causes on

a pure question of law, where it appears to this Court that an error of law has been committed which is likely to prove a matter of general interest and to involve further erroneous decision in other cases, if it is not at once set right. My difficulty in the case now before me is whether I am not bound to treat this decision of the Court below as purely arbitrary. So far as the record shows, it is not based upon any reasoned consideration, either of the pleadings or of the evidence. It does not proceed upon any allegation made by the plaintiff or any witness for the plaintiff, or upon any admission made by the defendants or any witness of the defendants. It looks, therefore, like a purely arbitrary attempt to satisfy the plaintiff while getting rid of a troublesome case. If in making these remarks I am doing injustice to the learned Judge of the Court below, I can only say that it is always open to him to guard himself against the possibility of such injustice by placing on the record just enough materials to make it clear to this Court, in the event of an application for revision, what the grounds really are on which his decision proceeds.

I have come to the conclusion that there must be a re-trial of this case, both because the matter is one of some general consequence, as affecting the agricultural community, and also because, so far as I can gather from this record, there has been no real trial of the matter in dispute between the parties. The questions which the Court below has to decide are:—

(1) Whether the defendants did or did not flay the carcass of any cattle belonging to the plaintiff and appropriate the hides thereof, and if so, what was the number of hides thus appropriated? (2) Whether the defendants did this under a definite contract to pay anything to the plaintiff, and if so, what the terms of that contract were? In the event of findings in favour of the plaintiff upon both these issues no further enquiry will be necessary; but if there is a finding in favour of the plaintiff on the first issue and against him on the second, the Court will have to consider, further, whether apart from proof of contract the defendants are under any liability to account to the plaintiff for the market price of the hides of any cattle belonging to him which they may have removed. If this question requires to be gone into, the Court should distinctly bear in mind that the question for consideration is not merely the benefit which a Chamar may obtain by disposing of the hide, but the remuneration which he would be entitled to charge for disposing of the carcass and for his labour in flaying it. There can be no doubt that the disposal of the carcasses of animals which had died a natural death is a service to the village community as a whole, and that it is frequently rendered by custom by resident Chamars in return for the right of flaying the carcass and appropriating the hide.

Before leaving the case I desire to add that the impression of arbitrariness about the decision of the Court below is further intensified by the unexplained order awarding the plaintiff his full costs. I set aside, therefore, the decree of the Court below and remand the case to that Court with orders to re-admit the suit on to its file of pending cases and to dispose of it according to law with due regard to the observations I have found it necessary to make.

Decree set aside; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1841 OF 1916.

July 17, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

BAIKANTA NATH CHATTERJEE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LAKSHAN CHANDRA CHATTERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Lease, construction of—Istimrari mourasi mokarrari, *meaning of.*

The words *istimrari mourasi mokarrari* in a lease always mean permanent and heritable and not merely permanent for the life of the grantee, even where no other words indicating a heritable interest, such as "the grantee, his sons and grandsons in succession should enjoy the property in perpetuity" are used in the document. [p. 876, col. 2.]

BAIKANTA NATH *v.* LAKSHAN CHANDRA.

Appeal against the decree of the Additional District Judge, 24-Pergannahs, dated the 26th June 1916, reversing that of the Munsif, Baruipur, dated the 30th January 1915.

FACTS of the case appear from the judgment.

Babu *Jogesh Chandra Roy*, for the Appellants.—The plaintiffs object to the encroachment on a certain road and the excavation of a *khal*. The encroachment is upon an *ijmali* road by defendants Nos. 1 and 2 to which they have no right. There have been trees too grown on the *ijmali* land. The defendants produced Exhibit 'A', which is an *istimrari mourasi mokarrari patta* on which they take their stand and base their right in the case and justify themselves for what they have done. I contend that the aforesaid document does not grant a permanent heritable lease so as to entitle the defendants to do what they have done. There are no words of inheritance in the document. No right of transfer is given.

[Babu *Brojolal Chakraburtty*.—The word *mourasi* means nothing but hereditary.]

It has got to be seen whether the *patta* falls within *Ram Narain Singh* v. *Chota Nagpur Banking Association* (1), following the decision in *Tulshi Pershad Singh* v. *Ramnarain Singh* (2). At one time *istamrari* was thought to be permanent. Does the word *mourasi* take the *patta* out of the class of cases in *Ram Narain Singh* v. *Chota Nagpur Banking Association* (1)? In those cases in which the grantor wants to give a heritable estate, the grantor says, *putra poutradi krame*. Moreover there are no words as 'dan' (gift), 'bikroy' (sale) in the document in the present case. This lease is clearly a lease for the life of the grantee in the absence of such words as 'the sons and grandsons in succession should enjoy the property.' The learned Judge was wrong in setting aside the whole decree of the Munsif inasmuch as defendants Nos. 3 to 7 have not appealed to your Lordships.

Babu *Brojolal Chakraburtty*, for the Respondents, was not called upon.

JUDGMENT.—This appeal, which has been preferred against a decision of the learned Additional District Judge of the 24-Pergannahs reversing the decision of the Munsif at Baruipur, must be dismissed. The plaintiffs who are the appellants before us brought the suit with reference to an encroachment on a road and the removal of the trees growing thereon, which they alleged to be the property in *ijmali* between them and the defendants and also with reference to the excavation of a *khal* in certain property which the plaintiffs alleged had fallen into their sole lot in a certain partition proceeding. The persons said to have encroached upon the road were the defendants Nos. 1 and 2. The other defendants are said to have excavated the *khal*. Certain incidental and consequential reliefs were also asked for. The learned Munsif decreed the suit against all the defendants disbelieving a certain document Exhibit A which was stated to be an *istimrari mourasi mokarrari patta*. The first two defendants appealed to the learned Additional District Judge. There the learned Additional District Judge accepted the *istimrari mourasi mokarrari patta* as being a genuine document and, on that footing, he held that the defendants Nos. 1 and 2 who were the appellants before him were justified in doing the acts complained of. Here, it has been argued in the first instance that the document is not a permanent heritable lease but is a lease for the life of the grantee, on the ground that there are no words in this lease that commonly appear in documents creating a permanent lease stating that the grantee, his sons and grandsons in succession should enjoy the property in perfect felicity so long as the moon and the stars last. Of course, it is not necessary to use all these words, that the grantee, his sons and grandsons in succession should enjoy the property in perfect felicity and that the grant is for the period so long as the moon and the stars last, in a document of this nature. It would be quite sufficient if other words indicating a heritable interest are used. The words *istimrari mourasi mokarrari* have always been held to mean permanent and heritable.

Another point has been urged by Mr. Roy which, if established, would have been a good point, and that is that the appeal to the lower Appellate Court had been preferred by the defendants Nos. 1 and 2 only but the learned Additional District Judge has set

(1) 36 Ind. Cas. 321; 43 C. 332.
(2) 12 C. 117; 12 I. A. 205; 9 Ind. Jur. 433; 4 Sar. P. C. J 646; 6 Ind. Dec. (N. S.) 80.

aside the whole decree made by the Munsif. An examination of the record, however, shows that that is not so. The learned Judge only set aside the Munsif's decree in so far as it affected the defendants Nos. 1 and 2. That is clearly right.

The present appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 209 OF 1915.

July 26, 1916.

Present:—Mr. Mittra, Offg. A. J. C.

SHARDAPRASAD—DEFENDANT—APPELLANT

versus

SHAIKH HUSAIN—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 25, 65—Consideration, failure of—Suit for refund of payment—C. P. Tenancy Act (IX of 1898), ss. 70, 71—Sale of occupancy holding by tenant, validity of—Nazarana paid to landlord, suit for refund of.

Plaintiff entered into an agreement for the purchase of some occupancy holdings from *S.* and *J.* A sale-deed was executed but was not registered. The defendant, who was the *malguzar* of the village in which the land was situate, filed an application under sections 47 and 71 of the Central Provinces Tenancy Act, but the proceedings were withdrawn on the plaintiff paying Rs. 175 to the defendant. *S.* and *J.* then brought a suit to recover possession of the holdings from the plaintiff and got a decree. The latter then brought a suit to recover the money paid by him to the defendant:

Held, that the money was paid to the defendant in consideration of his giving up his right to question the validity of the transfer, which right he was supposed to possess, and that the payment amounted to a compromise of a disputed claim which was binding on the parties and the plaintiff was not, therefore, entitled to a return of the money paid by him. [p. 878, col. 1.]

Appeal against the decree of the District Judge, Raipur, dated the 9th January 1915, reversing that of the Munsif, Raipur, dated the 22nd October 1914.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *P. S. Kotwal*, for the Respondent.

JUDGMENT.—The plaintiff entered into an agreement for the purchase of some occupancy and ordinary holdings from Sarju and Johan Chamars, the tenants of the land, for Rs. 467-10-0. A sale deed was executed, but was not registered, and in view of the prohibition contained in the Tenancy Act it could not be registered. The defendant is the *malguzar* of the village in which the land is situate. According to the plaintiff, the *malguzar* agreed to take one field No. 527, and Rs. 50 in cash as *nazarana*. The defendant filed an application under sections 47 and 71 of the Tenancy Act. The proceedings were withdrawn on the plaintiff paying Rs. 175 to the defendant. Sarju and Johan brought a suit to recover possession of the holdings, and they succeeded in their suit. The plaintiff now brings a suit for the return of the money and the field, on the allegation that there was an express agreement between the parties providing for such refund and return. Both the Courts below have held that there was no such express agreement. The first Court di-missed the suit on the ground that the agreement was not proved. The District Judge has decreed the claim, and his reasons are given in the following extract from his judgment:—"I find that the field No. 527 was given and payment of Rs. 175 was made to the defendant on account of *nazarana* in respect of the sale by Sarju and Johan. There was no valid sale by Sarju and Johan to the plaintiff. Thus the defendant got the field and Rs. 175 for consenting to or ratifying a contract of sale, which was not a contract by reason of the provisions of sections 46 (5) and 70 (5) of the Central Provinces Tenancy Act, 1898. Indeed these provisions virtually prohibit such sales. Therefore such sales are void in law. This being the case, the defendant must give back the field No. 527 to the plaintiff, and he must pay Rs. 175 to the plaintiff." The defendant has filed this second appeal, and I think it must succeed.

The plaintiff and the defendant must be assumed to have known the law; in other words, the plaintiff must be taken to have known that no valid transfer of occupancy and ordinary rights can be made when the consideration exceeded Rs. 100. If the plaintiff's vendors had kept their promise, the plaintiff could have obtained a good title after the lapse of two years. This is all that the plaintiff could reasonably expect as the result of his bargain with Sarju

and Johan. All that the landlord was asked to do in this case was, that he should give up his right to question the validity of the transfer. This was the sole consideration so far as he is concerned. The landlord did file proceedings in the Revenue Court, but eventually compromised the case and withdrew these proceedings. As it has been found that there was no express agreement to return the field and the money, I can see no reason for assuming the existence of an implied agreement to that effect. The *malguzar* was supposed to have a right to object to the transfer, and this right was waived for the consideration given by the plaintiff. In fact, there was a compromise of a disputed claim, and that compromise is undoubtedly binding on the parties. The consideration, so far as the *malguzar* is concerned, has not failed. He has not, in any way, sought to disturb the plaintiff's possession. It was the vendors who avoided the sale. It is argued that the consideration was illusory as it has turned out to be. This may be so; but the plaintiff, with his eyes open valued at his own figure the *malguzar's* right to avoid a transfer. The *malguzar* never covenanted to give good title or quiet possession to the plaintiff. The *malguzar*, no doubt, agreed to accept the plaintiff as a tenant so far as he was concerned, and in the absence of evidence to that effect, it cannot be assumed that he indemnified the plaintiff against the acts of his vendors. For these reasons, I think, the decision of the lower Court is unsound. The decree of the lower Appellate Court is, therefore, reversed, and the decree of the first Court is restored. The plaintiff will pay the defendant's costs in both the Appellate Courts.

Decree reversed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1916 OF 1915.

May 4, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

BEHARI LALL GHOSE AND OTHERS—DEFENDANTS—APPELLANTS

versus

SINDHUBALA DASSI—PLAINTIFF—RESPONDENT.

Landlord and tenant—Gift of non-transferable occupancy holding, whether binding upon heirs of donor—Gift, rescission of.

A gift of a non-transferable occupancy holding made by a *ryot* without the landlord's consent is binding upon his heirs, as by the gift the property ceases to form part of the estate of the donor so that his heirs cannot claim it as an inheritance. [p. 882, col. 2.]

Although in contracts for sale, mortgage, lease or exchange, there is pecuniary consideration, while in a gift there is no such consideration, yet the right of rescission in the case of a gift (on the part of the grantor) is circumscribed by the same sort of circumstances such as fraud, mistake, coercion, undue influence, misrepresentation or the like as would operate to invalidate a contract. [p. 882, col. 1.]

Appeal against the decree of the District Judge, Birbhum, dated the 3rd May 1915, affirming that of the Munsif, Balepur, dated the 17th March 1914.

FACTS of the case appear from the judgment.

Babu *Brajendra Nath Chatterjee*, for the Appellants.—The lower Appellate Court has found that the holding in dispute is a non-transferable occupancy holding; so it is not capable of transfer by way of gift or sale without the landlord's consent. The lower Courts have also concurrently held that the deed of gift was validly executed and duly registered by the former *ryot*. Against this finding of fact I have nothing to say. But the question still remains whether a gift of a non-transferable occupancy holding without the landlord's consent could be binding upon the heirs of the *ryot* after the death of the *ryot*. The District Judge has relied upon the Full Bench case of *Dayamoyi* v. *Ananda Mohan Roy* (1) for holding that the gift would be binding upon the heirs of the *ryot*. I submit that the Full Bench case does not support the proposition. In the Full Bench case it has been held that a transfer of a non-transferable occupancy

(1) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52.

holding, when made for *consideration*, would be binding upon the *ryot* and persons deriving title from him; but it has not been held in the case that a transfer without *consideration* would be binding upon the representatives-in-interest of the *ryot*. In the case of a sale or mortgage by a *ryot* an estoppel arises against the *ryot*, and that estoppel operates against the heirs of the *ryot* in favour of the transferee. But in the case of a gift no estoppel could arise against the donor; so his heirs are not estopped from questioning the validity of the gift as against themselves. The donee does not suffer any prejudice by accepting the gift; he had not to pay any consideration for the property granted to him by the donor. So there was not the least detriment to his interest when the transaction of gift was completed. Therefore he, the donee, cannot plead any estoppel against the donor or his successors-in interest.

It has been held by this Court that a bequest of an occupancy holding which is non-transferable, is not binding upon the heirs of the testator, *vide Amulya Ratan Sarkar* v. *Tarini Nath Dey* (2); and by analogy I submit that a gift of a non-transferable occupancy holding made by a *ryot* is not binding upon his heirs. What is the difference between a gift and a bequest? In both cases no consideration is paid, so that no estoppel could arise against the grantor. The only difference which could be suggested is that whereas a testamentary bequest takes effect after the death of the testator, a non-testamentary gift takes effect during the lifetime of the grantor. But that does not make any difference in principle between the two cases of transfer.

[MOOKERJEE, J.—In the case of a bequest the testator could revoke the gift at any moment before his death, but in the case of a gift which has been completed, the grantor has no power of revocation except under certain specified circumstances. Does not that make any difference between the two?]

It might make some difference, but that does not matter in a case where the heirs of the grantor question the validity of the bequest or the gift. The heirs could question the bequest only when it has been completed by the death of the testator without revocation. When the property has vested in the legatee by virtue of the bequest, then and then only the question arises whether the heirs would be bound by the bequest or not. Where the bequest has been revoked by the testator, the heirs are not in any way affected by the bequest The test is whether the heirs have been deprived of the property which they are entitled to inherit by law by a bequest or a gift made by the *ryot*. The heirs' case would be that the *ryot* had no power to grant away the property and thus to deprive them of it which they were entitled to get by right of inheritance, unless, of course, the grantee or the transferee could prove in equity that he was entitled to plead estoppel against the grantor and his heirs.

[MOOKERJEE, J.—How could the heirs claim a property which ceases to form part of the estate of the ancestor before the inheritance opens?]

[Babu *Bhupendra Kumar Ghosh*, for the Respondent, referred to the decision of *Rahimjan Bibi* v. *Imanjan Bibi* (3).]

The case referred to is distinguishable. The facts of that case are entirely different from the facts of the present case. A case is an authority for what it decides on the facts found or assumed, but is no authority for what logically follows from the decision. I submit that the gift that was made or attempted to be made was not valid at its very beginning. The property was non-transferable and under section 6 of the Transfer of Property Act, the *ryot* could not transfer it without the consent of the landlord. It is admitted that no consent was given to the gift by the landlord, and the heir of the donee, the plaintiff, has not upto this time been recognised by the landlord. On the other hand, my clients are in possession with the consent of the landlord, as the allegation in the plaint itself shows. How could the plaintiff eject me from the land in suit

(2) 27 Ind. Cas. 235; 42 C. 254; 21 C. L. J. 187; 18 C. W. N. 1290.

(3) 15 Ind. Cas. 698; 17 C. L. J. 173.

without proving her title? I submit, that at any rate as long as she has not been recognised by the landlord, she has no right to eject me from the land; whether I have acquired any right to it or not is immaterial. The plaintiff's suit being a suit in ejectment on declaration of her title, she must succeed if at all on the strength of her own case, and not on the ground that my clients have acquired no right to the property. Suppose the plaintiff gets this property from me. Could not the landlord then bring a suit for *khas* possession against the plaintiff on the ground that the gift under which the plaintiff claims title is inoperative without the consent of the landlord? There is nothing to prevent the landlord under the law from making this property *khas*, when the plaintiff will possess it by virtue of the gift. If your Lordships decree this suit in favour of the plaintiff, the result may be that the plaintiff will not be able to enjoy it as the landlord will make it *khas* and my clients will also be deprived of the enjoyment which they have had. The plaintiff would not be the gainer by the decree, whereas my clients would be the losers; the landlord would be the only person, who would gain this property in consequence of the plaintiff's suit being decreed.

[MOOKERJEE, J.—We are not now concerned with what the landlord might or might not do in future. We must decide the case on the state of things as it exists now.]

The state of things existing shows that the plaintiff has got no title to this property, as the gift was not valid and operative without the consent of the landlord; so the plaintiff cannot get any decree.

I may go further and submit that this gift which was made by the old tenant, Nader Chand, was a contingent gift; there was an implied agreement between the donor and the donee that on the happening of a particular event, namely, the landlord withholding his consent, the gift shall be revoked. (Refers to section 126 of the Transfer of Property Act.) The donor was not sure of the landlord's consent, and it is quite reasonable to assume that he intended when he made the gift that in the event of the landlord not recognising the gift, he would get back the property. Unless and until the landlord's consent has been obtained the donee's interest in the property is only contingent and not vested. Therefore, the donee cannot get a decree for possession on declaration of title until he proves that he has acquired a vested interest in the property. (Refers to sections 19 and 21 of the Transfer of Property Act.) This gift was an imperfect gift and could not be a completed gift, before the landlord has given his consent, and it is an established principle of equity that an imperfect gift cannot be enforced against the successors in interest of the donor. See *Milroy* v. *Lord* (4).

I am in possession of the property. You cannot eject me unless your title is complete. And your title cannot be complete until you have got the landlord's consent to the gift. Get the landlord's consent or recognition or a declaration in a Court of Law that the landlord is bound to recognise you, and then come in a Court of Justice to eject me from the property which I am possessing, it might be as a trespasser, it does not matter. I submit both in equity and under the law, the plaintiff has no right to take away this property from my possession, as the plaintiff has got no completed title and as it is probable that she will be deprived of the property by the landlord even if she recovers it from me.

Babu *Bhupendra Kumar Ghosh*, for the Respondent, was not called upon.

JUDGMENT.—This is an appeal by the defendant in a suit instituted by the respondent for recovery of possession of land upon declaration of title. The land in dispute constituted the occupancy holding of one Nader Chand Ghose who died in 1890. Shortly before his death, he executed on the 18th March 1890 a deed of gift in favour of his widowed daughter Suchandmukhi Dasi, whereby he professed to transfer the property to her. The document was duly attested and was registered as required by the provisions of the Transfer of Property Act. The donee continued in occupation till her death in 1898, when the present plaintiff, her daughter, came into possession under claim of title by inheritance. In 1910,

(4) (1862) 4 DeG. F. & J. 264; 31 L. J. Ch. 798; 8 Jur. (N. S.) 806; 7 L. T. 178; 45 E. R. 1185; 135 R. R. 135.

the defendants forcibly took possession of the land on the allegation that after the death of Nader Chand Ghose the land had passed to his widow, and, upon her death, had vested in them as the reversionary heirs (nephews) of the last full owner. On the 29th March 1913, the plaintiff instituted this suit for declaration of her title and for recovery of possession with mesne profits. The defendants denied that the deed was executed by Nader Chand Ghose and contended that the claim was barred by limitation. The Court of first instance found that the claim was not barred by limitation and that the plaintiff had acquired a valid title to the property as the heiress of her mother, who had obtained the land from her father under the deed of gift already mentioned. An objection was taken before the Trial Court that as the land constituted a non-transferable occupancy holding, the deed of gift was inoperative in law and that consequently the plaintiff had not acquired a valid title. The Court held that this question could be raised only by the landlord or his representative in-interest, and accordingly decreed the suit. Upon appeal the District Judge has confirmed the decree of the Court of first instance. On the present appeal, the defendants have argued that no valid gift could be effected in respect of a non transferable holding, that notwithstanding the execution and registration of the deed of gift, the property continued to form part of the estate of the donor, passing upon his death to his widow, and vesting upon her death in the defendants as the reversionary heirs to the last full owner. The decision of the Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy* (1) has been distinguished by the appellants on the ground that the principles enunciated therein are expressly limited in their application to cases of transfer of occupancy holdings for value. On the other hand, the respondents have referred to the decision in *Rahimjan Bibi* v. *Imanjan Bibi* (3), which is an authority for the proposition that in circumstances closely analogous to those of the case before us, the question of transferability cannot be raised by the heirs of the donor to the prejudice of the donee or his representative-in-interest. In our opinion, the view taken by the Courts below is well founded on principle and must be upheld.

The decision of the Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy* (1) is an authority for the proposition that in cases of transfers for value, the title passes from the transferor to the transferee, although the validity of the transfer is liable to be questioned by the landlord who is not a party to the transaction. Let us consider whether this principle is applicable to cases of gifts of non-transferable occupancy holdings. Section 122 of the Transfer of Property Act defines a gift as the transfer of certain existing moveable or immoveable property, made voluntarily and without consideration by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Section 123 defines the mode in which the transfer is to be effected; in the case of immoveable property, the transfer must be effected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. Section 126 deals with the question of revocation of gifts. The first paragraph of the section provides that the donor and the donee may agree that on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked; but a gift, which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part as the case may be. The second paragraph lays down that a gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Then follows the important provision, in the third paragraph, that "save as aforesaid, a gift shall not be revoked." This provision is a legislative recognition of a doctrine enunciated more than two centuries ago by Lord Nottingham in the case of *Villers* v. *Beaumont* (5), "If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if you would relieve in such a case, you must consequently establish this proposition, namely, that a man can make no voluntary disposition of his estate, but by his will only, which

(5) (1682) 1 Vern. 100; 23 E. R. 342.

would be absurd." The position, consequently, is clear, that except in the circumstances mentioned in section 126 of the Transfer of Property Act, a gift cannot be revoked. The second paragraph of the section shows that a gift may be revoked as if it were a contract but not on the ground of want or failure of consideration, in other words, a gift may be revoked, as a contract may be cancelled, on the ground of fraud, mistake, coercion and undue influence, misrepresentation or like reason. No such reason is assigned in the present case. But it is argued that the donor was competent to revoke the gift immediately after execution and registration of the document, on the ground that the property transferred by way of gift constituted a non-transferable occupancy-holding and that such right of revocation has vested in his heir. To test the validity of this argument, we have to consider whether the transaction could have been rescinded if it had been a contract. The section makes it plain that such rescission was not permissible. The substance of the matter is that although in contracts for sale, mortgage, lease or exchange, there is precuniary consideration, and in a gift there is no such consideration, the right of rescission is circumscribed by the same set of circumstances. Now the decision of the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (1) shows that this transaction could not have been rescinded if it had been for valuable consideration. The inference follows that it cannot be rescinded merely by reason of want or failure of such consideration.

Reliance has been placed on behalf of the appellant upon the decision of *Milroy* v. *Lord* (4). That case, however, is clearly distinguishable. There the property transferred constituted fifty Bank shares which were transferable only by entry in the books of the company: no such transfer was ever made, but a deed poll was executed. In these circumstances, Turner, L. J., observed as follows:—"In order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him." These remarks were followed by Jessel, M. R., in *Richards* v. *Delbridge* (6), where he observed that a man may transfer his property, without valuable consideration, if he does such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership which vests in the person who by those acts acquires the property. Consequently, to make the principle of *Milroy* v. *Lord* (4) applicable here, the appellant would have to establish that the nature of the property transferred in this case was such that no valid transfer thereof could be effected till the consent of the landlord had been obtained and the name of the transferee registered in his books. But the decision of the Full Bench shows abundantly that in cases of transfer for value, title unquestionably passes from the transferor to the transferee, even though there is no recognition by the landlord in other words, a transfer of this description cannot be impeached by the transferor, though the landlord may possibly refuse to recognise the transfer. In our opinion the principle of the decision in *Milroy* v. *Lord* (4) has no application to the circumstances of the present case. Reliance has finally been placed upon the decision in *Amulya Ratan Sarkar* v. *Tarini Nath Dey* (2), which is an authority for the proposition that the holder of a non-transferable occupancy-holding is not competent to make a testamentary bequest of such holding. That case is clearly distinguishable, founded as it is on the fact that the bequest was revocable up to the last moment of the life of the testator and that the very moment that the bequest would come into operation, if legal and valid, was the moment when the right of the heir would accrue by operation of law. In the case before us, the gift was not revocable, and was binding as between the donor and the donee. It cannot consequently be maintained that notwithstanding the execution and registration of the deed of gift, the property continued to form part of the estate of the donor. The property ceased to be part of the estate of the donor, and there is thus no escape from the position that the heir did not succeed to it by right of inheritance.

(6) (1874) 18 Eq. 11; 43 L. J. Ch. 459; 22 W. R. 584.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 215 OF 1915.

August 31, 916.

Present:—Mr. Stanyon, A. J. C.

GANESH PRASAD—

APPLICANT

versus

Musammat REWA BAI—NON-APPLICANT.

Hindu Law—Succession—Widow and daughter, rights of, in estate of deceased—Compromise, effect of—Civil Procedure Code (Act V of 1908), s. 115—Revision—Error in law, whether ground for interference.

One *O.* was the owner of certain property including a house. He died leaving a widow and two daughters. On his death one *L.* claimed to be his devisee under a Will and took possession of his estate. *O.*'s widow sued *L.* for possession of the property but died while the suit was pending, and her two daughters were substituted for her. Thereafter the suit was compromised and the house was, under the compromise, obtained by *R.* one of the daughters. Plaintiff on account of a personal debt of the widow of *O.* obtained a decree against *R. qua* the legal representative of her mother, but the decree was confined to the assets of the widow in the hands of *R.* The decree-holder, in execution of the decree, sought to attach and sell the house which *R.* had obtained under the compromise with *L.*:

Held, (1) that the house did not form any part of the assets of the widow, but was *R.*'s inheritance from her father, inasmuch as though *R.* and her sister took up the duties of their mother as plaintiff in an heir-at-law suit against an invader, they did so as heirs of their father and not as heirs of their mother, and any property which they obtained by force of that suit constituted their inheritance from their father and was no part of the estate of their mother; [p. 885, col. 1.]

(2) that under the compromise each party took what he and she got by virtue of the independent title set up by him and her, and that to the extent of the property which *R.* got, her title as her father's heir was admitted by the other parties by way of compromise. [p. 885, col. 1.]

Hiran Bibi v. *Sohan Bibi*, 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648 (P. C.), relied upon.

In order to justify interference under section 115 of the Civil Procedure Code on the ground of an erroneous view of the law taken by the lower Appellate Court, the error must involve, either a want or refusal of jurisdiction, or some illegality or material irregularity of procedure. [p. 885, col. 1.]

Civil revision against the order of the District Judge, Jubbulpore, dated the 13th July 1915, reversing that of the Munsif, Jubbulpore, dated the 13th March 1915.

Dr. *H. S. Gour*, for the Applicant.

Sir *Bepin Krishna Bose*, for the Non-Applicant.

JUDGMENT.—The case has been argued on both sides with the usual ability of the learned Counsel and Advocate who appeared in it, and an interesting question of law has been raised. The facts are not disputed. One Odeychand was the owner of certain property including a house which is now in dispute. He died leaving a widow Khilona Bai, a daughter by her who is the non-applicant, Rewa Bai, and one Ganga Bai, another daughter by a predeceased wife. On Odeychand's death, one Lakhmichand claimed to be his devisee under a Will and took possession of his estate. Apparently Lakhmichand was a nephew of the deceased and an expectant reversioner. However, Khilona Bai was Odeychand's heir-at-law, and the two daughters stood next in the order of succession after her. Khilona Bai, asserting the alleged Will to be a forgery, sued Lakhmichand for possession of her husband's estate. She died *pendente lite*, and the two daughters, Rewa Bai and Ganga Bai, were substituted for her. Thereafter the suit was compromised, and the litigants apparently divided the bone of contention among themselves. Under this compromise Rewa Bai obtained, *inter alia*, the house now in dispute.

Now the present plaintiff, Ganesh, on account of a personal debt of Khilona Bai has obtained from a Small Cause Court a money decree against Rewa Bai, *qua* the legal representative of her mother, and this decree is confined to the assets of Khilona Bai in the hands of her daughter. Execution of the decree having been transferred to the Munsif of Jubbulpore, the decree-holder sought to attach and sell the house which Rewa Bai obtained under the compromise with Lakhmichand. Rewa Bai objected that the house did not form any part of the assets of Khilona Bai, but was Rewa Bai's inheritance from her father, and the objection has been allowed by the Munsif and by the District Judge in appeal. The decree-holder has, therefore, applied to

GANESH PRASAD v. REWA BAI.

this Court for revision under section 115, Code of Civil Procedure, 1908.

It is urged on his behalf that Rewa Bai obtained the house not by inheritance but by a compromise of her mother's suit. She entered that suit as the heir of her mother, and she made a compromise, as it were, on behalf of her mother. If Khilona Bai had herself lived to make the compromise she would have got the house not by inheritance but by contract with Odeychand's devisee Lakhmichand, and the house would have been her *stridhan*. Rewa Bai merely stood in her mother's shoes in that contract and obtained the house as a part of her mother's assets. It was properly conceded that the learned District Judge had rightly held the *dictum* in *Bachcho Kunwar* v. *Dharam Das* (1) to be inapplicable, and Dr. Gour has been unable to find any case exactly in point.

On behalf of the non-applicant it was urged:—

(1) that the Courts below had rightly held that the house in dispute was part of the patrimony of Rewa Bai and did not constitute the assets of Khilona Bai in her hands; and

(2) that, assuming that the view of the law taken by the Courts below did not commend itself as correct to this Court, that circumstance afforded no ground for interference in revision.

I think that both these responses to the application are well founded. The argument in support of the decree-holder's claim is well-reasoned, but I think it is unsound. When Odeychand's estate was claimed by an alleged devisee who was not the heir at-law, a right to sue became available to the heir-at-law for the time being, and this right would survive for the benefit of each heir-at-law of Odeychand whose inheritance vested by succession *pendente lite*. On Odeychand's death his heir-at law for the time being was his sole widow Khilona Bai, and, upon Lakhmichand's seizure of the estate, a right of suit arose in her favour. She used it and filed the necessary suit. When she died, the right of suit did not die with her, because she represented the interest of Odeychand's heir-at-law against a claimant who was not a legal heir. Because the right to sue survived, the daughters of Odeychand, as the next legal heirs in succession to Khilona Bai, were brought on the record. They were her legal representatives in the suit, but they were not her heirs, even though they may have erroneously been named as such by a common, but often incorrect, translation of the vernacular term *waris*. They took up her *duties* as plaintiff in the suit, but they did not represent her interest. Her personal claim to enjoy the estate of her husband died with her. But her legal responsibility to protect the interest of the legal heir of Odeychand devolved, when she died, upon the next in the order of legal succession, namely, Odeychand's daughters. In most systems of inheritance each holder becomes a fresh stock of descent. But, as we know, there are exceptions to this rule where, as here, the personal law applicable is the Hindu Law. The parties in this case are presumably governed by the Hindu *lex loci* in Jubbulpore, which is the Mitakshara as interpreted by the Benares School. That being so, Rewa Bai took up the suit as an heir of her father, in succession to another and preferential heir of her father who had instituted it and died before it was decided. This view of the law was discussed in detail by a Bench of this Court in *Ramdin* v. *Raj Rani* (2), dissenting from a contrary view of the High Court of Madras in *Sakyabani Ingle Rao* v. *Bhavani Bozi* (3). And though the Madras view was re affirmed by the same Tribunal in *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshminarasamma* (4), the law has now been set at rest by the Supreme Tribunal in *Venkatanarayana Pillay* v. *Subbammal* (5), where their Lordships take the same view as was adopted here in *Ramdin* v. *Raj Rani* (2). I do not think that any distinction can be drawn between the case of a daughter succeeding to a suit instituted by her mother, as here, and a contingent reversioner succeeding as presumptive reversioner to a suit instituted by his predecessor in the

(1) 28 A. 347; A. W. N. (1906) 34; 3 A. L. J. 155.

(2) 17 Ind. Cas. 101; 8 N. L. R. 113.

(3) 27 M. 588.

(4) 15 Ind. Cas. 213; 37 M. 406; 11 M. L. T. 184; 22 M. L. J. 375; (1912) M. W. N. 442.

(5) 29 Ind. Cas. 298; 38 M. 406: 28 M. L. J. 535; 17 M L. T. 435; 21 C. L J. 515; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125 (P. C.).

reversion. Each case is one of a suit instituted by an immediate heir (vested or reversionary) of the *propositus*, and carried on, owing to the death of the original plaintiff, by the next succeeding heir of the same *propositus*, and not of the deceased plaintiff.

It follows that, in the present case, though Rewa Bai and Ganga Bai took up the duties of their mother as the plaintiff in an heir-at-law suit against an invader, they did so as heirs of their father, and not as heirs of their mother; and any property which they obtained by force of that suit constituted their inheritance from their father, and was no part of the estate of Khilona Bai. It makes no difference that they obtained it, not by adjudication on the merits, but by compromise. Under the compromise each party took what he and she got by virtue of the independent title set up by him and her. To the extent of the property which Rewa Bai got, her title as her father's heir was admitted by the other parties, by way of compromise. This principle was affirmed by their Lordships of the Privy Council in *Hiran Bibi* v. *Sohan Bibi* (6).

It is thus clear that the house which the applicant seeks to attach is the inheritance of Rewa Bai from her father, and not any part of the personal estate of Khilona Bai. The Courts below have correctly held that it is not liable to attachment, and this application must fail on the merits.

Under the above circumstances it is hardly necessary to go into the other response made to the application. But it may be well to point out that an erroneous view of the law need not involve either a want or refusal of jurisdiction, or any illegality or material irregularity of procedure; and, therefore, may be insufficient to justify interference under section 115, Civil Procedure Code, 1908. Ample authority may be found for this view in *Amir Hasan Khan* v. *Sheo Baksh Singh* (7), *Kristamma Naidu* v. *Chapa Naidu* (8), *Ghulam Khan* v. *Muhammad Hassan* (9), *Dura* v. *Mohanlal* (10).

For the above reasons the application fails and is dismissed with costs. I allow Rs. 25 as Pleader's fees in this Court.

Application dismissed.

(6) 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648 (P. C).

(7) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760.

(8) 17 M. 410; 6 Ind Dec. (N. S.) 284.

(9) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902.

(10) 4 N. L. R. 184.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 93 OF 1916.

January 3, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

MOTIHARI CONCERN, LTD.—PLAINTIFF—APPELLANT

versus

LACHMI PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Recognition of tenancy—Withdrawal by agent of money deposited as rent, effect of.

Where the agent of the plaintiff landlord duly authorised to do so withdrew rent deposited by the defendants in respect of a holding:

Held, that the withdrawal amounted to recognition of the defendants as tenants of the holding, or at all events, to an acknowledgment that the defendants were not trespassers. [p. 886, col. 1.]

Appeal against a decision of Mr. Justice Kingsford, reported as 35 Ind. Cas. 81, dated the 15th June 1916, in Second Appeal No. 1310 of 1915, confirming that of the District Judge, Muzafferpur, dated the 6th March 1915, confirming a decision of the Additional Munsif, Motihari, dated the 17th June 1914.

Messrs. *Naresh Chandra Sinha* and *Shivanarain Bose*, for the Appellant.

Messrs. *K. P. Jayaswal* and *Sunder Lal*, for the Respondents.

JUDGMENT.—This is an appeal under clause 10 of the Letters Patent against a judgment of Mr. Justice Kingsford confirming the decisions of the Munsif of Motihari and the District Judge of Muzafferpur. The appellant Company sue for possession of land in possession of the principal defendants alleging that the Company are the proprietors of the land and that the principal defendants are mere trespassers. All three Courts which have dealt with this case have held that in consequence of certain

rent having been withdrawn from the Court by the general agent of the Company, the Company must be taken to have recognized the principal defendants to be tenants of the land and, therefore, no suit is maintainable against them as trespassers. In this appeal it is contended that the general agent of the Company had no authority to withdraw the money which had been deposited in the Court and even if he had authority to withdraw it, the withdrawal did not amount to a recognition of the status of the defendants as tenants. We have examined a translation of the Power-of-Attorney held by the general agent and we are satisfied that the Courts below were right in holding that the general agent had the power to withdraw the money. The Power-of-Attorney authorised him to withdraw money deposited in the Court by tenants or any other money which was paid into Court to the credit of the Company.

It is said that the general agent had not power to decide whether the defendants were tenants or not and, therefore, the clause authorising him to withdraw money deposited by tenants had no application to the present case. It is unnecessary to discuss this question, for the other clause referred to clearly authorised the general agent to withdraw the money. The Power-of-Attorney conferred very wide powers on the general agent and it seems to us that there can be no doubt that the general agent was clothed with authority to withdraw the money paid into Court by the defendants as the rent of the land in question. We think that the Courts below were right also in holding that the withdrawal of the money amounted to an acknowledgment that the defendants were at all events not trespassers. In the plaint the Company prayed that, in case the Court came to the conclusion that they were not entitled to possession of the land, rent might be assessed at the rate of Rs. 100 a *bigha* and that Rs. 550 awarded as *salami* and as compensation for land. All the Courts below have declined to assess rent on the land and it seems to us that this Court is not in a position to do so. The findings merely amount to this, that the principal defendants are tenants of some kind on the land. Whether they are tenants at-will of the whole of the land or whether they acquired the rights of any previous tenants of the land are questions which have not been decided and until they are decided, it is impossible to say whether any Court is entitled to assess rent on the land. The question of the actual rights of the principal defendants and the question whether rent can be assessed by the Court must be settled, if at all, in subsequent litigation or by agreement. This appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 209 OF 1916.

May 14, 1917.

Present—Mr. Justice Piggott.

LACHMAN DAS—PLAINTIFF—APPLICANT

versus

MUTSADDI LAL AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 7, O. XLIII, r. 1 (w)—Appeal from order granting review, maintainability of.

Plaintiff sued defendants for specific performance of a contract to execute a lease of certain property and in the alternative for ejectment and damages. The dispute was referred to arbitration, and the arbitrator decided in favour of the plaintiff, but gave an option to the defendants to vacate the land after payment of the rent due at a certain rate. The Court passed a decree by which the plaintiff was given the right to eject the defendants in addition to the recovery of rent. Defendants applied for amendment of the decree, but their application was rejected. They then applied for review, and their application being granted, the plaintiff appealed:

Held, that the appeal could not be supported upon any of the pleas referred to in Order XLVII, rule 7, of the Civil Procedure Code. [p. 887, col. 2.]

Order XLIII, rule 1 (*w*), Civil Procedure Code, is merely inserted in order that the rule in question may contain a complete list of those orders from which an appeal lies. It must be read subject to the provisions of Order XLVII, rule 7, by which the right of appeal from an order granting an application for review is limited and defined. [p. 887, col. 2; p. 888, col. 1.]

Civil revision from an order of the District Judge, Saharanpur.

Mr. *Nehal Chand*, for the Applicant.

The Hon'ble Sir *Sundar Lal*, for the Opposite Party.

JUDGMENT.—This is an application in revision which arises under the following circumstances. The applicant was the plaintiff in a suit in which he claimed specific

performance of a contract to execute a lease of certain property on certain terms, or in the alternative the ejectment of the defendants from the property in question and damages. The matter was referred to arbitration and the arbitrator delivered an award. The first relief claimed by the plaintiff was in very clear terms allowed by the arbitrator, that is to say, he was declared to be entitled to obtain from the defendants the counterpart of a lease, on certain terms which were sufficiently indicated. He was awarded Rs. 270 as rent for three years prior to the institution of the suit, with a further direction that rent should continue to be payable at the same rate from the institution of the suit until the defendants should execute a *kabuliyat*, or counter part of a lease, in the prescribed terms. Then the arbitrator went on to deal, in the alternative, with the question of refusal or neglect on the part of the defendants to execute the requisite document. He laid it down in this alternative that they, that is to say, the defendants "will have the option to vacate the land after paying all rents due at the rate of Rs. 90 a year up to the date of the eviction, such option to be exercised within two weeks after confirmation of this award." The Court accepted the award and passed judgment accordingly; but a decree was drawn up in the vernacular which was not a literal translation of the alternative provision which has been quoted above from the award. According to the decree as drafted, the plaintiff was in express terms authorised to eject the defendants from the land in suit, besides recovering rent at the prescribed rate up to the date of ejectment. This decree is dated August the 7th, 1915. The defendants allowed two weeks to pass without executing any lease and the plaintiff thereupon took out execution of the decree according to its terms and obtained possession by ejectment of the defendants. The latter thereupon applied for amendment of the decree but on September the 25th, 1915, the presiding officer of the Court, Mr. Grant, being the same officer who had passed judgment in accordance with the award and had signed the decree in question, passed an order rejecting the application for its amendment. On October the 4th, 1915, the defendants applied for review of this order, and this application was entertained by Mr. Grant and notice ordered to issue to the opposite party. The matter came up for decision on November the 4th, 1915, by which time Mr. Grant had been transferred and his place had been taken by Mr. Neave. This officer came to the conclusion that the decree as passed was not in accordance with the award and that it was absolutely necessary for the Court to amend it. He himself, however, proceeded to draw up a decree which was not an accurate translation of the critical passage in the award to which reference has been made. He did not content himself with removing from the decree the words which in express terms empowered the plaintiff to obtain possession by ejectment of the defendants; but he proceeded to insert a provision to the effect that the relinquishment of the land in suit was to be a matter entirely at the option of the defendants, and that in no event should the plaintiff be regarded as empowered to obtain the ejectment of the defendants in execution of the decree. Against this order an appeal was filed in the Court of the District Judge of Saharanpur. The District Judge has dismissed the appeal on the ground that it could not be supported upon any of the pleas referred to in Order XLVII, rule 7, of the Code of Civil Procedure. The application now before me is against this order of the District Judge. The contention is that an appeal lay against Mr. Neave's order granting the application for review, under the provisions of Order XLIII, rule 1 (*w*) of the Code of Civil Procedure, that this right could not be qualified by anything contained in the provisions of Order XLVII, rule 7, and that consequently the District Judge has refused to exercise a jurisdiction vested in him by law in not entertaining the appeal before him on its merits. On the question thus stated, I am clearly of opinion that the District Judge was right. The provisions of Order XLVII, rule 7, and of Order XLIII, rule 1 (*w*), of the Code of Civil Procedure appear to overlap and it is necessary to put upon them a construction which reconciles them. In my opinion Order XLIII, rule 1 (*w*), is merely inserted in order that the rule in question may contain a complete list of those orders from which an appeal lies. It must be read subject to the provisions of Order

XLVII, rule 7, by which the right of appeal from an order granting an application for review is limited and defined. This has been held in *Sundar Lal* v. *Upendra Nath Seal* (1) and I find myself in entire agreement with the view of the learned Judge who decided that case.

I think the plaintiff has been badly advised. In the Trial Court both Mr. Grant and Mr. Neave had gone beyond the powers of the Court in passing a decree which was not in precise accordance with the terms of the award. The award had been made through the intervention of the Court; and if there was anything ambiguous about the alternative relief referred to in the closing portion of the award, that was a matter which the Court ought to have noticed at the time and referred back to the arbitrator for consideration. Once the award had been accepted, it was incumbent on the Court to accept it as it stood As soon as the decree-holder took out execution, a difficulty would, no doubt, have arisen as to the proper interpretation of the words in the award which I have already quoted; but this difficulty was inevitable, once the award had been accepted without amendment. Both the presiding officers of the Court of first instance seem to me to have gone beyond their powers in different directions, by seeking to clear up an ambiguity in the terms of the award.

This being my view of the case, it has been suggested to me in argument that I might take up the matter even now as an application in revision, not against the order of the District Judge dismissing the appeal filed in his Court, but against Mr. Neave's order of November 4th, 1915. I am not anxious to add to the irregularities which have already been committed in the case. If the plaintiff desired to invoke the revisional jurisdiction of this Court in respect of Mr. Neave's order, he should have done so in express terms; no doubt he has refrained from doing so because of the difficulty in which he had landed himself by appealing against hat order. Moreover, I am bound to say that, if the question had come before me on the execution side, so that the only point I had to decide was the legal effect to be given to the words of the award, assuming those words to have been embodied in a decree of Court, I should have agreed in substance with the view taken by Mr. Neave. The intention of the arbitrator may have been otherwise, and that is why I think it unfortunate that the possible ambiguity was not brought to the notice of the Court at the proper time, while the opportunity to refer the matter back to the arbitrator for consideration was still open; but on the words as they stand, I do not think that a power of ejectment is conferred upon the plaintiff. This does not mean that the decree leaves the plaintiff without his proper remedy. The provisions of Order XXI, rule 34, of the Code of Civil Procedure seem to have been overlooked by the plaintiff and by his legal advisers. His proper course was to take out execution of the first part of the decree under the provisions of the rule above mentioned. In this manner he can obtain execution of a document in the terms prescribed by the award, and the defendants, whether they like it or not, will be compelled to choose between executing such a document and abiding by its terms, or voluntarily relinquishing the land in suit. The decree-holder will be entitled under the terms of the decree to rent at the prescribed rate of Rs. 90 per annum so long as the defendants continue in possession.

I hold, therefore, that the application in revision now before me is altogether misconceived and that I must dismiss it with costs. I do so accordingly.

Application dismissed.

(1) 35 Ind. Cas. 15; 1 P. L. J. 193.

JAMNA DAS *v.* BISHAN DAS.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 3176 OF 1916.

April 24, 1917.

Present:—Mr. Shah Din, Chief Judge.

JAMNA DAS AND ANOTHER—DECREE-HOLDERS —APPELLANTS

versus

BISHAN DAS—JUDGMENT DEBTOR—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O. XLI, rr.* 14, 17, 21—*Appeal, hearing of—Notice to respondent, service of—Appellant, duty of, to furnish address of respondent.*

An Appellate Court is not to presume that the respondent has knowledge of the date of hearing of the appeal, if notice has not been duly served upon him. [p. 889, col. 2; p. 890, col. 1.]

It is the duty of the appellant to give the proper and correct address of the respondent, but the latter is not bound to communicate his address either to the Court against whose decree or order the appeal has been preferred or to the Appellate Court; and by his omitting to do so or by leaving the Appellate Court in dark as to his whereabouts he in no way abuses the provisions of the Civil Procedure Code. [p. 890, col. 1.]

Miscellaneous first appeal from the order of the Additional District Judge, Amritsar, at Gurdaspur, dated the 28th April 1916, rejecting the application for setting aside the *ex parte* judgment passed by the Additional Judge, Amritsar, at Gurdaspur, dated the 17th March 1916.

Facts appear from the following order of the District Judge:—

"This is an application to set aside an *ex parte* judgment delivered by Mr. Martineau on the 17th of March 1916. The facts are patent on the face of the record. The appellant judgment debtor appealed in the year 1913 from the decision of the Munsif at Amritsar, dated the 19th of April 1913, and eventually on the 19th of January 1915 Mr. Martineau directed notice to be issued to the respondents who now apply to set aside the *ex parte* decree in appeal. On the 15th of March 1915 Mr. Martineau noted that the respondents had not been found at Cawnpore. It appears that on the 11th of February 1915 an attempt was made to effect service on the respondents at Cawnpore, but it was reported by the process-server that they no longer had a place of business in that city and had no place of residence there. The report is silent as to the place where the respondents had gone or transferred their place of business. It is not suggested on their behalf that they had notified their change of address to the appellant or to the Court which had to execute their decree. It does not appear that any notice had been put up even on their old place of business at Cawnpore to say where they were to be found or where their new place of business was. On the record as it stands, the only address of the petitioners which can be traced is the address at Cawnpore and it is admitted that the petitioners left that place a considerable time ago. In consequence of the appellant's failure to get service of the notice effected at Cawnpore Mr. Martineau directed him to find out the petitioners' proper address. The only address which the appellant could trace out appears to have been a shop at Calcutta known as that of Multani Chand-Kanhaya Lal where Jamna Das and Lachhmi Narain petitioners appear to have been employed. Accordingly the notices were sent to the address for service on petitioners and as they could not be found there in person, the notices were affixed to the shop. Finally on the 17th of March 1916 or some 14 months after notice had issued in the first place, Mr. Martineau decided the appeal *ex parte*. It is now contended for the petitioners that there was no proper service upon them, but the answer to that contention is that the petitioners by their own conduct have rendered it impossible for the appellant ever to get proper notice served upon them. It is also contended that Mr. Martineau's procedure was under the circumstances illegal, but I am not disposed to give any weight to that argument. It appears to me that the petitioners have abused the provisions of the Civil Procedure Code as to the service of notices on respondents by leaving the Courts, both the Court of first instance and the Court of Appeal, totally in the dark as to their whereabouts and have done so intentionally with the object of defeating and delaying the hearing of the appeal in this Court. This being so, I see no reason to set aside the *ex parte* proceedings or Mr. Martineau's judgment. I accordingly reject this application."

Lala Hukam Chand for Mr. *Lal Chand Mehra*, for the Appellants.

Mr. *Duni Chand*, for the Respondent.

JUDGMENT.—After hearing arguments and referring to the record of the execution proceedings, I think that the Additional District Judge was not justified in assuming

SRI NARAIN v. JAGANNATH.

that the decree-holders, who are appellants before me, must be taken to have known the date on which the appeal of the opposite party was fixed for hearing in the Court of Mr. Martineau. The appeal from the order of the Munsif was sent from one Court to another for reasons which it is unnecessary to state in this place; and it is not surprising that the decree-holders, who had meanwhile changed their place of business, were unaware of the date of hearing fixed by the Appellate Court. They were not bound to communicate their address to the original executing Court or to the Court of Appeal; and I cannot agree with the Additional District Judge that they have abused the provisions of the Civil Procedure Code as to the service of notices by leaving the Court in the dark as to their whereabouts. There is nothing on the record to show that the decree-holders were employed at the shop of Multani Chand-Kanhaya Lal at Calcutta, and the fact that the proprietors of the shop refused to accept the service of notices on behalf of the decree-holders in no way tells against them.

I hold it not proved on the present record that the appellants had any knowledge of what the date of hearing was in the Court of Mr. Martineau. I accordingly accept this appeal, set aside the *ex parte* order of Mr. Martineau, dated the 17th March 1915, and send the case back with a direction that the appeal be re-heard after giving proper notice to the present appellants. In the peculiar circumstances of the case, the parties will pay their own costs.

Appeal accepted.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 75 OF 1917.

June 29, 1917.

Present:—Mr. Justice Tudball and Mr. Justice Walsh.

SRI NARAIN—PLAINTIFF—APPELLANT

versus

JAGANNATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20—Cause of action—Jurisdiction—Banker and depositor—Suit to recover deposit.

The ordinary rule is that a debtor must seek his creditor to pay him, and people do not generally make express stipulations on the subject when making a deposit, because the question of suing for the deposit is far from their minds. [p. 891, col. 1.]

In an ordinary case, especially a case against a Bank or some trader who holds himself out as a person to receive deposits, it does not necessarily follow that a re-paynment of the deposit is to be made at the place of business of the Bank. In the majority of such cases the intention of the parties is that the money should be paid to the depositor wherever he happens to be when he demands re-payment. [p. 890, col. 2.]

Civil revision from an order of the District Judge, Cawnpore.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Kailas Nath Katju*, for the Appellant.

The Hon'ble Mr. *Motilal Nehru*, for the Respondents.

JUDGMENT.—We have come to the conclusion that this decision cannot stand as it is at present, and there being an important question of jurisdiction raised, we ought to interfere even in revision. The question whether any part of the cause of action arose in the Court of Cawnpore depends entirely upon the place where, under the contract, either by express agreement or by the intention of the parties, re payment was to be made. Both parties have set up an express contract. That alleged by the plaintiff alone has been considered and has been dealt with, as would appear, rather in the light of what was decided by the Bikaneer Court. It is by no means clear that the previous judgment of that Court was admissible. It is not desirable to say more about the facts than this that in an ordinary case, especially a case against a Bank or some trader who holds himself out as a person to receive deposits, it would not necessarily follow that a re-payment of the deposit was to be made at the place of business of the Bank. In the majority of such cases the intention of the parties is obviously that the money should be paid to the depositor wherever he happened to be when he demanded re-payment. In deciding the question of jurisdiction it may be that the Court will also decide the merits. That cannot be helped, but if in deciding the merits, it comes to the conclusion that the payment was to be made at Bikaneer, then obviously it must give effect to that decision and decide that there is no jurisdiction in itself to determine the suit. In

onsidering the somewhat nice question which appears to arise, the Court must not lose sight of the fact that the sale of the jewellery and the deposit of the money was made by the deceased woman after, and possibly in consequence of, her husband's death; it was done in the company of her father with whom she had come to Bikaneer and shortly before her return to Cawnpore to her parents' house and further, it is suggested by the defendant, in consequence of a dispute with her mother-in-law. It will further not lose sight of the fact that it was a continuing contract, and that there was a liability on the part of the defendant not only to re-pay the money deposited but until re-payment was demanded, to make periodical payment of interest. These circumstances of course all have their place in the consideration of the real question where payment was to be made if no express provision on the subject was made, and the Court will no doubt further have regard to the fact that the ordinary rule is that the debtor must seek his creditor to pay him and that, as a general rule, people do not make express stipulations upon the subject when they are making arrangements of this kind, because the question of suing for the deposit is far from their minds. We, therefore, remand the whole case to the Court of first instance through the lower Appellate Court to be restored to its original number on the record and to be tried according to law. Costs in all Courts to abide the result.

Case remanded.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 712 OF 1916.

February 10, 1917.

Present:—Mr. Justice Shah Din.

Musammat GULABI BIBI—DECREE-HOLDER —PETITIONER

versus

ASLAM KHAN—OBJECTOR— RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 100, 101, 103—Order under r. 100—Appeal, whether lies.

Under rule 103 of Order XXI of the Civil Procedure Code no appeal lies from an order passed under rule 101 of that Order. [p. 892, col. 1.]

Civil revision from the order of the District Judge, Lahore, dated the 30th May 1916.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Petitioner.

Messrs. *Beechey* and *Obedulla*, for the Respondent.

JUDGMENT.—The order of the Munsif, dated the 21st of February 1916, was passed under Order XXI, rule 101, of the Civil Procedure Code, upon an application made by the respondent under rule 101. Under rule 103 no appeal lay from the said order of the Munsif, as it was conclusive between the parties (the decree-holder, who is petitioner before me, and the respondent); and the respondent was at liberty to institute a suit to establish the right which he claimed to the possession of the property of which he was dispossessed by the decree-holder.

The District Judge entertained an appeal by the respondent from the Munsif's order, dated the 21st of February 1916, on the strength of two very old rulings of the Calcutta High Court, *Brohmo Moyee Dabee* v. *Burkut Sirdar* (1) and *Mookundee Misrain* v. *Sheo Lochun Pattuck* (2), and setting aside the order in question he sent the case back to the Munsif for re decision.

Now, the two rulings which the District Judge has followed were passed under sections 230 and 231 of the Civil Procedure Code of 1859 (Act VII of 1859), which Act has long since been repealed and no longer governs cases like the present. The present case is covered by rules 100, 101 and 103 of Order XXI of Act V of 1908, and according to the

(1) 13 W. R. 264.
(2) 21 W. R. 39.

last mentioned rule of Order XXI no appeal lay from the order of the Munsif, dated the 21st of February 1916.

This is conceded by the Counsel for the respondent; but he has filed before me a petition under section 115, Civil Procedure Code, against the order of the Munsif aforesaid, and has urged that since the order in question was passed by the Munsif without holding an investigation into the merits of the petitioner's (present respondent's) claim, the order should be set aside and the Munsif be directed to decide the case on the merits after taking all the evidence that may be adduced by the parties. In my opinion the Munsif has given sufficient reasons in support of his order by which he has rejected the respondent's application; and it is perfectly unnecessary to send the case back to the Munsif for a fresh decision, as the respondent can bring a regular suit, if so advised, to establish his alleged right to the property in dispute.

I accordingly accept this revision, set aside the order of the District Judge, and restore that of the Munsif with costs. Pleader's fee Rs. 32.

Revision accepted.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No 889 OF 1915.
June 7, 1917.
Present: - Mr. Justice Tudball and
Mr. Justice Rafique.
RATAN DEI—PLAINTIFF—APPELLANT
versus
DURGA SHANKAR BAJPAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Rent Law—Ex-proprietary rights, sale of, validity of—Agreement to relinquish ex-proprietary rights for consideration.

Plaintiff judgment-debtor sold a *zemindari* to the defendant decree-holder and agreed to file a relinquishment of her ex-proprietary rights in the *sir* lands, and in consideration thereof the defendant agreed to file a certificate of the satisfaction of the decree and further bound himself to pay to the plaintiff a monthly allowance of Rs. 5 for the rest of her life, which was to be a charge on the property sold. Plaintiff sued the defendant to recover arrears of the allowance agreed to be paid to her:

Held, that the arrangement between the parties was merely a device to get round the provisions of the Rent Act of 1881 and amounted in fact to a sale of ex-proprietary rights, and was, therefore, absolutely void and unenforceable. [p. 893, col. 2.]

Moti Chand v. *Khwaja Ikram Ullah Khan*, 39 Ind. Cas. 454; 15 A. L. J. 150; 5 L. W. 388; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433; 39 A. 173; 26 C. L. J. 24; (1917) M. W. N. 453 (P. C.). relied upon.

Second appeal from a decree of the District Judge, Benares.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Sham Nath Mushran*), for the Appellant.

Mr. *Gokul Prasad* (with him Messrs. *Braj Nath Vyas* and *Harnandan Prasad*), for the Respondents.

JUDGMENT.—The facts of this case are as follows:—The plaintiff's husband was the owner of *zemindari* in several villages and some house property in Benares. He also held a large area of land as *sir* within his *zemindari*. He was heavily in debt to Durga Shankar Bajpai, defendant No. 1. The latter obtained one decree for about Rs. 20,000.

On the 7th October 1899, the plaintiff who was then a widow transferred the *zemindari* and the houses to Durga Shankar by a sale-deed, the consideration for which was Rs. 21,415. This included the amount due on the decree and also another debt. By the terms of the deed the plaintiff agreed to file a relinquishment of her ex-proprietary rights in the *sir* lands and Durga Shankar agreed to certify to the Civil Court full satisfaction of his claim under the decree.

At that time the Rent Act XII of 1881 was in force and it is quite clear that the sale consideration was to cover not only the proprietary rights but also the ex-proprietary rights and the arrangement was one of those devices considered by their Lordships of the Privy Council in *Moti Chand* v. *Khwaja Ikram Ullah Khan* (1) and which are there declared to be "in contravention of the policy of the Act and are contrary to law and are illegal and void." The Act which their Lordships had in view was the present Tenancy Act, but in this respect it does not differ from its pre-

(1) 39 Ind. Cas. 454; 15 A. L. J. 150; 5 L. W. 388; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433; 39 A. 173; 26 C. L. J. 24; (1917) M. W. N. 453 (P. C.).

decessor which equally prohibited the sale or transfer of ex-proprietary rights except as between those in whose favour jointly the right had arisen. In the present case a hitch appears to have occurred. The plaintiff at first did not file a relinquishment and Durga Shankar did not certify to the Civil Court full satisfaction of his decree. The cause of this is not given, for neither the plaintiff nor Durga Shankar have given the Court any assistance.

However, on October 24th, 1901, *i.e.*, two years after, Durga Shankar executed a document in favour of the plaintiff in which it is stated the parties had come to an agreement that she was to file her relinquishment and in consideration thereof Durga Shankar would file his certificate of satisfaction of the Civil Court decree and further bound himself to pay to the plaintiff a monthly allowance of Rs. 5 for the rest of her life, which was to be a charge upon the property transferred by the sale-deed of 7th October 1899. When the relinquishment was actually filed, if at all, is not stated.

In subsequent years the property in question was all sold in execution of decrees obtained against Durga Shankar.

Now on 24th February 1914, the plaintiff has brought a suit to recover arrears of the monthly allowance for the period from 24th October 1904 to the 24th February 1914, amounting to Rs. 560, *plus* interest which brings the claim up to Rs. 932-12-0, and also asks for a decree for future maintenance allowance at the rate of Rs. 5 recoverable by execution of the decree. Durga Shankar does not contest the claim. The subsequent purchasers contest it. The Courts below have dismissed the suit holding that the contract is contrary to law, null and void in that it was in fact and in substance a sale of ex-proprietary rights which is forbidden by law.

The pleas taken before us are: —

(1) That the transaction was not illegal in that it was only a surrender of the ex-proprietary rights for a consideration, and reference is made to section 83 of the Tenancy Act.

(2) That at least it may be treated as the granting of a lease of the ex-proprietary holding, the rent being the monthly allowance of Rs. 5.

(3) That at least the plaintiff is entitled to a personal decree against Durga Shankar.

Reviewing the transaction as a whole and keeping in view the terms of both the documents of 1899 and 1901, there is not the slightest doubt that the arrangement between the parties was merely a device to get round the provisions of the Rent Act of 1881. Section 83 of the Tenancy Act does not apply, as that Act was not in force. Even if it did apply, it would not avail the plaintiff anything for we cannot allow the law to be defeated by any such device. There was clearly a transfer for consideration, a buying out, agreed upon at the time of sale, of the ex-proprietary rights about to be created. The plaintiff, apparently knowing that the vendee could not enforce the contract, made use of her position to extract a further consideration, and the case we have mentioned above is to the point. The contract was contrary to law and, therefore, void. Neither party can enforce it. The plaintiff bases her claim upon it. She does not seek to avoid it and regain her holding. She raised no plea of fraud in her plaint nor is any such plea raised before us.

The suit has the appearance of being (far from a *bona fide* claim) an attempt to defeat Durga Shankar's creditors. The long delay in the claim is not free from suspicion. As for treating the claim as a suit for rent on the basis of a lease, that is an impossibility. There is no lease and it is not a suit for rent and this is not the case that the defendants were asked to meet in the Courts below.

Nor can the plaintiff obtain a personal decree against Durga Shankar. The contract being void she cannot enforce it, any more than he could have done if she had refused to give up her holding.

The appeal fails and is dismissed with costs.

The cross-objections have not been pressed and are dismissed with no order as to the costs thereof.

Appeal dismissed.

BRAJENDRA LAL DAS v. DEB NARAIN TEWARI

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 963 OF 1913.

May 22, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

BRAJENDRA LAL DAS AND OTHERS—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

DEB NARAIN TEWARI AND ANOTHER—PLAINTIFFS AND OTHERS—DEFENDANTS NOS. 3 AND 4—RESPONDENTS.

Chowkidari chakran *lands*—Zemindar's *title*—*Auction-purchaser of* zemindari *at revenue sale, whether acquires* chowkidari chakran *lands transferred to* zemindar *under Chowkidari Act.*

Chowkidari chakran lands form part of the original revenue paying estate and when they are resumed and transferred to the *zemindar*, the latter does not acquire thereby a new estate but the estate taken by him under the order of transfer is in confirmation and by way of continuance of his pre-existing estate. [p. 894, col. 2.]

Nevertheless a purchaser of the parent estate at a revenue sale under Act XI of 1859 acquires no title to the *chowkidari chakran* lands that have been resumed and transferred to the defaulting *zemindar* under the Chowkidari Act, where the Collector, treating the enfranchised *chowkidari chakran* lands as constituting by themselves a separate estate subject to the payment of a separate assessment made under the Chowkidari Act, puts up to sale the original parent estate, exclusive of those lands, for realisation of the arrears of revenue due therefrom. [p 895, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Burdwan, dated the 29th November 1912, affirming that of the Munsif, 3rd Court, at that place, dated the 30th August 1911.

Babu *Ram Chandra Majumdar*, for the Appellants.

Babu *Dwarkanath Chakrabarty* (with him Babu *Gopal Chandra Chakrabarty*), for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for recovery of possession of immoveable property on declaration of title. The lands in dispute were originally *chowkidari chakran* lands, which were resumed under the provisions of the Village Chowkidari Act, 1870, and were transferred to the plaintiffs on the 2nd February 1900. Since then, the proprietors of the estate have defaulted to pay Government revenue, with the result that the parent estate was sold on the 27th March 1907 when it was purchased by the appellants. The plaintiffs contend that their title to the *chowkidari chakran* lands was not affected by the sale of the parent estate and that they are consequently entitled to recover possession thereof. The defendants, on the other hand, maintain that the sale under the provisions of Act XI of 1859 transferred to them, not merely the lands comprised in the parent estate, but also the resumed *chowkidari chakran* lands. The Courts below have concurrently negatived this contention on the authority of the decision in *Kashim Sheik* v. *Prasanna Kumar Mukerjee* (1). The correctness of that decision, however, has been called in question, and our attention has been drawn to the cases of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (2), *Harak Chand* v. *Charu Chandra Singha* (3) and *Rakhal Das* v. *Madhab Chandra* (4). In our opinion, there is no room for controversy upon one fundamental question decided by the Judicial Committee in the case of *Ranjit Singh* v. *Kali Dasi Debi* (5), namely, that *chowkidari chakran* lands form part of the original estate, and, when they are resumed and transferred to the *zemindar*, the latter does not acquire thereby a new estate, as was erroneously laid down in *Kashim Sheik* v. *Prasanna Kumar Mukerjee* (1). The Village Chowkidaris Act recognises the existing title of the *zemindar* to the lands resumed, and the estate taken by him under the order of transfer is in confirmation and by way of continuance of his existing estate. This proposition, however, is of no real assistance to the appellants, for as purchasers, they can claim title only to what has been actually exposed for sale by the Collector. In the case before us, it is clear that the *chowkidari chakran* land have not been sold by the Collector; consequently, the appellants have acquired no title to such lands by their purchase. Indeed, the state of facts here is identical with what was foreshadowed in the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (2). The Revenue Authorities have treated the parent estate as divided into two, namely, one comprising all the lands of

(1) 33 C. 596; 10 C. W. N. 598; 5 C. L. J. 299.

(2) 34 C, 109; 5 C. L. J. 33; 11 C. W. N. 201.

(3) 8 Ind. Cas. 766; 13 C. L. J. 102; 15 C. W. N. 5.

(4) 8 Ind. Cas. 828; 13 C. L. J. 109; 15 C. W. N. 61.

(5) 40 Ind. Cas. 981; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 25 C. L. J. 499; 19 Bom. L. R. 462; 2 P. L. W. 1; (1917) M. W. N. 459; 6 L. W. 101 (P. C.).

the parent estate except the *chowkidari chakran* lands and the other including the *chowkidari chakran* lands. *Rakhal Das* v. *Madhab Chandra* (4). The Revenue Authorities have thus substituted two distinct estates in place of what originally constituted one integral estate. Whether this was or was not the necessary consequence of the provisions of the Village Chowkidari Act, we need not discuss on the present occasion; we are concerned only with the legal effect of what has actually taken place. The Collector has treated the enfranchised *chowkidari chakran* lands as constituting by themselves a separate estate subject to the payment of a separate assessment made under the Village Chowkidari Act, 1870. The residue of the original estate as created at the time of the Permanent Settlement has been treated as a separate estate, and that alone was exposed for sale for recovery of the arrears due therefrom. The sale was not held for the recovery of the amalgamated revenue, namely, the revenue assessed at the time of the Permanent Settlement and the subsequent assessment made at the time of the resumption under the Village Chowkidari Act, nor was the amalgamated estate brought to sale. In these circumstances, it is clearly impossible to maintain the position that the purchaser at the revenue sale has acquired title to the *chowkidari chakran* lands which were never put up to sale for realization of the arrears due from the remainder of the estate. We hold accordingly that the decree made by the Subordinate Judge is correct but not on the grounds set out in his judgment.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 3 OF 1916.

March 7, 1917.

Present:—Mr. Shah Din, Chief Judge, and Mr. Justice LeRossignol.

RAM SINGH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

BAKHSHI—DEFENDANT—RESPONDENT.

Punjab Tenancy Act (*XVI of* 1887), *s.* 77 (3)—*Punjab Land Revenue Act* (*XVII of* 1887), *ss.* 45, 158 (2) (vi)—*Suit for declaration that entries in revenue papers are incorrect—Revenue Court, whether competent to entertain suit—Civil Courts, jurisdiction of.*

The plaintiffs alleged that the entries in the revenue papers relating to the ownership of certain *khasra* numbers of a village were incorrect, in so far as the land comprised in those *khasra* numbers was shown as the property of the defendants whereas it really formed part of the *shamilat deh*, and the relief prayed for by them was that the proceedings relating to the mutation of the land in question in the Settlement Record be held null and void and the entries in the Record of Rights and the annual record be corrected. The suit was tried and dismissed by the Revenue Courts on the merits. The Financial Commissioner referred the case to the Chief Court under section 100 of the Punjab Tenancy Act:

Held, (1) that the suit as laid was not covered by any of the clauses of sub-section 3 of section 77 of the Punjab Tenancy Act; and since section 158 (2) of the Land Revenue Act, which debars the Civil Courts from exercising jurisdiction over matters specified therein, did not confer jurisdiction on a Revenue Court, as distinguished from a Revenue Officer, to try a suit relating to any of those matters, the present suit as laid could not be taken cognizance of by a Revenue Court; [p. 896, col. 1.]

(2) that even if the present suit be considered as one for the correction of an entry in a Record of Rights, annual record, or the register of mutations, it was clearly not cognizable by a Revenue Court as no express jurisdiction was conferred upon a Revenue Court by either the Tenancy Act or the Land Revenue Act to entertain a suit of that description; [p. 896, cols. 1 & 2.]

(3) that as upon a liberal interpretation of the plaint it was reasonable to hold that the real object of the plaintiffs was to obtain a declaration that the entries relating to the land in question in the Record of Rights and the annual record were incorrect and that the land was part of the village *shamilat* and did not belong exclusively to the defendants, such a suit was cognizable by a Civil Court, for the relief claimed by the plaintiffs was not the actual correction of the entries complained of, as contemplated by clause (*vi*) of sub-section (2) of section 158 of the Land Revenue Act, but only to obtain a declaration under section 45 of the Act in respect of certain rights of which the plaintiffs claimed to be in possession and in respect of which they alleged that a wrong entry had been made in the Record of Rights and in the annual record. [p. 896, col. 2.]

Case referred by the Financial Commissioner, Punjab, with his letter No. 346, dated the 14th January 1916.

Mr. *Daulat Ram*, for the Petitioners.

Mr. *Raman Nand*, for the Respondent.

JUDGMENT.—This is a reference by the Financial Commissioner under section 100 of the Punjab Tenancy Act. After hearing arguments and referring to the plaint, we

agree with the learned Financial Commissioner (Sir Michael Fenton) that the suit brought by the plaintiffs out of which this reference has arisen is not cognizable by a Revenue Court.

The plaintiffs allege that the entries in the revenue papers relating to the ownership of certain *khasra* numbers of village Chatia Aulia are incorrect, in so far as the land comprised in those *khasra* numbers is shown as the property of the defendants, whereas it really forms part of the *shamilat deh* and the relief prayed for by them is that the proceedings relating to the mutation of the land in question in the Settlement Record of 1910 be held null and void and the entries in the Record of Rights and the annual record be corrected. The suit has been tried by Revenue Courts and has been dismissed by them on the merits.

Now it is clear that the suit as laid is not covered by any of the clauses of sub section 3 of section 77 of the Punjab Tenancy Act; and since section 158 (2) of the Land Revenue Act, which debars the Civil Courts from exercising jurisdiction over matters specified therein, does not confer jurisdiction on a Revenue *Court*, as distinguished from a Revenue *Officer*, to try a suit relating to any of those matters, the present suit as laid could not be taken cognizance of by a Revenue *Court*. As pointed out by the learned Financial Commissioner, the Land Revenue Act does not contemplate the creation or constitution of any Revenue *Courts* having jurisdiction to hear and determine any suits other than those specified in the various clauses of section 77 (3) of the Punjab Tenancy Act; and it does not follow that because the jurisdiction of a Civil Court is barred by section 158 (2) of the Land Revenue Act in respect of the matters detailed therein, therefore, a Revenue Court has power, as a Court, to entertain a suit with respect to any one of those matters.

Even, therefore, if the present suit be considered as one for the correction of an entry in a Record-of-Rights, annual record or the register of mutations, it is clearly not cognizable by a Revenue Court for the simple reason that no express jurisdiction has been conferred upon a Revenue Court by either the Tenancy Act or the Land Revenue Act of 1887 to entertain a suit of this description. As pointed out in *Raja Nur Khan* v. *Musammat Darab Khatun* (1), "under the Land Revenue Act of 1871, a suit could be instituted with the sole object of having it declared that a Settlement entry was incorrect and that a different entry ought to have been made (section 20). But the new Act (*i. e.*, Act XVII of 1887) has introduced a change in this respect, and while leaving it still open to a person aggrieved by an entry in a Record of Rights to sue for a declaration of his rights under the Specific Relief Act, 1877, it has wisely enough reserved the mere correction of the entry alleged to be wrong to the Revenue Officers."

The plaint in the present suit is not very happily worded and should not be construed literally; upon a liberal interpretation of it, it is reasonable to hold that the real object of the plaintiffs was to obtain a declaration that the entries relating to the land in question in the Record of Rights and the annual record were incorrect and that the land was part of the village *shamilat* and did not belong exclusively to the defendants. A suit of this nature is, as held in *Raja Nur Khan* v. *Musammat Darab Khatun* (1), cognizable by a Civil Court, for the relief claimed by the plaintiffs is not the actual correction of the entries complained of, as contemplated by clause (*vi*) of sub-section (2) of section 158 of the Land Revenue Act, but only to obtain a declaration under section 45 of the said Act in respect of certain rights of which the plaintiffs claim to be in possession and in respect of which they allege that a wrong entry has been made in the Record of Rights and in the annual record.

For the foregoing reasons, we hold that the suit of the plaintiffs was not cognizable by a Revenue Court, and as the plaintiffs seem to have been prejudiced, as pointed out by the learned Financial Commissioner, by the mistake as to jurisdiction, we direct that the plaint be returned to them for presentation in a Civil Court having jurisdiction to entertain the suit.

Reference accepted.

(1) 25 P. R. 1889.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 258 OF 1917.

August 3, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

PADMA LOCHAN CHAKRAVARTTY—PLAINTIFF—PETITIONER

versus

RUSTOM KHAN AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Contract Act (IX of 1872), s. 74—Interest, high rate of, whether penalty.

There is nothing in law to prevent parties to a loan from contracting that a high rate of interest should be paid, if the money is not re-paid within a certain time. The rate of interest, deliberately arrived at by the parties to a contract, should not be reduced by a Court on the ground that being high it is a penal rate.

Rule against the order of the Sub-Judge, 2nd Court, Sylhet, exercising the powers of a Court of Small Causes in Suit No. 377 of 1916.

FACTS of the case appear from the judgment.

Babu *Gopal Chunder Das*, for the Petitioner:—The learned Small Cause Court Judge has held that the rate of interest stated in the bond is very high and hence penal. He has disallowed interest at the contractual rate, and reduced it to 1 per cent., per month, although the defendant did not put in any written statement. There was no stipulation to pay compound interest, and one rate of interest which is simple interest has never been held to be penal although the rate might be high. The defendant has admitted that the stipulated rate of interest is the usual rate paid on mortgage-bonds in the locality. There is nothing on the record to show that the interest is penal, and there is no justification for the lower Court's disallowing the contractual rate of interest. No ground has been shown for varying or modifying the contract which the defendant entered into with his eyes open.

No one appeared for the Opposite Party.

JUDGMENT.—This is a Rule obtained by the plaintiff calling upon the opposite party to show cause why so much of the decree of the learned Small Cause Court Judge, dated the 14th December 1916, as disallowed interest at the contractual rate should not be set aside. The plaintiff brought the suit on a contract in writing to recover the principal and interest due on such contract. No formal defence was put in by the defendants. The defendants appeared before the Court and made an appeal that the decree should be drawn up in such a form that they might be permitted to pay the amount in instalments. They also complained that the rate of interest as claimed by the plaintiff and which is provided for in the contract was penal. The learned Judge has found that this rate of interest is penal. That cannot be suggested for one moment. It may be a high rate. There is nothing in law to prevent parties from contracting that a high rate of interest should be paid if the money is not paid within a certain time. Various matters arise for consideration as to the rate of interest, one of the principal being the solvency of the borrower. There cannot be an universal rate of interest applicable to all borrowers. It has got to be adjusted having regard to the circumstances of the case. There is nothing to show in this case why the rate that the parties deliberately arrived at should not be adhered to. The Rule is accordingly made absolute and the case is remitted to the Court below for the learned Judge to calculate the interest on the principal sum decreed at the rate provided for in the contract and not at the rate which has been found by the learned Judge to be equitable between the parties, namely, 12 per cent. Petitioner will get costs of the Rule, one gold *mohur*.

Rule made absolute.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 58 OF 1914.

March 12, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

GHULAM MUHAMMAD KHAN—DEFENDANT—APPELLANT

versus

NUR KHAN AND ANOTHER—PLAINTIFFS AND YAR MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2, O. XXIII, r. 1—Withdrawal of suit, whether operates as bar to subsequent suit—Permission to withdraw, effect of

GHULAM MUHAMMAD KHAN *v.* NUR KHAN.

—*Custom—Succession—Awans of* Mauza *Chakrala, Mianwali District*—Sardari, *custom of—Collateral succession—Presumption—Burden of proof.*

Where plaintiffs first sued for their shares in the moveable property of a deceased collateral and then sued separately for their shares in his immoveable property and the Court allowed them to withdraw their suits for their shares in the moveable property with permission to bring fresh suits under rule 1, Order XXIII of the Civil Procedure Code:

Held, that the suits for the immoveable property were not barred by rule 2, Order II, of the Civil Procedure Code, inasmuch as the effect of the permission given under rule 1, Order XXIII, of the Code was to leave matters in the position in which they would have stood if no such suits had been instituted. [p. 900, col. 2.]

A special custom of *sardari* exists in the family of Awans of *Mauzas* Chakrala and Thamewali, Mianwali District, and among them the rule of succession from father to son is governed by the *pagwand* rule, and in the case of collateral succession the whole blood and half blood succeed together. [p. 900, col. 2; p. 901, col. 1.]

The onus of proving any other custom, *e. g.*, *yakmadri*, lies on the party who alleges it. [p. 900, col. 2.]

First appeal from the decree of the District Judge, Mianwali, dated the 27th October 1913.

Mr. *Beechey*, for the Appellant.

JUDGMENT.—The annexed pedigree-table* will assist in the elucidation of this case. Azmat was a resident and a proprietor in the village of Chakrala, and his sons founded the village of Thamewali. Amanat as the elder son was vested with, or assumed the *pag* and was regarded as Sardar or the head of the family in so far as Thamewali (at least) was concerned. He was succeeded in the Sardarship by his brother Kamal owing to the fact that he died without issue. Kamal had five sons and his eldest son Suleman succeeded him as Sardar. Suleman died, or renounced this world (see page 165, paper-book A, Appeal No. 58/85 of 1914) without leaving any male issue surviving and was succeeded by Allah Yar. This Allah Yar had three wives and sons by all of them. He was in due course succeeded in the *sardari* by Barkhurdar, his eldest son. Barkhurdar was murdered in Lahore, and of his sons Yaran alone survived him. He was a mere child at the time of his father's death and his uncle Budhe Khan was vested with, or usurped the *pag*. In any event he was acknowledged as the Sardar and, as such, the holder of the lands at Thamewali, by the rest of this family, in *Sambat* 1908, as is evidenced by a deed of relinquishment, dated the 28th *Maghar* 1908 (11th December 1851)—pages 95-96, paper-book A. It appears that his half brother Zulfikar was associated with him in the management of the family estates, for in 1864 both the brothers were *lambardars* in Thamewali. Zulfikar was not satisfied with his position, and made repeated claims in the Revenue Courts to half the property left by Allah Yar but, though directed to do so, brought no regular suit to establish the claim he advanced. In 1864, however, he induced his nephew Yaran, then about 20 years of age, to institute a suit against both Budha Khan and himself in which Yaran claimed one-fifth share in the Thamewali lands.

In this suit Budha Khan pleaded that since the foundation of the village Thamewali it had been the custom in the family that the most capable of its members was appointed Sardar and invested with the *pag* and that the Sardar so appointed became the owner of all the lands, his other brothers being only entitled to suitable maintenance. He set up his due appointment as Sardar as evidenced by the deed already referred to. Zulfikar too denied Yaran's claim to one fifth, but he also denied the existence of the custom set up and pleaded that his father Allah Yar had, in his lifetime, divided the lands in suit into two portions giving him one-half as the son of one wife and the other half to his sons by his second wife.

The case was enquired into thoroughly by Mr. L. Cowan, Assistant Commissioner, who on the 12th April 1864 held that the custom alleged in regard to the Thamewali lands had been proved, and that, according to it the *pag* should have gone to Yaran. He, however, maintained Budhe Khan in the Sardarship for the duration of his life, and directed that Yaran should succeed to the *pag* on Budhe Khan's death. On the 13th May 1864, he passed a further order defining Budhe Khan's powers of alienation in regard to the Thamewali lands. On the 7th January 1865, owing to Budhe Khan's conduct, Mr. Cowan set aside his order maintaining him in the Sardarship, and appointed Yaran as the *pagwala*. Budhe Khan appealed and Major Pollock, on the 20th March 1865, (page 105, paper-book A) remanded the case

* Page 902 *infra*—*Ed.*

to the Deputy Commissioner for further enquiry. On the 14th April 1865, the Deputy Commissioner, Mr. H. B. Armston, confirmed the orders of Mr. Cowan, dated the 12th April 1864 and 13th May 1864. Apparently the Commissioner, on appeal, set aside the order of Mr. Cowan, dated the 13th May 1864, but maintained that of the 12th April 1864. This litigation came to an end with an order passed by Colonel Lake, Financial Commissioner, dated the 1st January 1866, by which Zulfikar was given one-fifth share of the Thamewali lands. The alleged custom was not further adjudicated upon, and Zulfikar was given this land under special circumstances, he having been in actual possession of the same and having assisted Budhe Khan in the management of the property.

On the 10th August 1868, Muhammad Khan, son of Allah Yar, sought to obtain partition of the Thamewali lands (see pages 110-111, paper-book A) claiming one-fifth share for himself, and a similar share for his nephew Faiz Bakhsh. This application was rejected on the 5th October 1868 (page 112, paper-book A) and he was referred to a regular suit.

Budhe Khan died soon after 1863 and Yaran, who should have succeeded to the Sardarship and to the lands thereto pertaining, apparently allowed mutation to take place in the name of *Musammat* Bakht Bhari, widow of Budhe Khan, who had left no male issue but whose daughter Yaran had married. Their actual possession appears to have been joint, and Yaran seems to have managed the property, for Faiz Bakhsh, son of Dad Khan, sued both Yaran and *Musammat* Bakht Bhari in 1874 claiming a share of the land left by Budhe Khan. This claim was rejected and the custom *re* the *Sardari* maintained as established and as admitted by the order of Colonel W. G. Davies, dated 10th October 1874, see pages 112-113, paper-book A.

Zulfikar also sued *Musammat* Bakht Bhari for the lands in Thamewali and Chakrala. This suit was heard by Mr. Thorburn and on the 31st May 1874, it was held that the custom alleged *re* the *Sardari* had been clearly established (page 115, paper-book A), and the suit was decided on a compromise to the effect that, (1) Zulfikar should receive one-fifth of the lands held by Bakht Bhari in Chakrala; (2) Yaran should be made the *pagwala* and successor in the *Sardari* to Budhe Khan and (3) *Musammat* Bakht Bhari should keep her life-interest in the lands. The Financial Commissioner (Mr. R. E. Egerton) on appeal to him on the 30th April 1875, remanded the case for further decision, on the ground that the compromise was not binding, and the case was again dealt with by Mr. Thorburn who decided it on the 24th November 1875, and gave Zulfikar a decree for one-fifth share of the lands in Chakrala, dismissing his claim to the Thamewali lands. On appeal, the Settlement Commissioner (Mr. J. B. Lyall) dismissed the claim for the Chakrala lands as well on the ground that it was time-barred.

Apparently, in spite of the fact that Yaran and *Musammat* Bakht Bhari were not on the best of terms, the land continued to be entered in the name of the latter till her death, which took place on the 26th September 1909. Yaran had predeceased her and the land was then taken possession of and entered in the name of Ghulam Muhammad, Yaran's eldest son, who, it appears, had been recognized as the *pagwala*.

On the 1st October 1912, Nur Khan, son of Muhammad Khan, instituted a suit against Ghulam Muhammad and four others for Rs. 1,800 being a one-fourth share of the moveable estate left by Bakht Bhari and alleged to have been taken possession of by Ghulam Muhammad.

On the same date a similar suit for a similar sum was brought against Ghulam Muhammad alone by Fatteh Khan and Mehr Khan, sons of Zulfikar, and Sarfaraz, Zulfikar's grandson.

On the 7th October 1912, Nur Khan and his brother Mehr Khan instituted their present suit claiming a one fourth share in the lands situated in Thamewali and Chakrala, making Ghulam Muhammad and some forty-four other members of the family defendants.

On the 15th October 1912, Fatteh Khan, Mehr Khan and Sarfaraz also instituted their present suit against the same defendants similarly claiming one-fourth share in the same lands. The principal defendant in all the suits was Ghulam Muhammad who being a minor was represented by the *Malik* of Kala Bagh, and on his behalf the

custom *re* the *sardari* was pleaded and it was also pleaded that the present suits were barred under rule 2, Order II, Civil Procedure Code, inasmuch as they should have been brought with the suits for moveable property. In any event it was said that the custom of *yakmadri* prevailed in the family and that the plaintiffs in both the cases had no claim to any of the lands held by Budhe Khan inasmuch as they were the descendants of Allah Yar by different wives.

The learned District Judge, on the 18th June 1915, allowed the two sets of plaintiffs to withdraw their suits for their shares in the moveable property, and under Order XXIII, rule 1, Civil Procedure Code, gave them leave to bring fresh suits, and held that the present suits for the immoveable property were not barred by Order II, rule 2, Civil Procedure Code. He then held that the custom *re* the *sardari* had been established, but that it related only to the Thamewali lands while the Chakrala lands were "ancestral," and as such divisible under the ordinary rule of succession inasmuch as the custom of *yakmadri* had not been proved. He accordingly dismissed both the suits *qua* the Thamewali lands but decreed them *qua* the Chakrala lands.

Against this decision both sides have preferred appeals to this Court. Ghulam Muhammad's appeals are Nos. 58 and 59 of 1914 and we have heard Mr. Beechey on his behalf. Sarfaraz Khan's appeal is No. 194 of 1914 and he has been represented by Mr. L. M. Datta, while Nur Khan, whose appeal is No. 85 of 1914, has appeared before us in person. Mr. Datta quite frankly admitted that he had been wholly unable to understand the case and was of no assistance to us in any way. We are indebted to Mr. Beechey for a statement of the case and of the history of the family and the litigation culminating in these suits.

The points for determination are, (1) whether Order II, rule 2, Civil Procedure Code, bars the present suits; (2) whether the custom of *sardari* has been proved; (3) whether the succession to Budhe Khan is governed by the rule of *yakmadri* and (4) whether the Chakrala lands are attached to the *sardari* or are ancestral. The decision of these points will dispose of all the appeals which will be dealt with in the one judgment.

With regard to point (1) in our opinion Order II, rule 2, does not operate as a bar to the present suit. No doubt the two suits in question might have been joint; possibly they ought to have been so joined, but it is not necessary for us to decide this question inasmuch as it seems to us that the bar, if any, was removed by the orders passed by the learned District Judge under Order XXIII, rule 1, Civil Procedure Code; the suits for the moveables having been allowed to be withdrawn with permission to bring fresh suits they must be regarded as non-existent. The effect of the permission given under this rule and Order is to leave matters in the position in which they would have stood if no such suits had been instituted. In this view we are supported by *Behari Lal Pal* v. *Srimati Baran Mai Dasi* (1), which case was followed by Chevis, J., in *Buta* v. *Bishen Das* (2). We accordingly hold that the present suits are not barred by Order II, rule 2, Civil Procedure Code.

Coming next to the second point, the history of the family and the litigation between some of its members, referred to already, leaves no room for doubt that the custom *re sardari* exists and is valid. It was urged that the custom was departed from and practically abrogated when *Mussammat* Bakht Bhari obtained possession of the lands left by her husband Budhe Khan, in spite of the presence of Yaran. As stated above, however, her possession was with Yaran's consent, which was no doubt given because of the relationship between them, and there is every reason for believing that Yaran was the *de facto* manager of the lands in question. Doubtless the necessity for such a custom ceased to exist with the advent of British rule, but it has nevertheless been clearly recognized and in agreement with the learned District Judge we hold that it has been proved and that Ghulam Muhammad is the present *pagwala*.

As to point (3) the *onus* of proving the custom alleged was on Ghulam Muhammad. Admittedly among Awans of this locality (the parties to this case are Awans)

(1) 17 A. 53; A. W. N. (1894) 201; 8 Ind. Dec. (N. S.) 358.

(2) 9 Ind. Cas. 956; 37 P. L. R. 1911; 176 P. W. R. 1911.

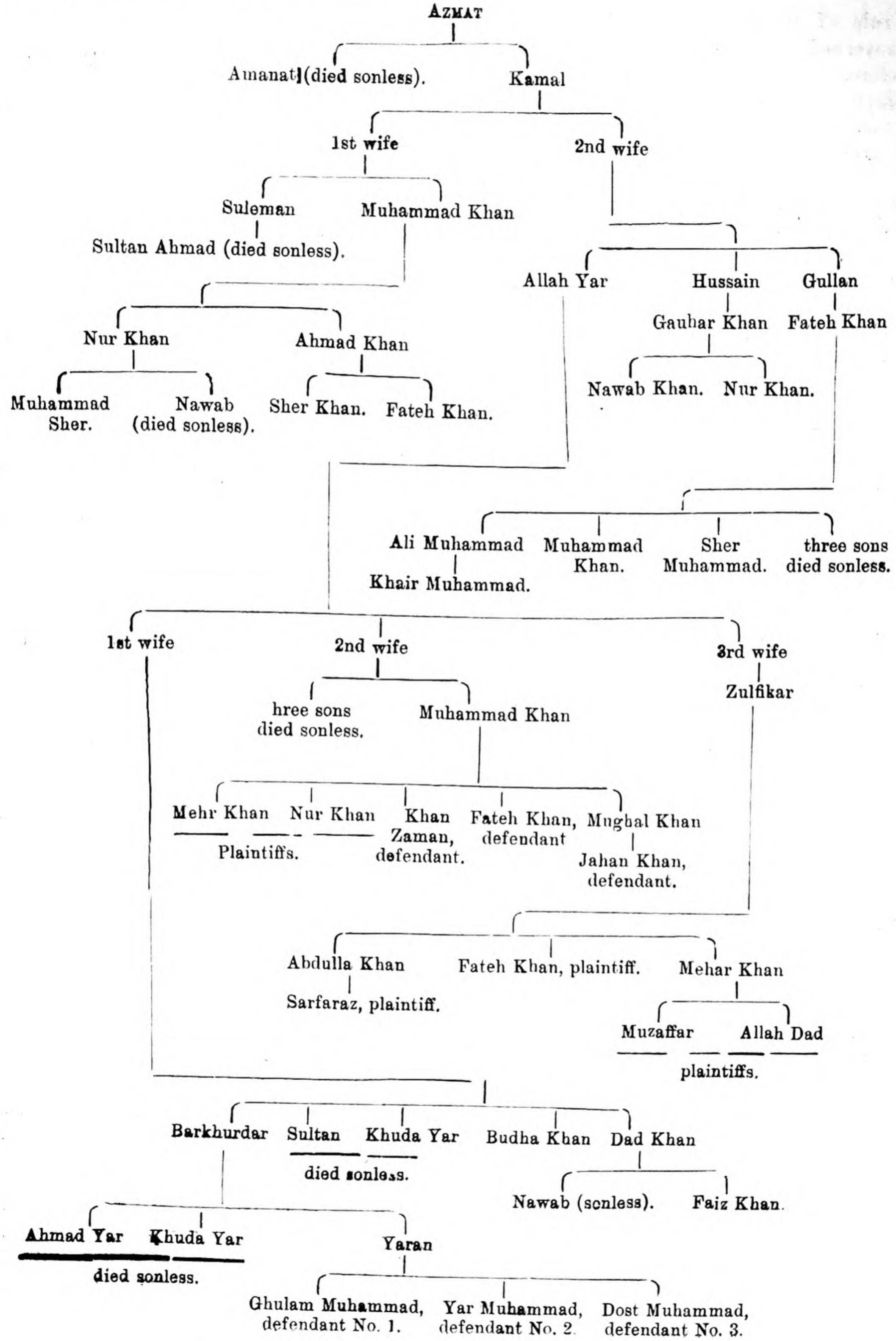
the rule of succession from father to son is governed by the *pagwand* rule, and, therefore, as laid down in Article 26 of Rattigan's Digest of Customary Law, in the case of collateral succession the Court may presume that the whole blood and half blood succeed together. Mr. Beechey, however, urged that a custom had been established by which, *as between the sons themselves*, on the death of one without issue his uterine brother or brothers succeeded to his estate to the exclusion of his half brothers, a reference to the customary law of the Mianwali District shews that, among the Awans, the rule of succession as between brothers varies, and instances of both forms of succession are forthcoming. Five instances of succession *per capita* are given, two of which come from Thamewali, four instances where succession was *per stirpes* or according to the rule of *yakmadri* are also entered, but none of them are from this village. Mr. Beechey referred us to the evidence on the record relating to this custom and pointed out that, at page 88 there was an instance of the *yakmadri* rule having been followed in this family, Muhammad Khan, son of Allah Yar, alone having succeeded to the lands left by his three uterine brothers to the exclusion of Allah Yar's other sons. This one instance alone does not seem to us to be sufficient to establish the departure from the general rule which appears to be, that all the brothers, whether of full or half blood, inherit equally. It is also somewhat stultified by the fact that instance (2) at page 43 appears also to be an instance in this family where all the brothers succeeded equally. Not a single instance has been brought to our notice relating to Chakrala itself and it is significant that no attempt has been made to shew under which rule of succession the ancestral lands in this village have devolved.

So far as this family is concerned, the succession to the Thamewali lands is governed by a special custom, so that instances from that village can afford no real assistance. We have carefully considered all the material on the record and have arrived at the conclusion that Ghulam Muhammad has not discharged the *onus* which was on him and that the said custom of *yakmadri* has not been proved in this case.

Finally, as to point No. 4, Mr. Beechey contended that the question as to whether the Chakrala lands were attached to the *sardari* or not was never really raised, that plaintiffs neither in their plaint nor in their written replication alleged that the Chakrala lands did not go with the *sardari* and he urged that the finding of the learned District Judge on this point was not correct. The plaintiffs, however, claimed a share in all the lands held by Budhe Khan. Ghulam Muhammad raised the question relating to the *sardari*, and it seems to us that it was for him to shew that not only the Thamewali, but the Chakrala lands, also formed a part of the estate which appertained to the Sardarship. The history of this village Thamewali shews that its founders came from Chakrala where they already had lands. Those lands were clearly ancestral, and as such were not subject to the special rule of succession which was prevalent in Thamewali. The whole of the former litigation shews that the struggle centred round the Thamewali lands alone. Allah Yar clearly inherited some lands in Chakrala from his father, Kamal, and regarding these lands there appears to have been no dispute so long as Budhe Khan was alive. It seems to us that the *pagwala* for the time being never advanced any claim, as *pagwala* to the Chakrala lands, and that Zulfikar's efforts were invariably directed towards securing the same rights in the Thamewali lands as he possessed in the lands at Chakrala. It is also clear that the *sardari* only came into existence with the foundation of village Thamewali, and in these circumstances we have no hesitation in holding that the view taken by the learned District Judge is correct and that the *pagwala* only holds the Thamewali lands as the Sardar and that his rights in the lands at Chakrala are governed by the ordinary rules. The plaintiffs are, therefore, clearly entitled to share in the Chakrala lands and we accordingly dismiss all the appeals, but in the special circumstances that exist we direct that the parties bear their own costs in this Court.

Appeals dismissed.

GHULAM MUHAMMAD KHAN *v.* NUR KHAN.



OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 230 OF 1916.

May 16, 1917.

Present—Pandit Kanhaiya Lal, A. J. C.

Raja MUHAMMAD ABUL HASAN KHAN—PLAINTIFF—APPELLANT

versus

The Hon'ble Raja Sir MUHAMMAD ALI MUHAMMAD KHAN, *Khan Bahadur*—DEFENDANT—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O. VI, r.* 16—*Pleadings, amendment of—Court, power of, to order amendment, scope of—Alternative claims on ground of ownership and prescriptive right, maintainability of—Reliefs, alternative.*

Order VI, rule 16, of the Civil Procedure Code, authorises a Court at any stage of the proceedings to direct that any matter in any pleading which may tend to prejudice, embarrass or delay the fair trial of the suit be amended or struck out. But the Court is not to dictate to the parties how they should frame their cases. [p. 903, col. 2.]

All it has to see is that the parties do not offend against the rules of pleading, which have been laid down by the law, and introduce what is unnecessary or tends to prejudice, embarrass, or delay the fair trial of the suit. The object of permitting alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation to dispose of the same controversy or the subject-matter of the same relief, though the ground upon which the relief is claimed may be different. [p. 903, col. 2]

Where a plaintiff prayed for a declaration that he was entitled to irrigate his land from a certain tank, basing his claim on his alleged joint ownership of the tank and also on a right of easement enjoyed by him through his tenants for a period of more than 20 years, and the lower Court threw out the suit on the ground that the pleas set forth were inconsistent:

Held, that the suit did not offend against the rules of pleading and that alternative claims on the ground of ownership and prescriptive right were entertainable. [p. 904, col. 1.]

Appeal against the decree of the Subordinate Judge, Sitapur, dated the 16th March 1916, upholding that of the Munsif, Biswan, at Sitapur, dated the 2nd April 1915.

Messrs. *Aditya Prasad* and *Ali Muhammad*, for the Appellant.

Mr. *Zahur Ahmad*, for the Respondent.

JUDGMENT.—The parties are co-sharers in the village Banni in which the disputed tank is situated. The allegation of the plaintiff was that he was the owner of a two-thirds share in the said tank and had been irrigating his land, that is the land appertaining to his share, from the said tank. The defendant asserted that the village was divided into two *pattis* that the tank in question stood in the *patti* belonging to the defendant and that the plaintiff had no right to use the water of the said tank. He denied that the plaintiff or his tenants irrigated their fields from the same. The plaintiff claimed a decree, declaring his right to irrigate the land appertaining to his share from the said tank, basing his right to that relief on his alleged joint ownership and on a right of easement said to have been enjoyed by him through his tenants from a period of more than 20 years. The Courts below have thrown out the suit on the ground that the pleas set forth in support of the claim were inconsistent. The decision in *Durga Pershad* v. *Mendi Lal* (1) is relied on in support of that contention. But that decision has no relevancy to the present case. The plaintiff sued in that case for the cancellation of a deed of sale, executed by one of the defendants in favour of another defendant, and in the alternative for pre-emption of the property included in the deed. The right of pre-emption arose out of a set of facts, different from those which gave rise to the claim for the cancellation of the deed of sale. The right of relief, now claimed, arises from the same set of facts with this difference that the plaintiff's alleged joint ownership or user, whichever may be established, is made the basis of that relief. Order VII, rule 7 of the present Code of Civil Procedure has considerably widened the scope for choice of a person seeking relief either simply or in the alternative, and the only restriction laid down for guiding the discretion of the Court is that contained in Order VI, rule 16, which authorizes the Court at any stage of the proceedings to direct that any matter in any pleading which may tend to prejudice, embarrass, or delay the fair trial of the suit be struck out or amended. The discretion is very large, but, as pointed out in *Farid un-nisa* v. *Mukhtar Ahmad* (2), the Court is not to dictate to the parties how they should frame their cases. All it has to see is that the parties do not offend against the rules of pleading, which have been laid down by the law, and introduce what is unnecessary or tends to prejudice, embarrass, or delay the fair trial of the suit. The object of permitting

(1) 1 O. C. 174.

(2) 40 Ind. Cas. 488; 4 O. L. J. 230.

alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation to dispose of the same controversy or the subject-matter of the same relief, though the ground upon which the relief is claimed may be different.

A claim to a right of easement is to some extent inconsistent with a claim to joint property. But in cases where a partition has taken place, there might be circumstances in which a right of easement might be claimed within the limits of the provisions contained in section 13 of the Easements Act (V of 1882). Independently however, of section 13, it has been held in *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (3), that a claim in the alternative over the same plot of ground to rights of ownership and of easement can be properly joined. In *Durgamani Debya* v. *Ambica Charan Sarma* (4), alternative claims on the ground of ownership and prescriptive right were similarly entertained and in *Purnendu Narain Roy* v. *Dwijendra Narain Roy* (5), alternative defences of the same character were held to be permissible. The same view was taken in *Chadammi Lal* v. *Shib Charan* (6). In *Morgan, In re; Owen* v. *Morgan* (7) it was laid down that pleadings should not necessarily be treated as embarrassing, because they are inconsistent. Lindley, L. J., who delivered the judgment in that case, in commenting on Order XIX, rule 4, of the Rules of the Supreme Court, requiring every pleading to contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, observed: "Now I cannot myself construe that Order as prohibiting inconsistent pleadings. One sees perfectly well what is meant by it, *viz.*, that each party is to state succinctly and concisely and in a summary form the material facts on which he relies. Now a person may rely upon one set of facts, if he can succeed in proving them, and he may rely upon another set of facts, if he can succeed in proving them; and it appears to me to be far too strict a construction of this Order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark." Order VI, rule 16, of the Code of Civil Procedure follows Order XIX, rule 27, of the Rules framed by the Supreme Court, and the decisions passed when the old Code of Civil Procedure was in force, are consequently not entitled to weight. The Courts below ought, therefore, to have gone into the merits and determined whether the allegations made by the plaintiff in his plaint were correct or not and whether he was entitled to the relief, which he was claiming.

The appeal is consequently allowed and the suit is remanded to the Court of first instance with a direction to re-admit it under its original number and to dispose of it after taking such relevant evidence as the parties may adduce in the manner provided by law. The costs here and hitherto will abide the event.

Cause remanded.

(3) 34 C. 5'; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. L. T. 364.

(4) 4 C. L. J. 367.

(5) 8 C. L. J. 289 at p. 291.

(6) A. W. N. (1905) 18; 2 A. L. J. 59.

(7) (1887) 35 Ch. D. 492; 56 L. J. Ch. 603; 56 L. T. 503; 35 W. R. 705.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 15 OF 1917.

May 2, 1917.

Present:—Sir George Knox, KT., Acting Chief Justice.

GANESH PRASAD—DEFENDANT—APPLICANT

versus

BANSIDHAR BARAUNIA—

PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 20—Place of suing—Cause of action—Goods sent without order—Plaintiff asked to keep goods—Suit for charges—Jurisdiction.

Defendant from Cawnpore sent a bale of cotton to plaintiff at Jhansi without any order or direction of the latter. The plaintiff refused to take delivery of the bale and the defendant wrote to him asking him to take delivery and to hold the goods on the defendant's behalf. The plaintiff sued the defendant for his charges, etc.

Held, that the cause of action arose at Jhansi and that the Jhansi Courts had, therefore, jurisdiction to entertain the suit. [p. 905, col. 1.]

Civil Revision from an order of the District Judge, Jhansi.

Mr. *Damodar Das*, for the Applicant.

Mr. *Sital Prasad Ghosh*, for the Opposite Party.

JUDGMENT.—The contention raised in this application is that the District Court of Jhansi has wrongly held that the suit

was cognizable in the Civil Court at Jhansi. The suit out of which this application has arisen was a suit brought by one Bansidhar Baraunia to recover certain monies due to him. The main item was an item said to be the value of a bale of cotton. The plaint is to the effect that the bale without any order or direction of any kind was sent by the defendant to the plaintiff. The learned Judge says that this is an admitted fact. It has not been shown to me that this statement of the learned District Judge is, in any way, in error. Other items sued for beyond the price of bale were items such as cost of warehousing the bale, railway freight paid, etc. The plaint says that when the plaintiff informed the defendant that he had refused to take delivery of the bale of cotton because he had not ordered the goods, the defendant replied in a letter asking the plaintiff to take delivery and to hold the goods at the defendant's risk. Somehow or other the matter in dispute, *viz.*, the price of the bale of cotton got into the Courts of Cawnpore and the Courts of Cawnpore gave a decree against the plaintiff. In this application I am not concerned as to the rights or wrongs of the Cawnpore suit. That matter has not been brought into this application further than to support a plea that as the decree for payment on account of this bale was obtained against the plaintiff at Cawnpore, therefore, the suit was cognizable only in the Civil Court at Cawnpore. The suit was one, as I have already said, for recovery of monies said to be due from the defendant to the plaintiff on account of the plaintiff having taken delivery of the bale of cotton under defendant's directions at defendant's risk and for monies incurred in keeping the same. As the plaint runs, it is a claim for a debt due from the defendant to the plaintiff and nothing else. The cause of action in such a case is a cause of action which arose within the jurisdiction of the Courts of Jhansi. Mau, which is situated in Jhansi, was the place where the contract was made and it was the place where the performance of the contract was completed, the money to which the suit relates also, was according to the allegation contained in the plaint, expressly or impliedly payable at Mau.

The learned Vakil, for the applicant, endeavoured to place the suit on a different footing on the ground that it was not a suit arising out of a contract but a suit arising out of breach of contract, but he did not refer me to any precedent in support of this part of his pleading. He cited the case of *Salig Ram* v. *Chuba Mal* (1). That was a case for compensation under section 212 of the Contract Act in respect of the direct consequences of alleged neglect and misconduct on the part of the defendants who were acting as agents of the plaintiff, the neglect or misconduct took place at Karachi and nowhere else, the contract in that case too was made at Karachi, and the money due was payable at Karachi. The case is in no way any help with reference to the present case unless we read what we may very well do in the present case, Mau in place of Karachi. The application fails and is dismissed with costs.

Application dismissed.

(1) 11 Ind. Cas. 712; 8 A. L. J. 1169; 34 A. 49.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 171 OF 1913.

May 21, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

Srimati GIRIBALA DASI—PLAINTIFF—APPELLANT

versus

NITYA LAL SINHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *ss.* 11, *O. IX*, *r.* 9—*Suit for recovery of possession on declaration that a decree and sale were fraudulent, maintainability of, after dismissal of previous suit for same declaration*—Res judicata, *doctrine of, whether applies to suit dismissed for default.*

No question of *res judicata* arises in favour of either of the litigants where a suit is dismissed for default. [p. 906, col. 1.]

A suit brought in the Munsif's Court for a declaration that a rent-decree and an execution sale thereunder of a holding were fraudulent was dismissed for default. Subsequently the plaintiff, being deprived of the holding under the execution sale, instituted another suit in the Court of the Subordinate Judge for recovery of possession of the holding on the same declaration as prayed for in the previous suit:

Held, that the subsequent suit was not barred under Order IX, rule 9, as it was not based on the same cause of action as the earlier suit, nor was it barred as *res judicata*, as the previous suit was dismissed for default, and also as the Munsif, who dismissed that suit, was not competent to try the subsequent suit, instituted in the Court of the Subordinate Judge. [p. 906, col. 2.]

GIRIBALA DASI v. NITYA LAL SINHA.

Appeal against the decree of the Subordinate Judge, 1st Court, Burdwan, dated the 19th February 1913.

Babus *Baidya Nath Dutt*, *Biraj Mohan Mozumdar*, *Mohini Nath Bose*, *Satyendra Nath Mukerjee* and *Rishendra Nath Sarkar*, for the Appellant.

Babus *Dwarkanath Chakravarty* and *Sib Chandra Palit*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of possession of land on declaration that a decree for arrears of rent and the execution sale consequent thereon have not affected his right, title and interest. The claim has not been tried on the merits but has been dismissed on the preliminary ground that it is barred under the provisions of section 11 and Order IX. rule 9 of the Civil Procedure Code of 1908. The reasons assigned in support of this view may be briefly stated. The plaintiff instituted a suit on the 18th June 1909 in the Court of the Munsif of Burdwan for declaration that the rent-decree mentioned and the sale consequent thereon were fraudulent; there was no claim for recovery of possession as on the date of the institution of the suit, the plaintiff had not been deprived of possession of the disputed property. The relief claimed was valued at Rs. 600. The suit was not tried on the merits and was dismissed for default on the 6th June 1910. On the 30th September 1910, the plaintiff instituted the present suit in the Court of the Subordinate Judge for recovery of possession of the land which she valued at Rs.10,500. The Subordinate Judge has held that the order of dismissal for default made by the Munsif on 16th June 1910, bars the trial of the controversy between the parties in his Court. We are clearly of opinion that this view cannot possibly be maintained.

Section 11 of the Civil Procedure Code has obviously no possible application to this case. As pointed out by Lord Watson in *Chand Kour* v. *Partab Singh* (1), no question of *res judicata* arises in favour of either of the litigants when a suit has been dismissed for default. It would be a contradiction in terms to hold that the suit is barred by *res judicata* when admittedly the parties did not afford any opportunity to the Court to pronounce an adjudication on the matters in controversy between them. The only effect of dismissal of a suit for default is that a suit upon the same cause of action cannot be maintained by virtue of section 103 of the Codes of 1877 and 1882 and Order IX, rule 9 of the Code of 1908. This view is supported by another decision of the Judicial Committee in the case of *Shankar Baksh* v. *Daya Shankar* (2). It is further clear that the decision of the Munsif, even if it had been pronounced on the merits could not operate as *res judicata* in the Court of the Subordinate Judge [*Shibo Raut* v. *Baban Raut*(3) and *Siliman Sahib* v. *Bontala Haman Sahib* (4).] This point, in fact, has been placed beyond the possibility of dispute by the provisions of section 11 of the Code of 1908. The question consequently reduces to this. Is the present suit barred by the operation of rule 9 of Order IX? The obvious answer is that the rule in question does not operate as a bar because this suit is not based on the cause of action which formed the foundation of the earlier litigation. Since then the plaintiff has lost possession of the property; consequently, whereas the former suit was for a declaratory decree, the present suit is for recovery of possession. We are of opinion that the grounds assigned by the Subordinate Judge in support of his view cannot be upheld.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him for trial on the merits. The appellant will get her costs in this Court, as also those in the Court below which had been thrown away by reason of the order of that Court. An order will also be made in favour of the appellant under section 13 of the Court Fees Act entitling her to obtain a refund of the Court-fee paid on the memorandum of appeal to this Court.

Appeal allowed; Case remanded.

(1) 15 I. A. 156; 16 C. 98; 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65.

(2) 15 I. A. 66; 15 C. 402; 5 Sar. P. C. J 107; 12 Ind. Jur. 132; Rafique and Jackson's P. C. No. 100; 7 Ind. Dec. (N. S) 866.

(3) 35 C. 353; 12 C. W. N. 359; 7 C. L. J. 470.

(4) 20 Ind. Cas. 418; 38 M. 247; (1913) M. W. N. 554; 25 M. L. J 125.

POKHAR DAS *v.* AMIR.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 11 OF 1915-1916.

May 8, 1917.

Present:—Mr. Maynard, F. C.

POKHAR DAS—PLAINTIFF—PETITIONER

versus

AMIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Occupancy tenancy—Right of landlord to cut trees—Wajib-ul-arz, *entries in, value of, Fatehpur, Tahsil Gugera.*

Entries in the administration papers of *Mauza* Fathepur make it plain that the trees growing in the land of an occupancy tenancy are not the property of the occupancy tenants, but they may cut them in order to supply themselves with agricultural implements with the consent of the landlords, a consent which must not be withheld without reasonable cause. [p. 907, col. 2.]

Musammat Gur Devi v. *Sondha*, 61 P. R. 1881, is applicable to occupancy tenants of Fatehpur and the proprietor is not entitled, in the absence of reliable evidence as to his right, either by custom or otherwise, to enter upon the land in the occupation of a hereditary tenant and cut and sell the trees growing thereon without the said tenant's consent, but this only means that the tenant is entitled to be safeguarded in the exercise of certain rights of user, not that he can claim the price of a tree which the landlord has cut. [p. 907, col. 2.]

Where the plaintiff (tenant) failed to show that the loss of a *kikar* tree cut by the landlord was in any way prejudicial to his agricultural interest:

Held, that he was not entitled to an award of damages for the injury done, and that as he was not the proprietor of the tree he was not entitled to its price or any portion of it. [p. 908, col. 1.]

Case forwarded by the Commissioner, Multan, with his order, dated the 2nd November 1916.

Mr. *Nand Lal*, for the Petitioner.

Mr. *Badr-ud-Din*, for the Respondents.

ORDER.—I have heard the Counsel for both parties. The applicant, occupancy tenant, sued the landlords for the price of a *kikar* tree cut and removed by the latter from the land of the occupancy tenancy. The claim was rejected by the Assistant Collector and by the Collector on appeal; but the Commissioner forwards the proceedings for revision on the grounds that the decision is opposed to the general principles governing the rights of landlords and tenants in trees; and that it involves the inference that a landlord is at liberty to enter the holding of an occupancy tenant and cut down all the trees.

The decision that a tenant is not entitled to recover from his landlord the price of a *kikar* tree cut by the latter, does not, in fact, involve the inferences which are above suggested. A tenant may be entitled to prevent a landlord from cutting a tree, on the ground that the cutting of it would deprive him of wood required for agricultural implements or of other conveniences, such as shade for his cattle, to which he is entitled as tenant; and he may be able to enforce this right by a suit for an injunction, and yet he may have no claim whatever to the price of the tree. Again, he may have a right to prevent the landlord from cutting an undue number of trees, when he would have no right whatever to prevent him from cutting one only, on the ground that cutting, when carried beyond a certain point, would deprive him, the tenant, of the means of exercising the right to take wood for agricultural implements.

The entries in the administration papers of the village of Fattehpur, Tahsil Gugera, make it plain that the trees growing in the land of an occupancy tenancy are not the property of the occupancy tenants, but that they may cut them in order to supply themselves with agricultural implements, with the consent of the landlords; a consent which, on the principle laid down in *Subhan* v. *Niamat Khan* (1) must not be withheld without reasonable cause. There is no doubt that *Musammat Gur Devi* v. *Sondha* (2) is applicable to occupancy tenants at *Mauza* Fattehpur and that the proprietor is not entitled, in the absence of reliable evidence as to his right either by custom or otherwise, to enter upon the land in the occupation of a hereditary tenant, and cut and sell the trees growing thereon without the said tenant's consent; but this only means that the tenant is entitled to be safeguarded in the exercise of certain rights of user, not that he can claim the price of a tree which the landlord has cut. Whether the legal position would be different if the tree cut were a fruit tree is a question which I need not discuss in the present case where only a *kikar* tree is concerned.

(1) 4 P. W. R. 1908 Rev.; 2 P. R. 1908 Rev.
(2) 61 P. R. 1881.

RAGHUBIR RAI v. MADHO.

It has been urged before me, on behalf of the applicant, that *Ganga Ram* v. *Mahni* (3) dealt with facts virtually identical with those of the present case, and that in the case referred to, the Financial Commissioner upheld a decree giving to the tenant a share in the price of certain trees cut down by the landlord. It seems to be true that the decree which was upheld actually awarded a portion of the price to the tenant. But the question, whether a right to prevent the landlord from cutting trees on an occupancy tenancy necessarily involves a right to a portion of the price of the trees so cut down, is nowhere touched upon in the judgment, and the Financial Commissioner does not appear to have adverted to this aspect of the case. What the judgment makes quite clear is that a landlord is not entitled to cut down trees on a tenancy held by an occupancy tenant without the consent and contrary to the interest of the tenant. This principle is fully applicable, as has already been stated, to *kikar* trees standing upon the lands of occupancy tenants at *Mauza* Fattehpur.

As observed by the Collector, it was never urged by the plaintiff that the loss of the one *kikar* tree cut by the landlord was in any way prejudicial to his agricultural interests. If he had alleged and proved this, he might have been entitled to an award of damages for the injury done, and he might have been entitled to an injunction against the landlord. But he is not the proprietor of the tree and he is not entitled to the price of it or to any portion of the price.

Application rejected.

(3) 9 P. R. 1904 Rev.; 45 P. L. R. 1905.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1236 OF 1915.

May 22, 1917.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

RAGHUBIR RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MADHO AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901) ss. 4, 167—Suit for share of fruit of grove, whether suit for rent—Jurisdiction—Revenue Courts.

A suit for the share of the value of the fruits of a grove payable on account of the grove by the tenants is a suit for rent and is cognizable by the Revenue Courts.

Second appeal from a decree of the District Judge, Ghazipur.

Mr. *Uma Shankar Bajpai*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen is in substance a suit for recovery of rent from a *tenant* within the definition of these two words in section 4 of the Tenancy Act. The plaintiffs first of all went to the Revenue Court. The plea taken in defence there was that the Revenue Court had no jurisdiction. The Court of first instance accepted that plea. The plaintiffs appealed. The Appellate Court held that the Revenue Court had jurisdiction, but it dismissed the plaintiffs' suit on the ground that they had failed to prove that they were entitled to recover the rent which they claimed. Neither side proceeded to the Court of the District Judge. The plaintiffs have now come to the Civil Court and are seeking to recover the same rent from the defendants on account of the same years. The Courts below have dismissed the suit on the wrong ground that it is barred by the principle of *res judicata* under section 11 of the Civil Procedure Code. It is quite clear that the suit is one which should and ought to have been tried in a Revenue Court in view of the terms of section 167 of the Tenancy Act. The defendants first party are clearly tenants and the sum sued for is the share of the value of the fruits of a grove and if payable at all is payable on account of the grove. The suit ought to have been dismissed on this ground alone by the Court of first instance. We dismiss the appeal with costs.

Appeal dismissed.

SITLA BAKHSH SINGH *v.* JAGDAT.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 412 OF 1916.

June 11, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

SITLA BAKHSH SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAGDAT—PLAINTIFF, SWAMBAR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Vendee acquiring property after institution of suit—Defence based on title acquired after institution of suit, maintainability of.

Where after a suit for pre-emption had been filed the defendants-vendees acquired some property by gift, which lay in the same sub-division in which the property sold was situated, and set it up as a defence in the suit:

Held, that they could not be allowed to use this transfer, which was effected subsequent to the filing of the plaintiff's, suit, as a shield and thus defeat his claim. [p. 910, col. 2.]

Appeal against the decree of the District Judge, Fyzabad, dated the 2nd September 1916, reversing that of the Munsif, Fyzabad, dated the 9th March 1916.

Mr. *J. K. Banerji*, for the Appellants.

Mr. *H. N. Misra* holding brief of Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption, and the question for consideration is whether an acquisition, made by the vendees during the pendency of a suit for pre-emption, can be of any avail in defeating a claim for pre-emption, brought in respect of a prior sale, effected in their favour. The sale which is the subject of pre emption was made on the 19th August 19 4. The suit for pre-emption was brought by the plaintiff on the 11th September 1915. On the 25th September 1915, the vendees obtained a gift from one of the vendors of a one pie share in the same sub-division in which the property sold was situated. The Court of first instance dismissed the claim, holding that the plaintiff had ceased to have a preferential right by reason of that gift; but the lower Appellate Court took a different view.

It is admitted by the learned Counsel, who appear for the parties, that a suit was subsequently filed by the donor for the cancellation of the deed of gift but without success. No stress can, however, be laid on that fact, because that decision has not yet become final. Assuming, however, for the purpose of argument that that gift is effective, the defendants-vendees cannot be permitted to set it up as a defence to the suit, filed against them for pre-emption, because it was obtained after the suit for pre-emption was instituted against them. The general rule as laid down in *Janki Prasad* v. *Ishar Das* (1) is that a suit for pre-emption may be successfully maintained, if the cause of action which arises in favour of the pre-emptor at the time of the sale, on which the suit is based, subsists at the time when the suit is brought. Anything done by him prior to the institution of the suit, which destroys that cause of action may, therefore, deprive him of his right to sue. Similarly anything that may happen between the date of the suit and the date when the suit comes up for adjudication before the Trial Court and which disqualifies him from getting relief will deprive him of his right to obtain a decree. In other words, as pointed out in *Nuri Miah* v. *Ambica Singh* (2), *Tofazul Husain* v. *Than Singh* (3) and *Amir Hasan* v. *Sardar Begam* (4), the plaintiff in a pre-emption suit must be able to show a valid and subsisting title not only at the time when he brings his suit into Court but also upto the date when the decree of the Court of first instance is passed in his favour.

The position of the defendant-vendee is somewhat different. If he acquires any property prior to the date of the suit filed against him for pre-emption which has the effect of defeating the right of pre-emption, which another intends to set up, he can use such acquisition as a shield against any attack on his title. The principle underlying that rule, which the decisions in *Ram Hit Singh* v. *Narain Rai* (5) and *Tahawwar Khan* v. *Madho Ram* (6) enforce, is that the rights of the claimants have to be determined, as they exist on the date of the suit unless they are waived or lost by any subsequent

(1) 21 A. 374; A. W. N. (1899) 126; 9 Ind. Dec (N. S.) 947.
(2) 34 Ind. Cas 869; 20 C W. N. 1099; 44 C. 47.
(3) 6 Ind. Cas. 426; 32 A. 567; 7 A. L. J. 715.
(4) 3 Ind. Cas 546; 12 O. C. 229.
(5) 26 A 389; A. W. N. (1904) 68; 1 A. L. J. 209.
(6) 11 O C. 290.

act of theirs or by any act binding on their interest. An acquisition made by the vendee after the date of the suit cannot, however, invest him with the same weapon of defence because, though any right that might be possessed by him or by the pre-emptor might be lost by virtue of events which may have happened subsequent to the suit, a right which existed on the date of the suit cannot be defeated by acquisitions made after its institution. An acquisition may in certain cases give a new right, but as in the case of the plaintiff, it cannot create a right which did not exist on the date of the suit, so in the case of a vendee it cannot give him a defence, which could be used with retrospective effect. In *Dhanna Singh* v. *Gurbakhsh Singh* (7) it was accordingly held that a vendee cannot defeat the pre-emptor's claim by showing that he became a proprietor in the village by gift or otherwise after the date of the institution of the suit but before the passing of the pre-emption decree. In *Rohan Singh* v. *Bhao Lal* (8), where a suit for pre-emption was dismissed for the deficiency of Court-fees in both the Courts below, which decree was subsequently reversed by the High Court and the case remanded, and the vendee in the meantime acquired the status of a co-sharer, it was held that the suit could not be dismissed, the pre-emptor having been entitled to a decree at the date of the institution of the suit.

The learned Counsel for the defendants-appellants relies on the decisions in *Sheo Charan Singh* v. *Bhikai* (9) and *Onkar Singh* v. *Bhagwan Dat Singh* (10). In the former case the vendees had re sold the property to the original vendor before the institution of the suit for pre-emption, and it was held that the re-transfer was sufficient to defeat the claim for pre-emption. In the latter case a purchase made by the vendees prior to the date of the suit, which was defeasible on the date on which it was made in the sense that it could have been made the subject of a claim for pre-emption, was allowed to operate in defeasance of a suit for pre-emption, brought in respect of a prior sale, when the subsequent sale became absolute by reason of the dismissal of the claim for pre-emption, brought in respect of it. As explained in *Ram Sahay* v. *Jagdamba Singh* (11), the right of the vendee to use that purchase as a shield against a claim for pre-emption, on being perfected by the dismissal of the suit for pre-emption against him in respect of it, could be referred back to the date of the purchase, that is to the date anterior to the institution of the suit for pre-emption, filed in respect of the earlier sale. There is a considerable amount of difference between the loss of an existing right and the acquisition of a new right of defence or attack as affecting a pending claim for pre-emption. A man may lose what he possesses, but he cannot use what he subsequently acquires either to give him a right which he did not possess on the date of the suit or to provide him with a weapon of defence which was not available to him when the suit was filed.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(7) 4 Ind. Cas. 337; 91 P. R. 1909; 161 P. W. R. 1909; 148 P. L. R. 1909.

(8) 3 Ind. Cas. 42; 31 A. 530; 6 A. L. J. 699.

(9) 11 Ind. Cas. 532; 14 O. C. 156.

(10) 25 Ind. Cas. 694; 17 O. C. 242.

(11) 37 Ind. Cas. 163; 19 O. C. 153 at p. 157; 3 O. L. J. 683.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 3325 OF 1916

March 1, 1917.

Present:—Mr. Justice Scott-Smith.

JAGAN NATH—DECREE-HOLDER—APPELLANT

versus

FATTEH CHAND—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 144—Court, inherent power of, to make restitution for wrong done by its erroneous order—Executing Court, jurisdiction of, to decide question of mesne profits on restoration of possession.

A Court has an inherent power to make restitution and a party who is entitled to it should not be referred to a regular suit. [p. 912, col. 1.]

J. N. got a decree for possession of a certain property by partition in 1903. The Chief Court, by its decree of the 17th February 1906, made the decree conditional on payment of Rs. 153-13-0. Prior to that *J. N.* had obtained possession in execution proceedings. On the 14th February 1907, the executing Court held that the decree had become

void owing to the non-payment of the sum and ordered restoration of possession to the judgment-debtor together with mesne profits for the period during which the decree-holder had been in possession. An appeal to the Chief Court was dismissed on the 19th July 1907, but on the 10th January 1908, an application for review was accepted, and it was ordered that the decree had not become void and that possession should be restored to the decree-holder. The latter was again put in possession and applied for mesne profits for the period during which he had been wrongfully kept out of possession:

Held, that though the case did not strictly come within section 144 of the Civil Procedure Code, yet it was eminently a case where the Court should make restitution for the wrong done to the decree-holder by reason of its erroneous orders. [p. 911, col. 2; p. 912, col. 1.]

Beni Madho Singh v. *Pran Singh*, 14 Ind. Cas. 456; 15 C. L. J. 187, relied upon.

Miscellaneous first appeal from the order of the District Judge, Ludhiana, dated the 26th June 1916.

Mr. *Gokal Chand Narang*, for the Appellant.

Mr. *Kirkpatrick*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the District Judge, Ludhiana, refusing the application of Jagan Nath, decree-holder, for mesne profits by way of restitution in accordance with the provisions of section 144, Civil Procedure Code. Briefly the facts are as follows: Jagan Nath got a decree for possession of a certain property by partition in 1903. The Chief Court by its decree of the 17th February 1906, made the decree conditional on payment of Rs. 153-13 0. Prior to that Jagan Nath had obtained possession in execution proceedings. On the 14th February 1907, the executing Court held that the decree had become void owing to the non-payment of the sum above mentioned, and ordered restoration of possession to the judgment-debtor together with mesne profits for the period during which the decree-holder had been in possession. An appeal to this Court was dismissed on the 19th July 1907, but on the 10th January 1908, an application for review was accepted, and it was ordered that the decree had not become *void* and that the possession should be restored to the decree-holder. The latter has now again been put in possession and asks for mesne profits for the period during which he has been wrongfully kept out of possession.

On behalf of the appellant it is urged that section 144, Civil Procedure Code, is not exhaustive, and that independently of its statutory power the Court has inherent power in this respect; see in this connection Woodroffe and Ameer Ali's Civil Procedure Code (2nd edition) at page 498 where it is pointed out that "it is both its right and duty to prevent its proceedings being made the cause of injustice and, therefore, to order the restitution of the thing improperly taken, and generally to restore the party to the position he would have occupied but for its erroneous order since reversed". This view is supported by ample authority and one of the latest rulings is that reported as *Beni Madho Singh* v. *Pran Singh* (1), where it is said that "the power of restitution extends also to cases which do not come strictly within section 144, Civil Procedure Code, because the Court has an inherent right, irrespective of the section, to order restitution. A Court will not permit injustice to be done by reason of an erroneous order made by it, and upon reversal of such order, the Court will restore the parties to the position which they would otherwise have occupied." It is pointed out that the decree-holder appellant obtained possession under his decree and through an erroneous order of the Court was subsequently dispossessed and kept out of possession for some years. Again it was held that he was entitled to possession, and possession was restored to him. Mr. Kirkpatrick urges that in these circumstances the case does not come strictly within the purview of section 144, Civil Procedure Code. His contention is that, when possession was restored to his client, the parties reverted to the *status quo ante*, and that subsequently when it was held that the decree-holder was entitled to possession, he obtained possession in ordinary course by execution of his decree, that there was no order in the decree for mesne profits subsequent to the date of the decree, and that, therefore, the decree-holder is not entitled to claim them in the present proceedings. I am unable to accede to this contention of Mr. Kirkpatrick. I hold that though the case does not strictly come within section 144, Civil Procedure Code,

(1) 14 Ind. Cas. 456; 15 C. L. J. 187.

yet this is eminently a case where the Court should make restitution for the wrong done to the decree-holder by reason of its erroneous orders. The Court has an inherent power to make restitution and I consider that the decree-holder is clearly entitled to it and should not be referred to a regular suit.

I, therefore, accept the appeal and setting aside the order of the lower Court remand the case to it that it may decide the decree-holder's claim in accordance with law.

Appeal accepted; case remanded.

ALLAHABAD HIGH COURT.

FULL BENCH.

LETTERS PATENT APPEAL No. 61 OF 1916.

March 30, 1917.

Present:—Sir Henry Richards, KT., Chief Justice, Justice Sir P. C. Banerji KT., and Mr. Justice Tudball.

BIJAI MISIR AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

KALI PRASAD MISIR AND OTHERS—

DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 233 (k), 107, 110—Partition—Civil suit, maintainability of—"Partition and union of mahals", *interpretation of.*

Certain co-sharers in a village applied for partition of their shares under section 107 of the U. P. Land Revenue Act. Under section 110 of the Act notice was issued to all the recorded co-sharers, and thereupon an application was made by some co-sharers praying for partition of their shares and setting forth the extent of the shares which they prayed should be formed into one lot. A proceeding was thereafter drawn up by the Revenue Court under section 114 of the Act declaring the basis on which partition was to be effected and putting down the plaintiff's share as that given in the application. Nearly a year after this the plaintiff brought a suit to recover possession of a share allotted to the defendants:

Held, (*Richards, C. J.*, dissenting) that the suit was barred by the provisions of section 233 (*k*) of the U. P. Land Revenue Act. [p. 913, cols 1 & 2]

Shambhu Singh v. *Daljit Singh*, 33 Ind. Cas. 19; 14 A. L. J. 293; 38 A. 243, distinguished.

Per *Banerji, J.*—In determining whether section 233 (*k*) of the U. P. Land Revenue Act applies to a suit, the Court must look to the substance of the claim and not to the form in which it is dressed up. [p. 913, col. 1.]

Per *Richards, C. J.*—The word "partition" and the words "union of *mahals*" in section 233 (*k*) of the U. P. Land Revenue Act refer to "units" of area which the Revenue Authorities create in the course of partition proceedings. [p. 914, col. 1.]

Appeal under section 10 of the Letters Patent from a judgment of Mr. Justice Lindsay, reversing a decree of the Additional Judge, Gorakhpur.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *S. N. Sen*, for the Respondents.

JUDGMENT.

BANERJI, J.—In the suit out of which this appeal has arisen the plaintiffs claimed, among other reliefs, possession of a share in the village of Bankata and it is this part of the claim with which we are concerned in this appeal. It appears that certain co-sharers in the aforesaid village applied for partition of their shares under section 107 of the Land Revenue Act. Notice was issued to all the recorded co-sharers as required by section 110 of the Act and thereupon an application was made on the 11th of September 1912, by the parties to this suit and other co-sharers under clause (2) of the section, praying for partition of their shares. In that application they set forth the extent of the shares which they prayed should be formed into one lot or *qura*. After this application was made a proceeding was drawn up by the Revenue Court under section 114 of the Act declaring the basis upon which partition was to be effected and in that proceeding the extent of the plaintiffs' share was put down as that mentioned in the application to which I have referred. Nearly a year after this, that is, in August 1913, the plaintiffs instituted the present suit. The question to be determined is whether the suit is barred by the provisions of section 233 (*k*) of the Land Revenue Act. I should have considered that the point was fully concluded by authority in this Court had it not been for the decision in the recent case of *Shambhu Singh* v. *Daljit Singh* (1). In my opinion the present suit is in substance a suit in respect of the partition of a *mahal* within the meaning of clause (*k*) of section 233. That section provides that no Civil Court shall take cognizance of a suit in respect of the several matters mentioned in the section. One of these matters

(1) 33 Ind. Cas. 19; 14 A. L. J. 293; 38 A. 243.

is "partition or union of *mahals* except as provided in sections 111 and 112." In determining whether the section applies we have to look to the substance of the claim and not to the form in which it is dressed up. If, as observed by Strachey, C. J., in *Muhammad Sadiq* v. *Laute Ram* (2), the object of the suit is to establish the plaintiff's ownership and possession in respect of property as to which the Revenue Authorities in making a partition have declared that it should go to the defendant, that is a matter relating to partition and a Civil Court is forbidden to take cognizance of it by the provisions of section 233. I am unable to distinguish this case from the case last mentioned, which is very similar to the present. It is a Full Bench decision by five Judges of this Court, and the view taken in it was held in subsequent cases also. I see no reason to depart from the course of rulings on the point. No question of *res judicata*, in my opinion, arises in a case like this. Had the question of the title of the parties been decided by the Revenue Court under sections 111 and 112 the matter would have been *res judicata*. In my opinion the present suit is barred by reason of the prohibition contained in section 233 and not on the ground of *res judicata*. It is not necessary for the purposes of this case to say whether I agree or disagree with the ruling in *Shambhu Singh* v. *Daljit Singh* (1) referred to above, as the facts of that case are different from those of the present case but if it is deemed that the principle involved in that case is the same as that which arises in this, I am unable, with great deference, to acquiesce in all that was said in that case. In my judgment the decision of the learned Judge of this Court from which this appeal has been preferred under the Letters Patent is correct and I would dismiss the appeal.

TUDBALL, J.—The facts of the case have just been stated by my learned colleague Banerji, J. It is unnecessary to repeat them. In substance the present suit is merely an effort to turn round and annul the partition made by the Revenue Court. The appellants were parties to that partition, the property in dispute was the subject matter of that very proceeding and the present case is nothing but a very very clear instance to which section 233, clause (*k*) applies beyond doubt. The case is clearly distinguishable from the case of *Shambhu Singh* v. *Daljit Singh* (1), for in that suit the subject-matter thereof had not been the subject-matter of a partition case in any way at all. I would dismiss the appeal.

RICHARDS, C. J.—The facts have been fully stated by my learned brother Banerji. The property claimed by the plaintiff in the present suit has in recent partition proceedings been allotted to the defendants. The plaintiff was a party to these proceedings and there is no doubt that he could then have put forward the title he now alleges (sections 111-112, Land Revenue Act). While I do not agree with my learned brothers that the present suit is barred by the provisions of section 233 (*k*), I quite appreciate the objection of allowing parties to partition proceedings in the Revenue Court to re-open in the Civil Court questions of title which could, and ought, to have been decided before partition, in the manner provided by the Revenue Act. If the result of the view taken by the majority of the Court in this case is to settle that parties to partition proceedings in the Revenue Court cannot re-open questions of title in the Civil Court, which have been or ought to have been decided before partition, some good and little harm will probably be done, particularly if the Revenue Courts by their rules and practice give proper facility and opportunity for the raising and decision of such questions. If, however, as a consequence of our decision persons are prevented from asserting their rights in the Civil Court merely because of partition proceedings in the Revenue Court to which they were not parties (or in which they were not interested to assert such rights), grave injustice will often be done. The only question for decision in the present appeal is whether or not the Civil Court could take cognizance of the present suit having regard to the provisions of section 233 (*k*) of the Land Revenue Act. The suit is in form a suit which is brought every day in the Civil Court. It is an

(2) 23 A. 291; A. W. N. (1901) 86.

ordinary suit for possession of land. Possession of the land in dispute is the appropriate relief for the plaintiff to seek. It is only after at least partial investigation that the suit could possibly be said to have been instituted contrary to the provisions of section 233 (*k*) notwithstanding the partition proceedings. One at least of my colleagues would, I think, have held the suit cognizable, had it not been for the fact that the plaintiff was a party to the proceedings in the Revenue Court. In the case of *Shambhu Singh* v. *Daljit Singh* (1) there had also been partition proceedings and the plaintiff was seeking to recover possession of property which had been dealt with (wrongly, it is true) in those proceedings. The Court below had held that the suit was barred by section 233 (*k*). I gave my reasons at some length in that case for holding that the suit was not barred and I referred to another case decided about the same time by the same Bench; *Kalka Prasad* v. *Manmohan Lal* (3). My brother Tudball expressed his concurrence in both cases. I did not understand him to take exception to anything I said in the course of my judgment. At the same time it must be admitted that the facts in the case of *Shambhu Singh* v. *Daljit Singh* (1) differ materially, at least on the merits. It is, however, common to all three cases that there had been recent partition proceedings in the Revenue Court and the property in dispute in the Civil Court had been dealt with by the Revenue Court in the partition proceedings. Section 233 (*k*) provides that "No person shall institute any suit or other proceeding in the Civil Court with respect to partition or union of *mahals* except as provided in sections 111 and 112." The question is, whatis the meaning of "partition or union of *mahals* ?" The expression "partition" is followed by the expression "union of *mahals*." In the course of the argument it was said (with the approval of both my colleagues) that "partition" meant the opposite of "union of *mahals*". I agree and think that the word "partition" and the word "union of *mahals*" refer to "units" of area which the Revenue Authorities create in the course of partition proceedings. If this is the correct meaning of the expressions, the institution of the present suit was not contrary to the provisions of section 233 (*k*). If the plaintiff in this suit was successful the property would remain in the same unit in which it was placed by the Revenue Court, notwithstanding the plaintiff's decree for possession. The "unit" would not be affected, though the ownership of the property in it would be. If the meaning which I give is the correct meaning, then a suit which seeks to affect a "unit" created by the Revenue Court as "unit" cannot be instituted by any person, whether he was or was not a party to partition proceedings, and the meaning of a badly drawn section becomes comparatively clear. There are obvious reasons why the Legislature might have confined the power of altering and creating revenue areas (which for the want of a better name I call "units") to the Revenue Courts. The reasons for the exclusion (even partial exclusion) of the power to decide questions of title or the right to possession to property in those units for the Civil Court is not so obvious. My learned colleagues agreed that "partition" meant the opposite of "union of *mahals*," still they seem to think that it also means the determination of the title to the specific land allotted. It seems to me that to assert that there has been no "partition" in the Revenue Court because the plaintiff was not a party to those proceedings is to assert contrary to fact. The section does not say that a person cannot institute a suit in respect of a partition to which he was a party. It seems to me that the very words "except as provided by sections 111-112" show that the expression "partition" is not confined to divisions actually made, because sections 111-112 contemplate the raising of questions of title before partition. The section cannot be read as meaning that no person can institute a suit in the Civil Court which can in any way effect a contemplated division of *zemindari*. Such suits are instituted every day before any proceedings are taken in the Revenue Court and appear to be recognized by the Code of Civil Procedure. The rights of the parties are declared by the Civil Court and it is only

(3) 33 Ind. Cas. 86; 38 A. 302; 14 A. L. J. 373.

the actual division that is carried out by the Revenue Court. If you give any meaning to the expression "partition" other than the meaning I have given it and substitute that other meaning of the word "partition" and then read the section giving the language its ordinary meaning, I think you will find that confusion at once arises. It is said that the words "except as provided by sections 111-112" show that the expression "partition" means or at least includes the actual division as between the parties and the determination of their title. It may possibly be that the framers of the section hoped the introduction of these words would prevent subsequent questions of title being raised. Another explanation might be to obviate some contradiction or inconsistency between sections 111-112 and section 233 (*k*). If the Legislature intended to prevent questions of title being re-opened after partition it would have been simpler, fairer, and less calculated to do injustice if the rules of "*res judicata*" as laid down in the Code of Civil Procedure had been incorporated It is unnecessary for me to repeat what I have said in my judgments in *Kalka Prasad* v. *Manmohan Lal* (3) and *Shambhu Singh* v. *Daljit Singh* (1). As the view of the majority of the Court will prevail, I need not consider what the order of this Court would have been had the views of my colleagues coincided with mine.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1195 OF 1914.

March 15, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

BHAGWAN SINGH—PLAINTIFF—APPELLANT

versus

MUNSHI RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 25 (3)—Promise to pay barred debt—Cause of action, accrual of—Interest, delay in instituting suit, whether ground for disallowing.

Where a balance struck more than three years after the date of the last item in a *bahi* account is duly signed by the debtor with an additional statement that interest at a specified rate will be realisable along with (*gail*) the said balance, such an agreement amounts to a contract under section 25 (3) of the Contract Act and constitutes a fresh cause of action. [p. 917, cols. 1 & 2.]

Mere delay in instituting a suit is not a sufficient ground for disallowing interest on a barred debt acknowledged under section 25 (3) of the Contract Act. [p. 917, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Hissar, at Karnal, dated the 2nd March 1914.

Mr. *Dharm Chand*, for the Appellant.

Mr. *Gokul Chand*, for the Respondents.

JUDGMENT.—On the 23rd January 1913 Bhagwan Singh instituted a suit against Munshi Ram and Phullu, the minor sons of one Mohlu, for Rs. 2,500, alleging that this sum was due to him by the said Mohlu on a *bahi* account.

The averments in the plaint were that Mohlu had had dealings with Bhagwan Singh and had, on the 20th February 1907, struck a balance showing that a sum of Rs. 1,200 was due on the account and had undertaken to repay that amount together with interest at Rs.18-12-0 per mensem; that subsequent to this he had taken a further advance of Rs. 130 bearing interest at the rate of Rs. 2-0-6 per mensem.

After crediting a sum of Rs. 300, as received towards interest, Bhagwan Singh claimed Rs. 1,330 as principal and Rs. 1,170 as interest or an aggregate sum of Rs. 2,500 The suit was contested, it being alleged that Mohlu neither had any dealings with the plaintiff, nor struck the balance relied on, nor agreed to pay any interest, nor taken the further advance of Rs. 130.

The entry in the *bahi* bore the mark and thumb-impression of Mohlu and the primary Court held that he had struck the balance as alleged and had agreed to pay interest.

The further advance of Rs. 130 was found not to have been proved and the plaintiff's suit was decreed to the extent of Rs. 2,226, with proportionate costs against "the defendants as representatives of the estate of the late Mohlu, recoverable from estate of the deceased." Both sides preferred

appeals to the Divisional Judge who, on the 24th February 1914, held—

(1) that Mohlu had struck the balance in question;

(2) that the entry relating to the said balance contained a promise to pay within the ambit of section 25 (3), Indian Contract Act;

(3) that the suit was within limitation;

(4) that interest, however, had not been agreed upon and that Rs. 1,200, alone were claimable under the balance;

(5) that the subsequent advance of Rs. 130 had been proved, but that no interest was payable inasmuch as there had been inordinate delay in the institution of the suit; and finally that the principal alone, amounting in all to Rs. 1,330, was claimable.

After deducting the credit of Rs. 300 above mentioned he granted a decree in favour of the plaintiff for Rs. 1,030 with costs in proportion.

Dissatisfied with this result both sides have appealed to this Court and this judgment will dispose of both the appeals, this and Civil Appeal No. 1262 of 1914.

Mr. Dharm Chand for Bhagwan Singh (appellant in this appeal) claims that interest has been wrongly disallowed, while Mr. Gokal Chand for the defendants (appellants in Civil Appeal No. 1262 of 1914) contends that the suit should have been dismissed *in toto* on the ground that it was time barred.

This plea of limitation was not raised in the pleadings, and was not taken in the grounds of appeal to the Divisional Judge. It was, however, urged at the hearing of the appeal and was disposed of by the lower Appellate Court as stated above.

Mr. Gokal Chand contended that prior to the 20th February 1907, the last entry relating to an advance was of a sum of Rs. 3 shown as taken by Mohlu on the 7th November 1897; that the claim on the book account was, therefore, barred on the 20th February 1907, and that as the entry relating to the balance of Rs. 1,200, properly construed, contained no promise to pay, the said entry did not form a fresh starting point for limitation.

Mr. Dharm Chand on the other hand urged that the Courts below had correctly construed the entry which did contain a promise to pay; and further that had the plea of limitation been taken at the proper stage, his client could have proved that the claim was within time on the 20th February 1907, by showing that Mohlu had been making payments to him within the period prescribed; he, therefore, urged that a remand for an enquiry into this point should be made if his first contention was held to be untenable. A remand, however, is not necessary as, in our opinion, the entry has been correctly construed.

This entry runs as follows:—

"*Baki rahe lene miti Phagan Sudi* 8, *Sambat* 1963, *biaj Rs.* 18-12-0 *mahina gail lene Hazri, Mohlu, Bahman, Harnam ke bete ki likhi. Hazri Bholar, Khubi ke bete ki likhi - ticket anna 1 nishani Mohlu Bahman, Harnam ke bete ki*," and, as has been stated above, to this is affixed a thumb impression which has been proved to be that of Mohlu. Assuming that the claim on the book account was time barred on the 20th February 1907, it is clear that if the entry under discussion contains a promise "to pay," it comes within the purview of section 25 (3), Indian Contract Act, and brings the case within limitation. Mr. Gokal Chand in support of his contention cited *Shankar Dos* v. *Josodhan* (1), while Mr Dharm Chand referred us to *Daula* v. *Gonda* (2), *Shankar Das* v *Jasodhan* (1), *Pala Mal* v. *Tulla Ram* (3) and *Makhan Lal* v. *Ganeshi Lal* (4).

It is obvious that the construction of any entry or document must depend on its wording, and former decisions can only be useful as guides in so far as the phraseology of the documents construed in them coincides with, or approximates to, that of the document under consideration.

In *Shankar Das* v. *Jasodan* (1) the wording of the entries under consideration was very different from that of the entry in this case. The entries there were clearly acknowledgments of an existing debt without any

(1) 102 P. R. 1908.
(2) 35 P. R. 1903; 101 P. L. R. 1903.
(3) 119 P. R. 1908; 206 P. W. R. 1908.
(4) 30 Ind. Cas. 84; 42 P. R. 1915; 130 P. W. R. 1915; 49 P. L. R. 1916.

phrase or words indicative of an intention to pay the debt. No reference was made to interest.

At page 477* of the report, *Ladhu Shah* v. *Fazl Dad* (5) was referred to and distinguished. In that case the wording of the entry approximated closely to that of the present entry. It was "Balance Rs. 323. One rupee per cent. per month has been fixed as interest on it....." and it was held that this was clearly a promise to pay *interest*, which promise led irresistibly to the conclusion that an undertaking to pay the debt had been given.

In *Daula* v. *Gonda* (2) the important words in the entry were "*baqi lena Ganda pason, Sohela pason*," and it was held by the Full Bench that '*lena*" and '*dena*" are complementary to one another "and when Ganda and Sohela signed this instrument by which plaintiff was to take the balance from them, they must be held to have undertaken to pay the balance, and to have, therefore, obliged themselves thereby to pay the money."

This case was followed in *Tirkha* v. *Rizak Ram* (6).

Pala Mal v. *Tulla Ram* (3) was a case in which there was a mere acknowledgment of an existing debt without importing a promise to pay it. No mention of interest was made in it, and for this very reason it was distinguished in *Makhan Lal* v. *Ganeshi Lal* (4), where it was held that a balance signed by a debtor which states as payable a rate of interest, and that a rate different from the rate usually charged in the previous account, amounts to a new contract. In the present case there is a balance duly signed by Mohlu, with an additional statement that interest at a specified rate was realisable *along with* (*gail*) the said balance.

Mr. Gokal Chand, no doubt, wished to challenge the finding of the lower Appellate Court as to this subsequent entry, but the finding is purely one of fact and cannot be attacked on second appeal.

After giving our careful consideration to the wording of this entry we are of opinion that the fixing of interest, and the making of the same realisable along with (*gail*) the balance arrived at and acknowledged, clearly imports an undertaking or promise to pay the balance so acknowledged, and gives a fresh starting point for limitation or constitutes a fresh cause of action. Civil Appeal No. 1262 of 1914 must, therefore, fail.

Coming next to the appeal by Bhagwan Singh, we are unable to see any reason for disallowing the interest claimed. Mere delay in instituting the suit is certainly not a sufficient reason. Doubtless the learned Divisional Judge considered it "very doubtful that the debtor, when he admitted a time-barred debt and agreed to pay the same, also agreed to pay a high rate of interest," but the doubt is wholly incompatible with his finding previously arrived at when dealing with the construction of the entry, when he says:—"If it had been only a memorandum of the account by the plaintiff himself, the presence of the debtor and witness, the entry of rate of interest, the affixing of a stamp and the mark and the thumb-impression were all quite unnecessary and superfluous, but the presence of all these ingredients shows unmistakably *that the debtor promised to pay a sum of* Rs. 1,200 *with interest at* Rs. 18-12 0 *per month....*"

In fact, as has been pointed out above, it was this mention of interest and the promise to pay the same that brought the entry within the ambit of section 25 (3), Indian Contract Act. In these circumstances we hold that the interest has been wrongly disallowed. Mr. Gokal Chand also urged that any decree passed should be against Mohlu's estate alone and not against the ancestral property. As a matter of fact the decree clearly specifies that the money is recoverable from Mohlu's estate, and it will be for the executing Court to determine what Mohlu's estate actually is, and to what extent it is in the hands of the defendants.

The result is that we reject Appeal No. 1262 of 1914 with costs and accept this Appeal No. 1195 of 1914 and grant the plaintiff a decree for Rs. 2,500 together with costs recoverable from the estate of Mohlu.

Appeal accepted.

(5) 72 P. R. 1879.

(6) 8 Ind. Cas. 8 1; 8 P. L. R. 1911; 138 P. W. R. 1910.

*Page of P. R. 1903.—*Ed.*

SARFARAZ KHAN *v.* PARBATIA.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 100 OF 1917.

July 4, 1917.

Present:—Mr. Justice Piggott.

SARFARAZ KHAN—PLAINTIFF—APPLICANT

versus

Musammat PARBATIA AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Civil Procedure Code (Act V of 1908), O. IX, r. 9—Dismissal for default—Application to set aside dismissal—Sufficient cause—Revision.

Courts of Small Causes should not show themselves too rigid or exacting in the case of a litigant who is acting evidently with a *bona fide* purpose of prosecuting his suit.

Where neither party was present when a case was called on, and the suit was dismissed for default, but the plaintiff put in his appearance later on in the course of the same day, and his explanation was that he had set out hoping to reach the Court in time, but had taken longer on the journey than he had anticipated:

Held, that his application to set aside the dismissal for default should be allowed.

Civil revision from an order of the Judge of the Court of Small Causes, Sambhal.

Mr. *Mohan Lal Sandal*, for the Applicant.

JUDGMENT.—I think this was a hard case. Neither party was present when the case was called on and the record shows that the plaintiff put in his appearance later on in the course of the same day. His explanation was that he had set out hoping to reach the Court in time, but had taken longer on the journey than he had anticipated. Without professing to lay down any general rule governing cases of this sort, I do think that Courts of Small Causes should not show themselves too rigid or exacting in the case of a litigant who was acting evidently with a *bona fide* purpose of prosecuting his suit. The defendants never appeared in the Court below and have been unrepresented at the hearing of this application. I set aside the order of the Court below and in lieu thereof allow the plaintiff's application for the restoration of his suit to the file of pending suits, subject to this condition that he will bear all costs here and hitherto, excepting the Court-fee stamp on the plaint which will abide the event of the case. The Court below will restore the case to its file of pending suits and dispose of it according to law.

Application allowed.

DHANPAT MAL *v.* MELA MAL.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2252 OF 1916.

March 21, 1917.

Present:—Mr. Justice Shadi Lal.

DHANPAT MAL—DEFENDANT—APPELLANT

versus

MELA MAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Appeal, presentation of—Copies of decree and judgment, necessity of—Copy filed after expiry of period of limitation, effect of—Limitation.

Under Order XLI, rule 1, of the Civil Procedure Code, a memorandum of appeal must be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded, and where the latter is filed after the expiry of the period of limitation, the appeal, in the absence of just cause shown for extending the time, must be dismissed as barred by time [p. 918, col. 2; p. 919, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 21st April 1916.

Lala *Dharm Das Suri*, for the Appellant.

Mr. *Balwant Rai*, for the Respondents.

JUDGMENT.—There was no valid presentation of this appeal within the period prescribed by law, and the appeal must, therefore, be dismissed. The decree appealed from was passed on the 21st April 1916, and the memorandum of appeal accompanied by a copy of the decree, and not by a copy of the judgment on which it was founded, was presented to this Court on the 26th July 1916. It will be observed that this memorandum did not bear the signature of either the appellant or his Pleader, and it was returned on the 27th July for rectifying this mistake and also for filing a copy of the judgment of the lower Appellate Court. The appeal was re-filed on the 2nd August but again without a copy of the judgment, and it was only after it had been returned again that the said copy was filed on the 8th August.

Now, Order XLI, rule 1, lays down that the memorandum of appeal shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it was founded. It is quite clear that no dispensation referred to above has been granted, and that a copy of the judgment is a necessary accompaniment for a valid

appeal, *vide, inter alia, Bhag Singh* v. *Jhanda Singh* (1). It was not, as observed above, until the 8th August that the copy of the lower Appellate Court's judgment was filed and it is beyond dispute that after excluding the time requisite for obtaining the copies of the judgment and the decree, the appeal was validly presented long after the expiry of the period of ninety days prescribed by law. No just cause has been shown for extending the time, and I am, therefore, constrained to dismiss the appeal with costs.

Appeal dismissed.

(1) 7 P. R. 1879.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 522 OF 1917.

July 24, 1917.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Beachcroft.

THE RIVER STEAM NAVIGATION COMPANY, LTD., AND ANOTHER —DEFENDANTS—PETITIONERS

versus

MESSRS. HAZARIMAL MULTAN MAL—PLAINTIFFS—OPPOSITE PARTY.

Carriers Act (III of 1865), s. 10—Notice, requirements and necessity of—Civil Procedure Code (Act V of 1908), s. 115—High Court's interference with decision erroneous in law.

To maintain a suit for damages for short delivery against a common carrier, a notice of claim under section 10 of the Carriers Act must be given to the defendant, even though the carrier came to know of the claim *aliunde* within six months' time and had no difficulty in tracing the goods. [p. 920, col. 2.]

Where a clause in a Bill of Lading ran as follows:—"No claim of any kind whatsoever in respect of the contract shall be valid, unless notice in writing shall be given and delivered at the office of the Company at Calcutta within six months from the date of any default, loss or damage, in respect of which such claim arises:"

Held, that the clause did not in any way limit the requirements of section 10 of the Carriers Act and was entirely consistent with it [p 920, col. 2.]

A Subordinate Court decreed the suit of a consignee against a Steam Navigation Company for damages on account of short delivery, erroneously holding that a notice of claim given to the sub-agent of the Company was a good notice in the circumstances of the case:

Held, that the decision being merely erroneous in law, it did not warrant the High Court's interference under section 115, Civil Procedure Code. [p. 920, col. 2.]

Rule against the order of the Court of the Sub-Judge, Darrang, in Appeal No. 8 of 1916.

FACTS of the cause appear from the judgment.

Babu *Mohendra Nath Roy* (with him Babu *Hemendra Kumar Das*), for the Opposite Party. —The question in controversy in this case is about notice under section 10 of the Indian Carriers Act. In this case the first notice was delivered to the joint agent at Biswanath Ghat on 21st September 1914. The second letter was similarly addressed on 19th October 1914. The third letter of demand was also similarly addressed on 13th November 1914. The fourth letter of demand was dated 10th December 1914. On 27th January 1915 the Biswanath Ghat sub-agent sent a letter repudiating the claim. The Judge is of opinion that the repudiation was made under proper authority.

[CHITTY, J.—The head office is not entitled to notice of claim.]

Six months is prescribed in the Bill of Lading and in the Act. 'To him' in section 10 would include the agent. Apart from the Carriers Act, there are several cases in which it has been held that the Bill of Lading binds the consignor. The lower Court has held that the conditions in the Bill of Lading are not binding. Section 115 of the Civil Procedure Code does not empower your Lordships to interfere in revision on an erroneous decision of law. Section 115 only gives your Lordships a power to call for the records of the case, unlike section 25 of the Provincial Small Cause Courts Act which gives your Lordships wider powers. In this case the findings on the merits are concurrent findings of both Courts. My claim reached the Company within six months.

Babu *Monmotha Nath Mukerjee*, for the Petitioners.—It is not enough to assert that the Company had knowledge of the loss of the opposite party. Refers to *British and Foreign Marine Insurance Co.* v. *India General Steam Navigation and Ry., Co.* (1). As regards jurisdiction, the lower Court has consciously departed from a rule of law and so the High Court can interfere in revision. The Judge has exercised jurisdiction in a

(1) 9 Ind. Cas. 960; 38 C. 50.

case not entertainable by him. There is no finding that the Company got a valid notice. Refers to *Mahomed Ismailjee Nada* v. *British India Steam Navigation Company* (2), *British India Steam Navigation Company Ltd.* v. *Hajee Mahomed Esack & Co* (3), *British and Foreign Marine Insurance Co.* v. *India General Steam Navigation and Ry. Co., Ld.* (4).

Babu *Mohendra Nath Roy* was not called upon to reply.

JUDGMENT.—This is a Rule issued at the instance of the defendants calling upon the plaintiffs to show cause why the decree passed against them by the Munsif of Tezpur and modified on appeal by the Subordinate Judge of the Assam Valley Districts should not be set aside on the ground that condition No. 17 of the Bill of Lading requiring service of notice of claim at the defendants' office in Calcutta was perfectly legal, and that the Courts below had no jurisdiction to entertain the suit without strict compliance therewith being proved. The clause in question runs as follows :—

"No claim of any kind whatsoever in respect of the contract shall be valid, unless notice in writing shall be given and delivered at the office of the Company at Calcutta within six months from the date of any default, loss or damage in respect of which such claim arises." The facts are that on 16th August 1914 goods were shipped by the defendant Companies' steamer at Calcutta consigned to the plaintiffs at Bishwanath Ghat. There was short delivery, and on 21st September 1914 a notice of claim was delivered to the defendants' sub-agent at Bishwanath Ghat. He is described as joint agent, as he represented the two steamship Companies.

On 19th October, 13th November, and 10th December 1914 three more letters were delivered to him. On 27th January 1915 he wrote repudiating the claim. On 29th January 1915 the plaintiffs wrote to the defendant Company's head office asking for a copy of the Bill of Lading which was supplied on 3rd February 1915. The plaintiffs then filed this suit.

The learned Subordinate Judge held that the defendants had no power to restrict the manner of service of notice by limiting the service at the Calcutta office of the Company. He thought that the notice served in this case on the sub-agent at Bishwanath Ghat was a good notice in the circumstances of the case, especially as he found that the defendant Companies came to know of the claim in less than six months' time and had no difficulty in tracing the goods.

This decision of the learned Subordinate Judge appears to be erroneous. In the first place, clause 17 does not in any way limit the requirements of section 10 of the Carriers Act, 1865. It is entirely consistent with that section. *Secondly*, it has been held by this Court in *British and Foreign Marine Insurance Co.* v. *India General Steam Navigation and Railway Company* (1) that notice under section 10 of the Carriers Act must be given. It is not enough to say that the Company had knowledge *aliunde* of the loss.

But we are met with the objection that this is merely a decision erroneous in law, that there is nothing in the procedure of the Courts below which warrants our interference under section 115 of the Civil Procedure Code. In the petition for the Rule the question of jurisdiction was ingeniously introduced, but it is really not a question of jurisdiction at all. The cases of *Amir Hassan Khan* v. *Sheo Baksh Singh* (5) and *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (6) make this clear. We must, therefore, decline to interfere in revision. The Rule is discharged but in the circumstances without costs.

Rule discharged.

(2) 9 W. R. 396 at p. 397.
(3) 3 M. 107; 1 Ind. Dec. (N. S.) 631.
(4) 9 Ind. Cas. 364; 15 C. W. N. 226; 38 C. 28.
(5) 11 C. 6, 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C No. 83; 5 Ind. Dec. (N. S.) 760.
(6) 23 Ind Cas 977; 41 C. 523.

MATHRA DAS *v.* NIZAM DIN.

PUNJAB CHIEF COURT.
FULL BENCH.
CIVIL APPEAL No. 1922 OF 1913.
March 22, 1917.

Present:—Mr. Justice Chevis, Mr. Justice LeRossignol and Mr. Justice Leslie Jones.

MATHRA DAS AND OTHERS—APPELLANTS
versus
NIZAM DIN AND OTHERS—RESPONDENTS.

Mortgage—Payment of mortgage-money to one of several co-mortgagees, whether constitutes complete discharge—Contract Act (IX of 1872), s. 38, scope of.

A payment of the mortgage-money to one of several co-mortgagees without the consent of the other co-mortgagees is not a complete discharge of the mortgage-debt binding on all the mortgagees. [p. 923, col. 2; p. 924, col. 2]

Section 38 of the Contract Act does not deal with the case of an offer accepted by one of several joint promisees but considers only the case of such an offer which has been rejected. [p. 924, col. 2.]

Appeal from the order of the Divisional Judge, Sialkot Division, dated the 18th June 1913.

FACTS of the case appear from the following Order of Reference dated the 22nd December 1916:—

LEROSSIGNOL, J. (JOHNSTONE, C. J. *concurring*).—The facts of this case are these. Daula mortgaged 84 *kanals* of land to Gandu Shah with possession. Gandu Shah first sub-mortgaged his mortgage right for Rs. 1,000 to Parshotam Das, this in 1901, but in 1907 he sold his mortgage right absolutely for Rs. 1,293 to the plaintiffs and *Musammat* Lachhmi, who now represent Parshotam Das. Subsequently Daula sold 50 7/20 *kanals*, out of the 84 *kanals* mortgaged, to Nizam Din and the latter, desirous of obtaining possession of the area sold to him and finding the heirs of Parshotam Das at loggerheads, has paid off the whole of the mortgage debt Rs. 1,293 to *Musammat* Lachhmi, who has given him possession of the land.

The plaintiffs sued to recover possession and their suit has been dismissed by the Courts below on the ground that *Musammat* Lachhmi as one of the joint promisees was competent to give a discharge which would bind her co-promisees. Plaintiffs appeal to this Court.

The decision turns on the interpretation to be placed on the provisions of section 38 of the Contract Act. The decisions by the High Courts on the point are in conflict, but before dealing with them, it may be mentioned that Mr. Mehr Chand contended that even if in respect of the purchase of the mortgage right in 1907 his clients and *Musammat* Lachhmi became joint tenants of the right, they had a right to fall back on the sub-mortgage of 1901, and in respect of that transaction he argued that his clients and *Musammat* Lachhmi as heirs of Parshotam Das had separate interests and were tenants-in-common of the right.

In support of his argument he quoted *Khiali Ram* v. *Gulab Khan* (1), which followed *Devi Ditta* v. *Pareman* (2), and he extracted therefrom the principle that a mortgage does not merge in a sale of later date, and that when the sale fails, the vendee may have recourse to his earlier mortgage, as it is the presumption that he had no *intention* to allow the mortgage to be merged in the sale.

Whilst entirely concurring in the conclusion reached in the decision quoted I venture to think that the *ratio decidendi* has not been quite correctly stated therein, for when a mortgage is superseded by a sale, the intention of the parties clearly is that the mortgage should merge in the sale, but it is equally their intention that should the sale eventually turn out to be invalid, the mortgage should be re-habilitated, and to such re-habilitation of his mortgage the mortgagee would be entitled on general principles of equity.

However that may be, the point regarding the different positions of plaintiffs with regard to the mortgage of 1901 and the sale of 1907 is now taken for the first time and I do not regard it as important; in any case, there is no question of the failure of the sale of 1907. The cardinal point for decision is whether section 38 of the Contract Act warrants the conclusion that one of two joint promisees is competent to give the promisor a full discharge without the concurrence of the other promisee.

In the affirmative the following decisions have been cited:—*Barber Maran* v. *Ramana*

(1) 11 Ind. Cas. 392; 33 P. R. 1911; 190 P. L. R. 1911.
(2) 71 P. R. 1898.

Goundan (3), *Mannava Annapurnamma* v. *Uppala Akkayya* (4), *Daulat Ram* v. *Sayad Abdul Kasim* (5), *Kari Chengamna* v. *Jatti Kristnamnah* (6).

The Punjab ruling is the earliest in date; the question in that case was one of limitation, which depended on the answer to the further question whether one adult joint promisee could grant a discharge which would bind the other promisees who were minors.

The Judges who decided the case noticed *Wallace* v. *Kelsall* (7) and also *Steeds* v. *Steeds* (8), which considerably impaired the first authority, and felt themselves "somewhat reluctantly" compelled to hold that one joint promisee could give a valid discharge of the whole contract. The last clause of section 38 of the Contract Act was held to justify this conclusion.

In *Barber Maran* v. *Ramana Goundan* (3) the facts were parallel with those of this case and the *ratio decidendi* was that because section 38, Contract Act, provides that a rejected tender divests the promisor of responsibility for non-performance, it follows that rejection of the tender by one of two joint promisees discharges the promisor from liability in respect of his promise. This appears to be a *non-sequitur*, for the promisor must redeem his mortgage at some time

Mannava Annapurnamma v. *Uppala Akkayya* (4) approved of the preceding decision but the Bench was not unanimous, for the Chief Justice wrote a dissenting judgment.

Kari Chengamna v. *Jatti Kristnamnah* (6) is a very short judgment and the Judges without discussion stated merely that they were not prepared to dissent from *Barber Maran* v. *Ramana Goundan* (3).

Contra.—*Ram Chandra* v. *Goswami Rajjan Lal* (9) was a case similar to this and the Court refused to follow *Barber Maran* v. *Ramana Goundan* (3), distinguishing it on a very meagre ground.

Sitaram v. *Shridhar* (10) doubted the correctness of *Barber Maran* v. *Ramana Goundan* (3), but decided the case on grounds which did not apply to the Madras case.

Ahinsa Bibi v. *Abdul Kader Saheb* (11), a partnership case, doubted the correctness of *Barber Maran* v. *Ramana Goundan* (3), but held that in any case that decision did not cover the case before the Court, which was a dispute between the co-heirs of a promisee.

Jagat Tarini Dasi v. *Naba Gopal Chaki* (12) decided merely that when a legal tender had been made to one of several promisees and refused, the promisor ceased to be liable for interest from the date of the tender.

In *Ramaswamy* v. *Muniandy Servai* (13), a Madras case, *Barber Maran* v. *Ramana Goundan* (3) was absolutely disapproved.

In *Husainara Begum* v. *Rahmannessa Begum* (14), a Calcutta decision, it was held, on the ground that persons making an advance on the security of a mortgage must in equity be presumed to have separate interests in the money, that payment to one of two joint mortgagees does not necessarily operate as a discharge of the debt in so far as the other mortgagee is concerned.

Sheikh Ibrahim v. *Rama Aiyar* (15), a Madras ruling, doubted the correctness of *Barber Maran* v. *Ramana Goundan* (3), and *Ramjit* v. *Khemchand* (16), (*Allahabad*) disapproved of *Barber Maran* v. *Ramana Goundan* (3), and found that payment to one of several co-mortgagees did not operate as a discharge against the co-mortgagees who had not concurred in that payment.

Thus the balance of judicial opinion is decidedly against the principle enunciated in *Barber Maran* v. *Raman Goundan* (3).

My view is that section 45 of the Contract

(3) 20 M. 461; 7 M. L. J. 269; 7 Ind. Dec. (N. S.) 327.
(4) 19 Ind. Cas. 12; 36 M. 544; 24 M. L. J. 333; 13 M. L. T. 268; (1913) M. W. N. 328.
(5) 60 P. R. 1893.
(6) 1 Ind. Cas. 219.
(7) (1840) 7 M. & W. 264; 8 D. P. C. 841; 10 L. J. Ex. 12; 4 Jur. 1064; 56 R. R. 707; 151 E. R. 765.
(8) (1889) 22 Q. B. D. 537; 58 L. J. Q. B. 302; 60 L. T. 318; 37 W. R. 378.
(9) 5 Ind. Cas. 129; 32 A. 164; 7 A. L. J. 99.
(10) 27 B. 292; 5 Bom. L. R. 91.
(11) 25 M. 26 at p. 39.
(12) 34 C. 305; 5 C. L. J. 270.
(13) 5 Ind. Cas. 343; 7 M. L. T. 253; (1910) M. W. N. 550; 20 M. L. J. 709.
(14) 8 Ind. Cas. 837; 13 C. L. J. 3; 38 C. 342.
(15) 10 Ind. Cas. 874; 21 M. L. J. 508; (1911) 1 M. W. N. 442; 35 M. 685.
(16) 23 Ind. Cas. 8.

Act contemplates the existence of joint promisees, but removes from their condition an incident which under the English Common Law would attach to it. In fact it declares that they shall be treated as tenants-in-common and not as joint tenants of their interest and that the principle of survivorship shall not apply. In this the Statute is in conformity with the English equitable rule.

Section 38, Contract Act, professes to deal with an *offer* of performance only and regulates the position of parties to the contract in the event of the *refusal* by a promisee of an unobjectionable tender.

The section provides that in such a case the results are: (1) the promisor is not responsible for the non-performance; (2) he does not lose his rights under the contract.

But the section nowhere provides for the case of an *accepted* tender and my view is that section 38 does not help us at all in such a case, which is entirely outside its purview, and that the law to be applied must be sought elsewhere. I concur entirely in the views expressed by the learned Chief Justice in *Mannava Annapurnamma* v. *Uppala Akkayya* (4), which I should like to emphasize in one point only.

He writes: "No doubt the last paragraph of the section is general and is not restricted to an offer which has not been accepted, but apparently the Legislature were not contemplating the legal consequences of an offer which had been accepted, but the legal consequences of an offer which has been refused."

I should like to add that in accordance with the accepted principles of interpretation, a clause placed as is the last clause of section 38 is obviously anciliary to the preceding clauses and cannot be held to have a more extended purview than theirs. I would paraphrase section 38 as follows: —

Where a legally complete tender has been made to the promisee, or to one of several joint promisees, and has been rejected, the promisor is not liable to any penalty for non-performance. Nor does he thereby lose his rights under the contract, but, of course, he must at sometime fulfil the contract.

For these reasons, as there is a decision of this Court in the contrary sense, I would refer the point to a Full Bench.

Mr. *Mehr Chand*, for the Appellants.

Messrs. *Zia-ud-Din* and *Niaz Ali*, for the Respondents.

JUDGMENT OF THE FULL BENCH.

The order of reference to this Full Bench sets forth in detail the circumstances which have rendered the reference necessary.

Briefly put, the facts are:—

1. One Daula mortgaged with possession 84 *kanals* of land to Gandu Shah.

2. In 1907 Gandu Shah sold his mortgage right for Rs. 1,293 to the plaintiffs and *Musammat* Lachhmi.

3. Next Daula sold 50·7 20 *kanals* out of the mortgaged area to Nizam Din, who

4. paid the whole mortgage-debt of Rs. 1,293 to *Musammat* Lachhmi and so secured possession of the area transferred to him by his sale-deed.

The plaintiffs who were not paid any portion of the Rs. 1,293 sue as mortgagees to recover possession of the land from Nizam Din.

The point referred to us is whether a payment of the mortgage-money to one of several co-mortgagees without the consent of the other co-mortgagees is a complete discharge of the mortgage-debt binding on all the mortgagees.

The Counsel for parties have added before us very little to what is contained in the order of reference.

Appellants' Counsel has repeated the arguments used in the order, and has pointed out that the plaintiffs are not the promisees but the transferees of the promisees and, therefore, are in the same position as heirs of one promisee, whilst respondent's Counsel used the argument that where *Barber Maran* v. *Ramana Goundan* (3) had not been followed, it had been distinguished and, therefore, any doubts cast on the soundness of *Barber Maran* v. *Ramana Goundan* (3) were mere *obiter dicta*. He failed, however, to establish any essential difference between heirs of a promisee and transferees of a promisee.

Section 38 of the Contract Act does not strictly speaking cover the facts of the case before us, for Nizam Din is not the promisor, he is the transferee of the promisor who is Daula, similarly the plaintiffs are not co-promisees, but transferees of the promisee who is Gandu Shah.

However, we may assume that the prin-

ciples regulating the mutual position of promisor and promisee apply also to the transferees of those persons, subject always to well recognised equitable considerations. We now come to the real point in dispute, which is: "Does section 38 cover the case of payment made to and accepted by one co-promisee without the consent of the other promisees?"

Our answer is, that on the assumption that the parties to this dispute are in the same positions respectively as a promisor and joint promisees, section 38 of the Contract Act contemplates and prescribes the results of only a rejected, not of an accepted, offer of performance.

We adopt the view and the reasoning set forth by the learned Chief Justice in the *Mannava Annapurnamma* v. *Uppala Akkayya* (4), which view was acted upon in a later Madras judgment reported as *Ramaswamy* v. *Muniandy Servai* (13).

We have carefully considered the opposite view adopted by the other Judges who were parties to *Mannava Annapurnamma* v. *Uppala Akkayya* (4).

They appear to have been influenced by the following considerations:—

"It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it and, therefore, the promisor cannot be held liable to pay over again to the other promisees what he has already paid."

The conclusion is certainly, we suggest with all deference, not justified by section 38 of the Contract Act and it does not follow that because *A* is entitled to take a certain step in regard to one person, the rights of other persons not concurring in that step are affected thereby. Again,

"the debtor owing money to several joint promisees * * * * * would feel the greatest difficulty in discharging his obligation if he should not be allowed to make a *bona fide* payment to any one of them."

What difficulty there would be in such a case is not insuperable; after all, all complex transactions involve some difficulty and section 38 of the Contract Act has been devised to relieve the debtor in the case contemplated of any loss that might accrue to him by the refusal of his creditors to give him a joint discharge.

In any case it is not for us to guess at the intention of the Legislature in a case for which it has not specifically provided, and with all deference we must hold that the majority decision in *Mannava Annapurnamma* v *Uppala Akkayya* (4) constitutes an unwarrantable extension of the law.

In short, our answer to the case referred is that section 38 of the Contract Act does not deal with the case of an offer accepted by one of several joint promisees, but considers only the case of such an offer which has been rejected.

Answer accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1197 OF 1914.

April 2, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Smither.

PRASANNA KUMAR BHATTACHARJEE —PLAINTIFF—APPELLANT

versus

IBRAHIM MIRZA AND OTHERS—DEFENDANTS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 92, 93—Execution-Sale—Judgment-debtor having no saleable interest—Purchaser, suit by, for refund of purchase-money, maintainability of.

A purchaser in execution of a decree can by a regular suit obtain a refund of the purchase-money paid by him on the ground that the judgment-debtor had no saleable interest in the property at the time it was put up to sale. The remedy of such a purchaser is not limited to making an application for the purpose under the terms of the Civil Procedure Code. [p. 927, col. 1.]

The suit is maintainable even though the plaintiff does not ask to set aside the auction-sale. [p. 927, col. 1.]

Appeal against the decree of the Subordinate Judge, Murshidabad, dated the 4th February 1914, affirming that of the Munsif, Lalbagh, dated the 12th May 1913.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

"This appeal arises out of a suit brought by the plaintiff appellant to recover possession of some lands or in the alternative to recover the purchase-money with interest from the decree-holder.

Defendants Nos. 4 and 5 were in possession of the disputed lands as their occu-

parcy holding which was not transferable. They mortgaged that holding to the defendant No. 3 who recovered a mortgage-decree and in execution thereof caused the sale of the holding, which the plaintiff-appellant purchased on the 17th March 1911, and when he sought to get actual possession of the holding, he was successfully resisted by the defendant No. 2. Defendant No, 1 is the landlord and he in execution of the rent decree against the defendant No. 5 purchased the land in suit on the 15th March 1906 and has been in possession thereof. He was the principal contending party.

The Munsif dismissed the suit, holding that the plaintiff did not acquire any right by his auction-purchase against the defendant No. 1, as the holding was a non-transferable one; then as to the plaintiff's claim for the refund of the purchase-money against the defendant No. 3, he has held that in the absence of fraud the plaintiff's only remedy is to apply to set aside the sale and to recover back his purchase-money, when the judgment-debtor had no saleable interest at all.

It was next contended that the plaintiff was entitled to get back his purchase-money by suit, and not only by application, if the judgment-debtor had no saleable interest. All the High Courts are not uniform on this point, but that much is settled law that until the sale is set aside on the ground that the judgment debtor had no saleable interest, the auction-purchaser cannot get back the refund of the purchase-money. So without entering into the difficult question whether outside the provisions of the Civil Procedure Code, an auction-purchaser has any right to recover the purchase-money merely by showing that the judgment-debtor had no saleable interest, I hold that as the plaintiff in his present plaint did not ask for setting aside the sale and as the sale has not been set aside, the plaintiff is not entitled to get back the purchase-money. If the sale were set aside, then the defendant No. 3 might realise his dues from the other properties of the defendants Nos. 4 and 5, but as the sale was confirmed and the decree was satisfied, it will not be equitable to make him liable to pay back the purchase-money to the execution purchaser.

Thus both the grounds fail and I agree that the suit was rightly dismissed by the Munsif.

Hence ordered that the appeal be dismissed with costs."

Babu *Brajendra Nath Chatterjee*, for the Appellant.—I do not claim to get the property, because it was an occupancy holding which was not transferable by custom and had been before my purchase sold away in execution of a rent-decree. But why should I not get a refund of the purchase money if I could establish that the judgment debtor had no saleable interest in the property at the time it was put up to auction-sale in execution of the mortgage-decree against him? The remedy provided for by Order XXI, rule 93, Civil Procedure Code, is not exhaustive. That remedy is limited to those cases, in which a sale is set aside under Order XXI, rule 92 An application for setting aside a sale under that rule must be made within a limited time. Suppose the purchaser does not know that the judgment-debtor had no saleable interest in the property until long after the limitation period for setting aside the sale under rule 92 has expired. What should he do then? Should he be deprived of the property as well as of the money he paid for the purchase? That would be inequitable and unjust. He referred to *Hari Doyal Singh Roy* v. *Sheikh Samsuddin* (1), *Nityanund Roy* v. *Juggat Chandra Guha* (2), *Surendra Nath Ghose* v. *Beni Madhab Misra* (3), *Jotindra Mohan Tagore* v. *Mahomed Basir Chowdhry* (4), *Ram Kumar Shaha* v. *Ram Gour Shaha* (5).

As regards the reasoning of the Subordinate Judge that my client, the plaintiff, could not get a decree for the refund of the purchase-money because he did not ask in the plaint for setting aside the auction-sale, I submit, it is wholly unsound. The very fact that the plaintiff asked for the refund of the purchase-money necessarily

(1) 5 C. W. N. 240.
(2) 7 C. W. N. 105.
(3) 10 C. W. N. 274.
(4) 32 C 332.
(5) 2 Ind. Cas. 559; 37 C. 67; 13 C. W. N. 1080; 10 C. L. J. 558.

implied that the sale at which he purchased should be set aside. If the sale stands then there could be no question of refund. Moreover the sale being, according to the plaintiff's contention, a void sale, how could the plaintiff ask for setting it aside, when it was a nullity ?

Babu *Krishna Kamal Moitra* (with him Babu *Gagan Chand Boral* for Maulvi *A. K. Fazlul Haq*, and Babu *Biraj Mohan Majumdar*), for the Respondents.—The plaintiff cannot maintain this suit, as the sale has not been set aside by order of any Court and as the plaintiff has not asked for setting it aside. The sale of an occupancy holding in execution of a mortgage-decree against the *ryot* may not be wholly void. The landlord might recognize the purchase. So that the purchaser could not say that the judgment-debtor had no saleable interest in the property sold. Moreover, I would submit that a regular suit for a purpose like this does not lie.

He referred to *Shanto Chandar Mukerji* v. *Nain Sukh* (6), *Haro Chandra Poddar* v. *Umesh Chandra* (7), *Munna Singh* v. *Gajadhar Singh* (8), *Pachayappan* v. *Narayana* (9),

The right to a refund of the purchase-money is given by the Civil Procedure Code, and it must be enforced under the provisions of that Code by an application under Order XXI, rule 93. There is no warranty of title at an execution sale, and the purchaser purchases the property at his own risk. So he cannot maintain a regular suit for the refund of the purchase-money if his purchase turns out to be invalid.

[FLETCHER, J.—Is not there an implied warranty of title in a Court sale ?]

Under the Transfer of Property Act and the Contract Act, there is a warranty of title by the seller, but the provisions of those Acts do not apply to an involuntary sale in execution of a decree. In some of the cases referred to by my learned friend on the other side, there was a prayer in the plaint for setting aside the sale, but in the present suit there is no such prayer in the plaint. Therefore those cases are distinguishable.

(6) 23 A. 355 at p. 356; A. W. N. (1901) 101.
(7) 5 Ind. Cas. 39; 14 C. W. N. 71; 11 C. L. J. 20.
(8) 5 A. 577 at pp. 580, 581; A. W. N. (1883) 130; 3 Ind. Dec. (N. S.) 491.
(9) 11 M. 269; 12 Ind. Jur. 92, 381; 4 Ind. Dec. (N. S.) 187.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against a decision of the learned Subordinate Judge of Berhampur, dated the 4th February 1913, affirming the decision of the Munsif of Lalbagh. The plaintiff brought the suit asking, first of all, for possession of a certain occupancy holding which he had bought at a sale in execution held under a decree founded on a mortgage. In the alternative, he asked that, in the event of his not being able to recover possession of that land, he might be allowed to recover back the money that he had paid for the purchase of the land. The first defendant, who was a co-sharer-landlord, resisted the plaintiff's claim on the ground that he was a purchaser of the property under a rent-decree and that, therefore, the plaintiff could have no right as against a person claiming under a rent-decree. The learned Judge found that portion of the case against the plaintiff and there is no appeal here with reference to that, namely, that the first defendant is not liable to be ejected by the plaintiff as he claims to have purchased the property in execution of a rent-decree.

With regard to the other point, namely, as to whether or not the judgment-debtor at the time the plaintiff purchased the property had any saleable interest, and whether, if the judgment-debtor had no saleable interest, the plaintiff is entitled to recover back his purchase-money in this suit, the case has been dismissed by the learned Judge. The learned Judge in the primary Court found quite clearly that the judgment-debtor had no saleable interest at the date of the sale to the plaintiff. The lower Appellate Court seems to have adopted the same view, and in fact, it is impossible to read the rest of the judgment of the learned Subordinate Judge except on the footing that the judgment-debtor had no saleable interest. But the learned Judge in the lower Appellate Court declined to decree the suit on the ground that even if a separate suit could be maintained to recover the money which the plaintiff had given for the purchase

of the property, he did not ask to set aside the sale and that, therefore, he could not recover the money. That obviously cannot be right. The mere fact that the plaintiff asked for his money back but did not ask for the sale being set aside cannot bar his right. In fact, it is quite absurd that he should ask to set aside the sale when the Judge found that there was nothing to pass because the judgment-debtor had no interest in the property and, if the plaintiff had no interest, why he should go through the farce of asking the Court to set aside the sale?

The only point in this case is whether a suit of this nature does lie. Apparently, all the High Courts in India seem to agree that a suit of this nature does lie. It is sufficient to refer to the decision of this Court in the case of *Ram Kumar Shaha* v. *Ram Gour Shaha* (5). There are cases also in the other High Courts in support of this view. But it has been objected that those decisions related to applications under the provisions of the old Code of Civil Procedure, and that, under the new Code, there has been a change. The authorities that have been cited show that that is not so. In the case of *Rustomji* v. *Vinayak Gangadhar* (10), which was clearly a case under the new Code, the Court held expressly that a suit would lie under the provisions of the Code of Civil Procedure (V of 1908). A similar view has been taken in the case of *Muhammad Najib Ullah* v. *Jai Norain* (11). The cases seem to establish that a suit of this nature does lie and that the purchaser in execution is not limited to making an application under the terms of the Civil Procedure Code. If that is so, and the learned Vakil who appears for the contesting defendants has not challenged that it is not so. The case seems to be a perfectly simple one because all that the learned Vakil has attempted to urge is that it is not established that the judgment-debtor had no saleable interest, and, if he had no saleable interest, I gather from the learned gentleman's argument that he did not deny that the plaintiff would be entitled to recover back the money paid by him in those execution proceedings. That apparently is the only matter in this case. As I have already said, I think the learned Subordinate Judge, although he has not stated so in express terms, did mean to find, and his judgment is only consistent with that view, that the judgment-debtor had no saleable interest in the property. Therefore, in my opinion, the plaintiff is entitled to recover back the money paid by him to the decree-holder in the suit brought on the mortgage and in execution of which he purchased the property.

I think the decree of the learned Subordinate Judge in the lower Appellate Court ought to be varied and in lieu of the decree dismissing the plaintiff's suit *in toto* a decree ought to be passed against the defendant No. 3, namely, that the defendant No. 3 should be ordered to pay to the plaintiff the sum of Rs. 50 together with interest at the rate of 6 per cent. per annum from the 17th March 1911 until realisation. The defendant No. 3 must pay to the plaintiff his costs not only in this Court but also in the lower Courts. The appellant must pay to the other defendants, who have appeared and against whom the appeal has not been pressed, their costs in this Court. We do not disturb the order of costs made in the lower Appellate Court in favour of these last mentioned defendants.

SMITHER, J.—I agree.

Decree varied.

(10) 7 Ind. Cas. 955; 35 B. 29; 12 Bom. L. R. 723.
(11) 26 Ind. Cas. 59; 36 A. 529; 12 A. L. J. 908.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2119 OF 1913.

March 22, 1917.

Present:—Mr. Justice Chevis and Mr. Justice Leslie Jones.

CHUHAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat JAS KAUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Acquiescence, question of—Custom—Adoption—Acquiescence, effect of—Estoppel—Status *of person, dispute as to—Burden of proof.*

The question of acquiescence is a matter of legal inference to be drawn from the facts proved in the case and can be taken up in second appeal. [p. 928, col. 2.]

CHUHAR *v.* JAS KAUR.

Where in consequence of the attitude taken up by the collateral heirs of the adoptive father the adopted son has been brought up as a member of the village community to which his adopted father belonged and has always been recognised as such, the collaterals are estopped from challenging the validity of the adoption. [p. 929, col. 1.]

In cases which involve the *status* of individuals, those who challenge such *status* must show that they have not by their own conduct led the person concerned to imagine that his *status* was accepted by them. In this respect there is a considerable difference between cases of, say, mortgage and the like and cases of alleged adoptions, the legitimacy of children and the validity of marriages. [p. 929, col. 1.]

Second appeal from the decree of the Divisional Judge, Jullundur, dated the 11th August 1913.

Mr. *Beni Parshad Khosla*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—In 1900 Gujar, a sonless *Jat* of the village of Punnian in the Nawashahr Tahsil of the Jullundur District, executed a registered Will under which he bequeathed all his property to Waryama, the son of his daughter whom he described as his adopted son. In 1907 he had half of his land mutated by way of gift in Waryama's favour. Gujar died in 1912 when Waryama obtained mutation of the other half of the property. The present suit was instituted on the 3rd August 1912 by the collaterals of Gujar who challenge the alienation in favour of Waryama. It is declaratory in form because two widows of Gujar are still alive.

The first Court framed five issues and decided on four of them (1) that the bulk of the property in suit is ancestral; (2) that Waryama was adopted by Gujar; (3) that the plaintiffs were estopped by reason of their acquiescence from contesing the adoption and (4) that the suit was barred by time. (There was no finding as to the remaining issue whether the adoption was valid according to custom). On these findings the suit was dismissed. The plaintiffs appealed to the Divisional Judge of Jullundur who again held that the adoption was proved, that the plaintiffs were estopped by reason of their acquiescence and that the suit was barred by time. In the grounds of appeal to that Court no reference was made to the failure of the first Court to come to the decision concerning the validity of adoption.

The plaintiffs have now preferred a second appeal to this Court.

The fact of the adoption is not a point which can now be questioned, though we may remark that it was very fully established. It is, however, open to the plaintiffs-appellants to question the finding as to acquiescence on second appeal, as that is a matter of the legal inference to be drawn from the facts proved in the case, *vide Beni Ram* v. *Kundan Lal* (1).

The facts proved in this case are that Waryama was adopted as an infant some time before 1892 and was brought from his paternal village of Phalphota in the Phillour Tahsil to live with his adoptive father in the Nawashahr Tahsil. In 1892 when Gujar celebrated a betrothal of Waryama, some of the plaintiffs (all of whom are adults) or their predecessors paid *neondra* to Gujar. The same thing occurred again on the occasion of the second betrothal of Waryama in 1903. When on the death of Gujar a question of succession to the *lambardari* appointment arose, two of the plaintiffs admitted that Waryama was the adopted son of Gujar and though they urged that an adopted son was not entitled to succeed to a *lambardari* appointment, they did not contend that the adoption was invalid. It was not until this suit was brought that the validity of the adoption was ever questioned. If the plaintiffs had ever seriously thought of contesting the adoption and had gone to the length of consulting any lawyer with the object of bringing a suit to challenge it, they would have been told that a suit for declaration that an alleged adoption is invalid or never took place must be brought within six years from the time when the alleged adoption becomes known to the plaintiffs and that even if they waited until the death of Gujar and then brought a suit for possession, they could not succeed unless they were able to get the adoption set aside and that Article 118 of the Limitation Act would still be applied. It was not until the publication of *Surjan Singh* v. *Kharak Singh* (2), which followed

(1) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022.
(2) 96 P. R. 1903; 79 P. W. R. 1903.

KSHETRA NATH BHUIYA v. KALI DASI DASI.

Tirbhuwan Bahadur Singh v. *Rameshar Bukhsh Singh* (3) that it was understood in this Province that Article 118 of the Limitation Act does not apply to suits for possession.

The natural father of Waryama died in 1915. Counsel for the appellants has stated that Waryama has succeeded to his share in the property of his natural father, but the facts which he does not deny are that when the matter came up for mutation the mother of Waryama claimed that her other three sons should alone get mutation, and that Waryama himself made no claim. The Tahsildar granted mutation to Waryama along with his brothers, but mutation confers no rights and his succession to a share in the property of his natural father may yet be challenged.

Thus since his infancy Waryama has been brought up in the belief that he was the validly adopted son of Gujar and that he would succeed to Gujar's property. His situation in his original family has become so altered that even though he might succeed in a contest regarding his right to share in the property of his natural father, it would be impossible to restore him to the position he would have enjoyed if he had been brought up in his community of origin. Similarly Gujar was allowed to continue until the date of his death in the belief that his adoption of Waryama would not be questioned by his collaterals. He had a right as well as a desire to adopt a son and if those collaterals had ever suggested that according to custom it was not open to him to adopt the son of his daughter and had given any indication that they would challenge that adoption, it would have been open to him to adopt some other person to whose adoption no such objection could have been taken.

The facts in this case are very similar to those discussed in an unpublished ruling of a Division Bench of this Court (Case No. 1894 of 1913), in which it was held that where in consequence of the attitude taken up by the collateral heirs of the adoptive father the adopted son had been brought up as a member of the village community to which his adopted father belonged and had always been regarded as an adopted son, it would be grossly inequitable to allow the plaintiffs to contend that the original adoption was invalid by custom. The learned Judges went on to remark as follows: "No doubt mere silence itself cannot give validity to an invalid transaction, but in cases which involve the status of individuals those who challenge such status must show that they have not by their own conduct led the person concerned to imagine that his status was accepted by them. In this respect there is a considerable difference between cases of, say, mortgage and the like and cases of alleged adoptions, the legitimacy of children and the validity of marriages. The passage at page 773 of Ameer Ali and Woodroffe's Evidence Act which deals with estoppel in cases of invalid adoptions is very relevant to the present case and we have no hesitation in accepting the propositions there laid down."

We entirely endorse the views thus expressed and from the whole facts before us we draw with complete confidence the inference that the plaintiffs acquiesced in the adoption of Waryama by Gujar and we hold that they are now estopped from contesting its validity.

In view of this finding it is unnecessary to discuss the question of limitation. The appeal fails and is dismissed with costs.

Appeal dismissed.

(3) 28 A. 727; 3 A. L. J. 695; 10 C. W. N. 1067; 8 Bom. L. R. 722; 16 M. L. J. 440; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377; 33 I. A. 156 (P. C.).

CALCUTTA HIGH COURT.

CIVIL RULE No. 700 OF 1915.

July 10, 1916.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Cuming.

KSHETRA NATH BHUIYA—PLAINTIFF—PETITIONER

versus

Sreemutty KALI DASI DASI—DEFENDANT—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 16, Sch. II, cl. 31—Civil Procedure Code (Act V of 1908, O. XLVI, rr 6, 7—Suit to recover specific sum of money—Suit for accounts—Jurisdiction of Small Cause Court—Doubt—Reference to High Court.

KSHETRA NATH BHUIYA v. KALI DASI DASI.

Plaintiff sued defendant in the Court of a Munsif to recover a specific sum of money due on account of salary and house rent, and added that if the correctness of the amount was questioned the amount due might be determined on examination of the accounts. The defendant pleaded that the suit was cognizable by a Court of Small Causes, and the Munsif ordered the plaint to be returned to the plaintiff for presentation to the proper Court. The plaint was then presented in the Court of Small Causes, but the Judge of the Small Cause Court held that the suit was not cognizable by him and returned the plaint for presentation to the proper Court:

Held, (1) that the suit was one for the recovery of money and not for accounts and was cognizable by the Small Cause Court; [p. 931, col. 1.]

(2) that the procedure adopted by the Small Cause Court Judge was wrong, inasmuch as if he entertained a doubt as to the *forum* in which the suit should be instituted, he should have referred the matter to the High Court for decision under rule 6 of Order XLVI of the Civil Procedure Code, and that if he was so confident of the correctness of his view as to entertain no doubt whatsoever in the matter within the meaning of rule 6, he might have sent the record to the District Judge with a request that action might be taken by him under rule 7 of Order XLVI. [p. 931, col. 1.]

A suit for the recovery of a specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. [p. 931, cols. 1 & 2.]

There cannot in essence be a suit for accounts by a plaintiff against a defendant, unless the defendant is under a liability to render accounts to the plaintiff. [p. 931, col. 2.]

Rule against the order of the Munsif, first Court, Jessore, in Title Suit No. 1180 of 1913.

Babu *Hirendra Nath Gangully*, for the Petitioner.

JUDGMENT.—We are invited in this Rule to determine the *forum* where the plaintiff can obtain relief in respect of his claim. The plaintiff sues to recover from the defendant a sum of Rs. 466. He asserts that he was entitled to get Rs. 448 for salary, Rs. 367 as money borrowed for the benefit of the defendant, and Rs. 76 as house rent, that is, Rs. 891 in the aggregate; he then allows credit for Rs. 425 and claims to recover Rs. 466. The plaint adds that if the correctness of the amounts is questioned, the amount due may be determined on examination of the accounts. The suit thus framed was instituted in the Court of the Munsif of Jessore on the 11th December 1913. Summons was served upon the defendant in due course. She entered appearance and pleaded that the suit was cognizable by the Court of Small Causes and was consequently not triable by the Munsif under section 16 of the Provincial Small Cause Courts Act. An issue was thereupon raised, whether the suit was cognizable by a Court of Small Causes. The Munsif came to the conclusion that the suit was so cognizable, and, on the 23rd December 1914, returned the plaint to the plaintiff for presentation to the proper Court. The plaint so returned was presented in the Court of Small Causes at Jessore on that very day. Summons was again served upon the defendant, who appeared and filed a written statement on the 12th April 1915. As that written statement is not before us, we do not know whether objection was taken by the defendant to the jurisdiction of the Small Cause Court to entertain the suit. It is plain that on the principle that no litigant is permitted to take up inconsistent positions in Court, such objection could not have been taken by her, for at her instance the Munsif had held that the Small Cause Court and that Court alone had jurisdiction to entertain the suit. We find, however, the following order recorded by the Small Cause Court Judge on the 23rd April 1915: "This Court has no jurisdiction. Return for presentation to the proper Court." The Small Cause Court Judge does not assign, it will be observed, any reasons in support of his conclusion, he makes no endeavour to meet the grounds assigned by the Munsif in support of his order. The plaintiff took the plaint again to the Court of the Munsif and filed it on the same day. On the 2nd June 1915 the Munsif held, and, in our opinion, very properly held, that so long as his previous order stood, he could not entertain the suit. Accordingly he returned the plaint to the plaintiff a second time for presentation to the proper Court. The plaintiff thereupon applied to this Court and obtained the Rule now under consideration; his prayer is that either the Munsif or the Small Cause Court Judge be directed to entertain and try his suit which was instituted more than two and a half years ago.

Before we determine the question of the *forum* of the suit, we cannot but

observe that the Subordinate Judge should never have followed the procedure he adopted to the manifest harassment of the plaintiff. He should have taken action under rule 6 or rule 7, Order XLVI, of the Code. Rule 6 provides that where, at any time before judgment, a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit. The Munsif had held, in a carefully written judgment, that the suit was cognizable, not by his Court, but by the Court of Small Causes. If the Judge of the Court of Small Causes was of a different opinion, he might reasonably have entertained a doubt as to the *forum* where the suit should be instituted and thus referred the matter to this Court for decision. On the other hand, if the Small Cause Court Judge was so confident of the correctness of his view as to entertain no doubt whatsoever in the matter within the meaning of rule 6 (1), he might, at any rate, have sent the record to the District Judge with a request that action might be taken by him under rule 7. The lamentable result of the course adopted by the Small Cause Court Judge has been that the plaintiff has been driven from Court to Court and has not been able yet to obtain trial of his suit on the merits, while his summary order leaves us even now entirely in the dark as to the grounds for his view of the scope and nature of the suit.

As regards the nature of the suit, we are clearly of opinion that the view taken by the Munsif is correct. The suit, as already stated, is for recovery of money and is, *prima facie*, cognizable by a Court of Small Causes. Reliance, however, appears to have been placed before the Munsif on clause 31 of the Second Schedule to the Provincial Small Cause Courts Act, which excludes from the jurisdiction of Small Cause Courts a suit for accounts. In our opinion, the present suit cannot be properly described as a suit for accounts. A suit for the recovery of a specific sum of money does not assume the character of a suit for accounts, merely because in the determination of the question in controversy accounts may have to be examined. This has been pointed out in a long series of decisions, amongst others in *Hansraj* v. *Ratni* (1), *Kondiru Runga Reddi* v. *Subbiah Setty* (2), *Sankara Reddy* v. *Errama Reddi* (3), *Kailas Chandra* v. *Kiranenda Ghosh* (4), *Maroti* v. *Balaji* (5), *Kadar Rowther* v. *Vencatachellapathy Chetty* (6), *Indar Mal* v. *Baldeo Das* (7) and *Malaya Pillai Nadan* v. *Venganan Chetty* (8). There cannot in essence be a suit for accounts by the plaintiff against the defendant, unless the defendant is under a liability to render accounts to the plaintiff. This was recognized in the cases of *Chidrie Kristappa* v. *Siddamsetti Yamanappa* (9), *Varadarajulu Chettiar* v. *Pattra Narayanaswamy Chetty* (10) and *Krishnaswami Aiyangar* v. *Poovanna Nadar* (11). In the present case, there is no allegation that the defendant is under a liability to the plaintiff to render accounts in the well-known technical sense of the term. We are accordingly of opinion that this is not a suit for accounts and is cognizable by a Court of Small Causes.

The result is that this Rule is made absolute, the order of the Small Cause Court Judge, dated the 23rd April 1915, is set aside and the case is remitted to him in order that he may take cognizance of it and try it on the merits. The plaint which has been filed in this Court will be received here and transmitted to the Small Cause Court Judge. As the application has not been contested by the defendant, there will be no order for costs.

Rule made absolute.

(1) 27 A. 200; A. W. N. (1904) 227.
(2) 28 M. 394.
(3) 4 Ind. Cas. 618; 19 M. L. J. 113.
(4) 10 Ind. Cas. 883; 24 C. L. J. 187.
(5) 14 Ind. Cas. 786; 8 N. L. R. 36.
(6) 14 Ind. Cas. 573.
(7) 23 Ind. Cas. 424; 12 A. L. J. 230.
(8) 24 Ind. Cas. 764; 1 L. W. 180.
(9) 13 Ind. Cas. 159; 11 M. L. T. 13; (1912) M. W. N. 36.
(10) 20 Ind. Cas. 518; 24 M. L. J. 693; 14 M. L. T. 46; (1913) M. W. N. 879.
(11) 28 Ind. Cas. 955.

MEER BIBI v. CHANAN DIN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1363 OF 1915.

February 14, 1917.

Present:—Mr. Justice Shah Din.

Musammat MEHR BIBI—PLAINTIFF—APPELLANT

versus

CHANAN DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Guardian of lunatic—Mother—Sale of lunatic's property by de facto *guardian—Widow, right of, to set aside sale—Limitation, commencement of—Cause of action, accrual of.*

Under the Muhammadan Law the mother of a lunatic is not his legal guardian. [p. 933, col. 1.]

A sale of the property belonging to a Muhammadan lunatic made by his *de facto* guardian is invalid, even if the sale is effected for paying off the lunatic's ancestral or family debts or for other family purposes. [p. 933, col. 2.]

Uttam Singh v. *Barkat Ali*, 19 Ind. Cas. 235; 15 P. R. 1913; 202 P. L. R. 1913; *Sajjad Ali* v. *Muhammad Zulfikar Ali Khan*, 33 Ind. Cas. 943; 83 P. R. 1916; 125 P. W. R. 1916; *Mata Din* v. *Ahmad Ali*, 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 15 C. L. J. 270; 9 A. L. J. 215; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49 (P. C.); *Hyderman Kutti* v. *Syed Ali*, 15 Ind. Cas. 576; 37 M. 514; 12 M. L. T. 147; (1912) M. W. N. 889; 23 M. L. J. 241, relied upon.

The cause of action for a suit by the widow of a lunatic for possession of her husband's property sold by his mother as his *de facto* guardian accrues, not on the date on which the sale of the property is made, but on the date of the husband's death. [p. 933, col. 2.]

Second appeal from the decree of the District Judge, Lahore, dated the 25th March 1915.

Messrs. *Oertel* and *M. N. Mukerji*, for the Appellant.

Messrs. *Tirath Ram* and *Muhammad Hussain*, for the Respondents.

JUDGMENT.—The facts of this case are fully stated in the judgments of the lower Courts and it is unnecessary to repeat them here at length. The following pedigree-table will assist in understanding the case:—

SAYAD BADAR DIN SHAH.

Sayad Ahmad Shah = *Musammat* Sakina Begam (widow) died 1909.	Sayad Budhe Shah
Kaim Ali Shah died in 1905 = *Musammat* Mehr Bibi (widow) plaintiff.	
Musammat Mehr Bibi (plaintiff).	S. Fazl Shah.
	Sayad Mehr Ali Shah.

The plaintiff-appellant, *Musammat* Mehr Bibi, who is widow of Kaim Ali Shah, a Shia Muhammadan of *Mauza* Bhogiwal in Tahsil Lahore, has brought the present suit for possession of a house which is alleged to have belonged to her late husband but which was sold by the latter's mother, *Musammat* Sakina Begam, on the 27th of October 1900 to the father of respondents Nos. 1 and 3 for Rs. 180. Kaim Ali Shah was a lunatic when the sale in question was made, and he died in 1905. *Musammat* Sakina Begam died in 1909, and the present suit was brought on the 28th of October 1912. The plaintiff alleges that *Musammat* Sakina Begam had no power to sell the house in dispute which was the property of her husband, Kaim Ali Shah; that the sale was invalid so far as it affects her rights of inheritance; and that she is entitled to possession thereof as against the defendants, who are sons of the original vendee or otherwise claim under him. Both the Courts below have concurred in dismissing the suit on the ground that the sale of the house in dispute having been made by *Musammat* Sakina Begam, mother of Kaim Ali Shah, lunatic, in her capacity of his *de facto* guardian, was valid under the Muhammadan Law by which the deceased Kaim Ali Shah was governed, and that the plaintiff had no right to challenge the validity of the sale. The Court of first instance has held that the sale was made for the benefit of the lunatic; but the District Judge has not recorded any clear finding on this point. He has contented himself with the remark, which will be found in the latter part of his judgment, that "there is no evidence to show that *Musammat* Sakina Begam was a bad characte

and it also appears that there were two widows (*i. e.*, *Musammat* Sakina Begam and the present appellant) and Kaim Ali Shah to be provided for." This is clearly insufficient as a finding that the sale in dispute had been made for the benefit of the lunatic himself.

In support of their concurrent decision the lower Courts have cited *Ummi Begam* v. *Kesho Das* (1), in which it was held that where the mother and wife of a lunatic Muhammadan, acting *de facto* as the guardians of the lunatic, had sold certain property belonging to the lunatic in order to discharge debts due by him, the transaction could not be impeached by the lunatic's daughter, although the mother was not under the Muhammadan Law the legal guardian of the lunatic. The Allahabad decision was based on a previous ruling of the same Court in *Majidan* v. *Ram Narain* (2) and two rulings of the Calcutta High Court, *Mafazzal Hosain* v. *Basid Sheikh* (3) and *Ram Charan Sanyal* v. *Anukul Chandra Acharya* (4). The three last mentioned decisions are to the effect that where property belonging to a Muhammadan minor is sold by a person who, though not the legal guardian of the minor's property under the Muhammadan Law, is his *de facto* guardian and the sale is for the benefit of the minor, it cannot be impeached by the minor. The rule of law applicable to a case of this kind as laid down by our own Court is enunciated in two recent decisions of this Court, *Uttam Singh* v. *Barkat Ali* (5) and *Sajjad Ali* v. *Muhammad Zulfikar Ali Khan* (6), and an important pronouncement on the same subject is contained in the decision of their Lordships of the Privy Council in *Mata Din* v. *Ahmad Ali* (7), which has been recently referred to and fully discussed in *Hyderman Kutti* v. *Syed Ali* (8). It is clear from the Privy Council decision and the decision of the Madras High Court just referred to that a sale of the property of a Muhammadan minor made by a *de facto* guardian of the minor, who is not his legal guardian under the Muhammadan Law, is invalid even in a case where it is made to pay off his ancestral or family debts or for other family purposes. In the present case there is no clear finding by the District Judge that the sale of the house in dispute was made by the mother of the lunatic for his benefit; and after considering the evidence on the record, I have no hesitation in holding it not proved that the sale in question was made for any purpose which could in law be deemed to be beneficial to the minor. It is in evidence that the family of the lunatic owned property other than the house in dispute; and there is nothing to show that it was absolutely necessary to sell the house to provide maintenance for the lunatic Kaim Ali Shah. The maintenance of the two widows clearly was not a purpose for which the lunatic's property could have been validly sold by his mother.

I therefore, hold, following the principle laid down in the Privy Council decision cited above, that the sale of the house in dispute was invalid so far as the present plaintiff's rights of inheritance are concerned. I may observe here in passing that the Courts below are wrong in holding that the plaintiff had brought her suit on the last day of limitation; her cause of action accrued, not on the date on which the sale of the house was made, but on the date of her husband's death, which admittedly took place in the year 1905. The plaintiff's suit was, therefore, instituted long before the period of limitation applicable to it would expire [*Ummi Begam* v. *Kesho Das* (1)].

There remains the question as to whether the plaintiff was entitled to the possession of the whole house, or only of the share to which she is entitled under the Muhammadan Law. On this point I am of opinion that the decision of the first Court is correct. The

(1) 30 A. 462 at p. 463; 5 A. L. J. 474; A. W. N. (1908) 220.
(2) 26 A. 22; A. W. N. (1903) 183.
(3) 34 C. 36; 4 C. L. J. 485; 11 C. W. N. 71.
(4) 34 C. 65; 4 C. L. J. 578; 11 C. W. N. 160.
(5) 19 Ind. Cas. 235; 15 P. R. 1913; 202 P. L. R. 1913.
(6) 33 Ind. Cas. 943; 83 P. R. 1916; 125 P. W. R. 1916.
(7) 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 15 C. L. J. 270; 9 A. L. J. 215; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49 (P. C.).
(8) 15 Ind. Cas. 576; 37 M. 514; 12 M. L. T. 147; (1912) M. W. N. 889; 23 M. L. J. 244.

SHANU SHEIKH *v.* DHANI SARKAR.

house in suit was sold by the mother of the lunatic in her capacity of his *de facto* guardian, and it was treated as belonging exclusively to the lunatic in which the mother had no share. Taking this view of the case, on the death of the lunatic the plaintiff as widow of the lunatic had a one-fourth share in it under the Muhammadan Law, which admittedly governs the case, and the three-fourths share devolved upon the lunatic's mother, *Mussammat* Sakina Begam, and the two brothers of the plaintiff, Sayad Fazl Shah and Sayad Mehr Ali Shah. In the present suit the plaintiff cannot claim the share of her mother-in-law, *Musammat* Sakina Begam, in the house in dispute, for the simple reason that as *Musammat* Sakina Begam had made the sale of the 27th October 1900, it was binding upon her as regards her own share in the house as heir of Kaim Ali Shah. Next, so far as the shares of plaintiff's brothers are concerned, it is not proved that those shares were conveyed to the plaintiff prior to the date of suit, and it is clear that the plaintiff could only sue in respect of her own share in the house and had no right to claim in this litigation the shares which had devolved upon her brothers.

For the reasons given, I accept this appeal and setting aside the decree of the lower Appellate Court I give the plaintiff a decree for possession of one-fourth share in the house in suit. In the peculiar circumstances of the case, I think that the parties should pay their own costs throughout and I order accordingly.

Appeal accepted.

CALCUTTA HIGH COURT.
RULE *Nisi* No. 507 OF 1917.
July 23, 1917.
Present:—Justice Sir William Chitty, KT., and Mr. Justice Beachcroft.
SHANU SHEIKH—DEFENDANT—PETITIONER
versus
DHANI SARKAR—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Order allowing withdrawal of suit in Appellate Court, legality of—Revision—High Court, power of interference of.

A suit in which a number of issues were raised and tried by the Munsif at considerable length was dismissed on the ground that the plaintiff had no title and that his claim was barred by limitation. On appeal, on an application made by the plaintiff-appellant for withdrawing the suit and the appeal with liberty to bring a fresh suit on the same cause of action, stating therein that "through the mistake of the writer who drew the plaint some important items were left out", the Appellate Court permitted the plaintiff to withdraw the suit and the appeal with liberty to bring a fresh suit:

Held, that there were no formal defects or sufficient cause within Order XXIII, rule 1, Code of Civil Procedure, for allowing the plaintiff to withdraw both his appeal and the original suit and that, therefore, the order could be set aside by the High Court in revision under section 115, Civil Procedure Code. [p. 935, col. 2.]

The case was remanded to the Appellate Court to be taken up for re-hearing from the point at which it stood when the order allowing withdrawal of the suit was made. [p. 935, col. 2.]

Rule against the order of the Court of the District Judge of Mymensingh in M. O. Appeal No. 757 of 1916.

FACTS of the case appear from the judgment.

Babu *Arun Chandra Ghose*, for the Petitioner.—The order of the Appellate Court allowing the opposite party to withdraw the suit and the appeal with liberty to file another suit on the same cause of action is without jurisdiction, for as a matter of fact there were no formal defects or any other sufficient cause justifying the order under Order XXIII, rule 1, Civil Procedure Code. When the first Court dismissed the suit on the merits the suit did not fail on any formal defect in the plaint. The allegation of the omission of certain material words in the plaint is vague, hence the order should not have been passed.

Babu *Surayya Kumar Guha*, for the Opposite Party.—When the suit came up on appeal, it was found that certain important and necessary words which were essentially necessary to be alleged in the plaint were by the mistake of the writer omitted from the plaint; so the Appellate Court allowed the suit and the appeal to be withdrawn in order that a suit might be instituted after correcting those errors in the plaint, and the provisions of Order XXIII, rule 1, Civil Procedure Code, give such jurisdiction to the Appellate Court. Moreover I submit that the order made by the lower Appellate Court is one which cannot be dealt with in

revision under section 115, Civil Procedure Code, see *Bansi Singh* v. *Kishun Lall Thakur* (1).

Babu *Arun Chandra Ghosh*, in reply.—*Bansi Singh* v. *Kishun Lall Thakur* (1) is distinguishable from this case. There the suit was allowed to be withdrawn not by the Appellate Court but by the first Court and that even before the actual decision of the case. The High Court has ample jurisdiction to interfere with an order of this nature. See *Kharda Company, Ltd.* v. *Durga Charan Chandra* (2) and *Mabulla Sardar* v. *Hemangini Debi* (3), *Hira Lal Mitra* v. *Uday Chandra Dey* (4), *Hriday Nath Parai* v. *Akshay Lal* (5). When a suit is dismissed on the merits by the primary Court the Appellate Court cannot, in the absence of any sufficient cause, permit any withdrawal under Order XXIII, rule 1, Civil Procedure Code, and any order so passed can be interfered with in revision by the High Court as an order made without jurisdiction.

JUDGMENT.—This is a Rule taken out at the instance of the defendant calling upon the plaintiff opposite-party to show cause why the order of the lower Appellate Court permitting him to withdraw the appeal and the original suit with liberty to file a fresh suit on the same cause of action should not be set aside. The case was tried before the Munsif at considerable length. A number of issues were raised and the Munsif decided that the suit was barred by limitation and also held that the plaintiff had no title. When the case went up on appeal, the learned Subordinate Judge passed an order permitting the plaintiff-appellant to withdraw the appeal and the original suit. He said: "As there were some defects in the plaint, the plaintiff is permitted to bring a fresh suit on the same cause of action." In his petition for leave to withdraw the plaintiff does not appear to have stated what the defects were. In his petition he said: "through the mistake of the writer who drew the plaint some important items were left out. After correcting those errors it is necessary that a new plaint should be drawn and the case be conducted on a new line". That clearly does not bring the matter within the provisions of Order XXIII, rule 1, Code of Civil Procedure. It has been objected on behalf of the opposite party that this Court has no jurisdiction to interfere; and the case of *Bansi Singh* v. *Kishun Lall Thakur* (1) has been cited. The facts, however, of that case were entirely different to the facts of the present case. There, although there had been some hearing in the first Court, the decision had not been delivered. It was not a case of the suit being withdrawn in the lower Appellate Court. It may also be noted that, though Mr. Justice Coxe expressed a doubt as to whether this Court had jurisdiction to interfere, Mr. Justice Digambar Chatterjee did not accede to that but agreed in discharging the Rule on other grounds. There are a number of cases in this Court which show that we have jurisdiction and that that jurisdiction has been exercised. We need only refer to *Kharda Co., Ltd.*, v. *Durga Charan Chandra* (2), *Mabulla Sardar* v. *Hemangini Debi* (3), *Hira Lal Mitra* v. *Uday Chandra Dey* (4) and *Hriday Nath Parai* v. *Akshay Lal* (5). In all these cases the order of the lower Appellate Court has been dealt with by this Court. In this case we think that the order now under review should not have been passed. There were no formal defects or other sufficient cause for allowing the plaintiff to withdraw both his appeal and the original suit. The order is accordingly set aside and the case is remanded to the lower Appellate Court to be taken up from the point at which it stood when the order now complained of was made. The defendant is entitled to his costs of this Rule. We assess the hearing-fee at one gold *mohur*.

Order set aside; Case remanded.

(1) 26 Ind. Cas. 203; 41 C. 632.
(2) 5 Ind. Cas. 187; 11 C. L. J 45.
(3) 6 Ind. Cas. 629; 11 C. L. J. 512.
(4) 14 Ind. Cas. 33; 16 C. L. J. 103; 16 C. W. N 1027.
(5) 39 Ind. Cas. 963; 25 C. L. J. 454.

HELALUDDI MOLLA *v.* ABDUL GAFUR.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 377 OF 1917.

July 18, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

HELALUDDI MOLLA *alias* ELAI MOLLA —DEFENDANT—PETITIONER

versus

ABDUL GAFUR—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Provincial Small Cause Courts (Amendment) Act (VI of 1914)—Suit for damages for cutting and taking away trees, whether cognizable by Small Cause Court.

A suit for recovery of damages for trees alleged to have been forcibly cut and taken away by the defendant is excluded from the cognizance of a Small Cause Court. [p. 937, col. 1.]

Rule against the order of the Munsif, second Court, Bagerhat, exercising the powers of a Court of Small Causes, in Small Cause Court Suit No. 670 of 1916.

FACTS material to the report will appear from the following petition:—

'In the matter of an application under section 115, Civil Procedure Code, and section 25, Provincial Small Cause Courts Act, against the *ex parte* decree passed on 2nd February 1917 in Small Cause Court Suit No. 670 of 1916 by the second Munsif, Bagerhat.

And in the matter of Helaluddi Molla *alias* Elai Molla Defendant-Petitioner *versus* Abdul Gafur, Plaintiff-Opposite Party.

To

The Hon'ble Sir Lancelot Sanderson, Kt., Chief Justice, and his companion Justices of the said Hon'ble Court.

The humble petition of the abovenamed petitioner

Most respectfully sheweth;

1. That the above mentioned suit was filed on 4th December 1916 by the plaintiff above named against your petitioner for recovery of Rs. 65 as damages for trees alleged to have been forcibly cut and taken away by your petitioner.

2. That your petitioner entered appearance on 12th January 1917 and filed his defence on 15th January 1917.

3. That the principal contentions of the defendant were that suit of the present nature was not cognizable by a Court of Small Causes, that the plaintiff had no title to or possession in the land and the suit was instituted by way of a test case with the fraudulent motive of establishing a false title at the instigation of his father with whom the petitioner and his co-sharers had a long standing dispute.

4. That on 19th January 1917 upon your petitioner's application the Court ordered the issue of summons on his witnesses on the condition that the money should be deposited within a day, failing which the application would stand dismissed and on the same date upon the plaintiff's prayer the case was adjourned for hearing to 2nd February 1917.

5. That on 2nd February 1917, the aforesaid date of hearing, your petitioner filed an application that the returns of the service of summons on his witnesses who were absent not having been filed in Court, he was unable to take further steps to secure their attendance and that as such adjournment of fifteen days might be granted to him for taking the necessary steps.

6. That the learned Judge rejected the said application and called upon the plaintiff to prove his case and on hearing his witnesses decreed the suit in part for Rs. 40 with Rs. 10-3-0 costs *ex parte* against your petitioner on the same date, 2nd February 1917.

7. Your petitioner being aggrieved by the aforesaid decree begs leave to move your Lordships against the same on the following amongst other

GROUNDS.—1. For that the Court of Small Causes had no jurisdiction to try the present suit under the provisions of the Provincial Small Cause Courts Amendment Act VI of 1914.

* * * * * * *

Your petitioner, therefore, prays that your Lordships may be pleased to issue a Rule on the opposite party to show cause as to why the *ex parte* decree should not be set aside and the suit dismissed or re-heard and on hearing any cause shown make the Rule absolute or pass such other orders as to your Lordships may seem fit and proper."

Babu *Prokash Chandra Majumdar*, for the Petitioner.

JUDGMENT.—This Rule must be made absolute. It is quite clear from the cause of action as given in the proceedings of the Court that the suit is of a nature mentioned in Article 35 (*ii*) of Schedule II of the Provincial Small Cause Courts Act. A suit of that

nature is excluded from the cognizance of the Small Cause Court. The Rule must, therefore, be made absolute. We make no order as to costs, as the opposite party has not entered appearance.

Rule made absolute.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 215 OF 1916.

March 28, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Srinivasa Aiyangar.

ARUNACHELLAM CHETTY—PLAINTIFF—APPELLANT

versus

SABAPATHY CHETTY—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 9, 20—Jurisdiction of inferior Court to set aside decree of superior Court—Fraud—Compromise, suit to set aside.

An inferior Court has jurisdiction to set aside the decree of a superior Court obtained by fraud, provided it is otherwise competent to try the suit. [p. 938, col. 2; p. 941, col. 2.]

It matters not whether the impeached judgment has been pronounced by an inferior Tribunal or by the highest Court of Judicature in the realm: in all cases it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud. [p. 938, col. 1.]

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Napier, in Civil Revision Petition No. 951 of 1916, praying the High Court to revise the order of the District Court, Coimbatore, in Civil Miscellaneous Application No 6 of 1916, preferred against the order of the District Munsif, Tiruppur, in Original Suit No. 1631 of 1915.

Mr. *N. A. Krishna Aiyar*, for the Appellant.

Mr. *T. Narasimha Aiyangar*, for the Respondent.

JUDGMENT.

SPENCER, J.—The question that has been argued in this Letters Patent Appeal is whether it is competent to a Court of inferior jurisdiction to entertain a suit to declare a compromise decree obtained in a Court of superior jurisdiction to be not binding on the plaintiff as having been obtained by fraud. The plaintiff asked in his plaint not only for a declaration that the decree in Original Suit No. 20 of 1914 on the file of the District Court of Coimbatore was not binding on him, but also that it should be set aside and that the said suit should be re-tried and decided on the evidence. The District Munsif, to whom the plaint was presented, held that he had no jurisdiction to go into the question whether the former decree was obtained by fraud and that only an Appellate Court or a Court transferring a suit from one Court to another would have the power to direct a re-trial. The District Judge, who heard an appeal from the District Munsif's decision, was of opinion that a Court of inferior jurisdiction could not either set aside or order a re-hearing of a suit tried by a Court of superior jurisdiction.

The learned Judge of this Court, who disposed of the petition to revise the District Judge's order, gave as his reason for refusing to interfere in the matter that the suit as originally instituted was not within the pecuniary jurisdiction of the District Munsif, although the amount involved in the compromise decree was.

There seems to have been a considerable misapprehension as to the course that the Court trying the question of fraud would have to follow if it decided in the plaintiff's favour. As observed in *Davuluru Vijaya Ramayya* v. *Davuluru Venkatasubba Rao* (1), it would be sufficient for the Court to declare that the previous decree was of no effect so far as he was concerned. Their Lordships remarked in that case that the trial of the suit, which had been improperly compromised, after a declaration to that effect, would no doubt proceed if a proper application were made to the proper Court. They refused in second appeal to make any order as to that. So here, the fact that the plaintiff asked for two reliefs which could not in the nature of things be granted, was no reason for not deciding whether he was entitled to the declaration which he demanded, if he proved that the compromise was fraudulent.

(1) 32 Ind. Cas. 881; 39 M. 853 at p. 873; 30 M. L. J. 465.

Next, as regards the powers of the District Munsif to try a suit brought for a declaration that a decree obtained in the District Court was obtained by fraud, section 9 of the Civil Procedure Code runs thus: "The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred." The respondent has not shown that there is any express or implied bar to such a suit as this. Under section 56, clause (*b*) of the Specific Relief Act, a Court has no power to stay proceedings in a Court not subordinate to it; but no such limit is placed by section 42 on a Court, that has otherwise jurisdiction over the suit, making a declaration as to a plaintiff's title to a legal right and granting a permanent injunction against the decree-holder executing his fraudulent decree against the plaintiff.

If it were only the Court which possessed the jurisdiction to try the suit in which the fraud was committed that could entertain a question whether a decree so obtained was vitiated by fraud, there would be no relief by suit under Article 95 of the Limitation Act for parties aggrieved by fraud perpetrated in the trial of Small Cause suits, or of rent suits in Revenue Courts, or in appeals to the Privy Council, however gross the fraud. In *Nistarini Dassi* v. *Nundo Lall Bose* (2), Stanley, J., quoting from *Shedden* v. *Patrick* (3) observed: "It matters not whether the impeached judgment has been pronounced by an inferior Tribunal or by the highest Court of Judicature in the realm; in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud". His judgment was upheld in appeal by a Bench of three Judges in *Nistarini Dassi* v. *Nundo Lal Bose* (4) (see observations of Maclean, C. J., at pages 381-2) and confirmed by the Privy Council in *Benode Behary Bose* v. *Nistarini Dassi* (5).

In *Banke Behari Lal* v. *Pokhe Ram* (6) and *Jawahir* v. *Neki Ram* (7) it was held that a Subordinate Judge and District Munsif could try suits to declare that decrees passed by the Calcutta High Court and by another Court in Bengal respectively were void as against the plaintiff, when the cause of action arose within the jurisdiction of the former Courts owing to execution proceedings having been taken in that locality.

As regards pecuniary jurisdiction, the compromise decree was for Rs. 1,700 and interest, and that is, therefore, the extent to which the interests of the plaintiff in this suit have suffered. It is not suggested that there has been any under-valuation. The property is situated and the defendant resides within the jurisdiction of the Tiruppur District Munsif's Court. Under section 12 of the Civil Courts Act, the Tiruppur District Munsif's Court is the proper Court to try the suit, unless it is shown to be 'otherwise exempted from his cognizance'. I am not aware of any provision of law which has the effect of exempting from the jurisdiction of a Court, otherwise competent to try them, suits brought to avoid decrees obtained in suits when the original plaintiff claimed in his plaint more than he got by the final decree.

I consider, therefore, that this appeal should be allowed and that the District Munsif of Tiruppur should be directed to restore Original Suit No. 1631 of 1915 to his file and dispose of it according to law. Costs throughout to abide and follow the result.

SRINIVASA AIYANGAR, J.—I agree. The question in this appeal is whether one Court has jurisdiction to entertain a suit to set aside the decree of another Court, in this case a superior Court, on the ground of fraud. The present suit was filed in the Munsif's Court, Tiruppur, to set aside a mortgage decree passed by consent by the District Court, Coimbatore, for a sum of Rs. 1,700 in favour of the defendant against the plaintiff in a previous suit in that Court by the former against the latter to recover a sum of money

(2) 26 C. 891; 3 C. W. N. 670; 13 Ind. Dec. (N. S.) 1171.
(3) (1854) 1 Macq. H.L C. 535 at p. 607; 149 R.R. 55.
(4) 30 C. 369; 7 C. W. N. 353.
(5) 33 C. 180; 15 M. L. J. 331; 7 Bom. L. R. 887; 32 I. A. 193; 3 C. L. J. 189; 9 C. W. N. 961 (P. C.).
(6) 25 A. 48; A. W. N. (1902) 179.
(7) 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190.

which was beyond the pecuniary jurisdiction of the Munsif. The lands charged are wholly within the local limits and the value of the relief sought is within the pecuniary limits of the jurisdiction of the Munsif. The plaintiff's claim is to relieve himself from the liability to pay Rs. 1,700 under the previous decree and to get rid of the charge on his lands for the same amount. The defendant also lives within the jurisdiction of the Munsif.

It is now quite settled that the more appropriate mode of setting aside a consent decree for fraud is by a separate action instituted for that purpose where charges of fraud can be fully investigated, rather than by a motion in the cause in the nature of a review; but such a suit is not, I think, the same as an action of review or the old bill of review, *Golab Koer* v. *Badshah Bahadur* (8). Legislative recognition of this mode of procedure is afforded by Article 95 of the Limitation Act. A suit instituted for that purpose is an ordinary civil suit and the jurisdiction of the Court to entertain such a suit must depend on the provisions of the Civil Courts Act and the Code of Civil Procedure. It was not said that suits to set aside decrees were exempted from the cognizance of Munsifs and under section 12 of the Civil Courts Act, therefore, Munsifs have jurisdiction to try suits of this class. If the suit is considered to be one for the determination of a right to or interest in immoveable property, the District Munsif's Court, Tiruppur, was the proper Court to try it (section 16 of the Code); otherwise the same Court will have jurisdiction to try it as the defendant actually and voluntarily resides within the local limits of its jurisdiction (section 20 of the Code). If, for instance, the plaintiff in the present suit had executed a mortgage-deed in favour of the defendant for Rs. 1,700 and interest on the security of the property charged by the decree in satisfaction of his claim in the previous suit and if that suit had been withdrawn or dismissed as adjusted without there being a decree and if the present suit was to set aside the mortgage on the ground of fraud, there can scarcely be any doubt that the District Munsif of Tiruppur would have jurisdiction to entertain it. For the purpose of determining the Court in which the suit should be filed, I do not see any difference between the two suits. The District Judge may also have concurrent jurisdiction, but the suit must be instituted in the District Munsif's Court as that is the Court of the lowest grade competent to try it. That is how the matter stands on the construction of the relevant portions of the Statutes which prescribe or limit the jurisdiction of Courts.

A certain amount of confusion has, however, arisen, by not keeping quite distinct the question of the appropriate relief or reliefs which a Court can grant in a suit to set aside a decree or the consequences which follow the setting aside of a decree, from the question of competency of the Court to try the suit. In this very suit the plaintiff, after praying that the consent decree should be set aside, further prayed that the Court should direct the previous suit in the District Court to be re-tried and decided on the evidence; this latter relief he was not entitled to in the suit and the District Munsif was not competent to grant it. If the plaintiff succeeds in the suit, and gets the consent decree set aside, any application in the previous suit either to revive it or proceed with it can only be made to the Court in which that suit was pending and it is only that Court that can make any order in respect of that suit; but that in no way affects the jurisdiction of the Munsif to try the suit to set aside the decree. What exactly are the forms of relief which a Court can grant when a party establishes his right to set aside a decree for fraud need not be considered or specified now, as they may conceivably depend on the nature of the decree sought to be set aside and other circumstances of the case. Ordinarily a declaration that the decree is not binding on the plaintiff and an injunction restraining the other party from executing it, would be sufficient and proper.

The learned District Judge, in his judgment in appeal in this case, draws a distinction between the jurisdiction of the Court to treat a decree obtained by fraud as a nullity when the impeachment of the decree arises incidentally or is only one of the reliefs prayed, and the jurisdiction of the Court where the impeachment of the decree is the sole object of the suit. It is quite possible that a Court which has juris-

(8) 2 Ind. Cas. 129; 10 C. L. J. 420; 13 C. W. N. 1197.

diction over a cause, may have jurisdiction to decide on the validity of a decree, though if the suit was wholly to set aside that decree it may have no jurisdiction on the ground that no part of the cause of action arose within its local limits or the defendant did not reside there. That difference arises, not out of any distinction between a direct and collateral impeachment of the decree, not out of any difference in the nature of the suits, but arises solely out of the difference in the place of suing as determined by the provisions of the Code or any other law determining the venue. I do not understand how a Court which is not competent to adjudicate directly on the validity or the invalidity of a decree can do so indirectly. If a decree obtained by fraud is a nullity and is wholly void (which I think it is not in spite of some expressions to the contrary in the reported judgments), the Court may ignore it; but if it is binding till set aside, the fact that it is impeached in a suit in which other substantial reliefs are asked which depend or are consequential on the setting aside of the decree cannot confer a jurisdiction which otherwise the Court did not possess. The recent decisions of the Calcutta and Allahabad High Courts, some of which were confirmed by the Privy Council, support the view taken above. In an early case in Calcutta, Pontifex, J., in connection with an application to take the plaint off the file on the ground that leave to sue was not obtained, is reported to have said that "where the principal part of the prayer of the suit was to set aside a consent decree of the High Court in a previous suit, that Court and that Court alone had jurisdiction." *Bibee Soloman* v. *Abdool Aziz* (9). In that case the whole cause of action appears to have arisen within the local limits of the original jurisdiction of the High Court as the fraud which gave rise to the action was committed within the local limits. The suit itself appears to be one in which substantial relief for the recovery of property appears to have been claimed and the previous decree which limited the right of the plaintiff was sought to be set aside as a preliminary to obtain such relief. If that be so, the later decision of the same Court on the Original Side in *Nistarini Dassi* v. *Nundo Lall Bose* (2), which was confirmed in appeal, which again was confirmed by the Privy Council, is conclusive authority for the position that a Court which has jurisdiction over the cause has jurisdiction to set aside the decree of another Court on the ground of fraud as an auxiliary to the granting of the other reliefs [*Nistarini Dassi* v. *Nundo Lall Bose* (2), *Nistarini Dassi* v. *Nundo Lal Bose* (4), *Benode Behary Bose* v. *Nistarini Dassi* (5)]. I would draw particular attention to the judgment of Chief Justice Maclean in appeal at pages 380 and 381 of 4 Calcutta Law Reports, where the question of jurisdiction of one Court to set aside the decree of another Court for fraud is discussed with reference to the Indian Statutes. In *Kedar Nath Mukerjee* v. *Prosonno Kumar Chattereje* (10) the suit was to set aside on the ground of fraud a decree of a Small Cause Court at Krishnagar and sale of immoveable properties in execution of that decree on transfer by a Munsif's Court. The plaintiff also claimed to recover possession of the property sold in execution and instituted the suit in the Munsif's Court. On objection taken, the jurisdiction of the Munsif to entertain the suit was sustained, but the learned Judges were disposed to hold that if the action was brought simply to set aside the decree, the suit should have been instituted in the Krishnagar Civil Court. It is important to note that the learned Judges say that the suit to set aside the decree of the Small Cause Court *would not lie in that Court*, but would have to be brought in the ordinary Civil Court, and it may be that the Krishnagar Civil Court was the only Court which could take cognizance of a suit under the Code of Civil Procedure, if it was simply to set aside the decree.

The precise question now raised came up for decision in *Sarthakram Maiti* v. *Nundo Ram Maiti* (11) and the Calcutta High Court decided that a Munsif's Court had jurisdiction to declare that a decree obtained by fraud in a Subordinate Court was not binding on the plaintiff and to

(9) 4 C. L. R, 366.

(10) 5 C. W. N 559.
(11) 11 C. W. N. 579.

grant an injunction restraining the defendant from executing the decree. There also the decree in the previous suit was for a sum which was within the pecuniary jurisdiction of the Munsif, though apparently the claim was for an amount above it. In this judgment the learned Judges appear to draw a distinction between 'setting aside a decree' and declaring it to be a nullity; but what exactly is the difference is not explained. No doubt one Court has no control over the records of another Court, and one Court setting aside the decree of another Court on the ground of fraud in an action brought for that purpose does not do so in the sense in which a judgment is vacated in appeal or on review. The consequences are, or may be, different; further in the latter case directions may be given as to revivor, new trial or continuance of the proceedings and the Court may even enter a fresh judgment in the old suit. Again there may be matters over which particular Courts have exclusive jurisdiction as, for instance, Probate Courts. If an order or decree is passed by such Courts in matters within their exclusive jurisdiction, such order or decree cannot be set aside by another Court, though the latter Court may be able to make a declaration that a party was guilty of fraud in obtaining that order. See *Priestman* v. *Thomas* (12), in appeal *Priestman* v. *Thomas* (13). In *Bandon (Earl)* v. *Becher* (14) Lord Brougham said: "it is undeniably true that the Court of Chancery has no right to review a decree of the Court of Exchequer; that nothing but a Court of Appeal can give redress if such decree is erroneous, is clear, and indeed nothing can be more true than such a proposition; but it is equally true, that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim, or to the defence of a right." How far such a distinction applies to Courts exercising the same or similar jurisdiction as the ordinary Civil Courts in British India may be a question. If, however, that was the distinction made by the learned Judges in *Sarthakram Maiti* v. *Nundo Ram Maiti* (11), as probably it was, that does not affect the present question. In a later case in the same Court, *Abdul Haque* v. *Abdul Hafiz* (15), the suit was instituted in a Munsif's Court to set aside a decree of the Presidency Small Cause Court. The jurisdiction of the Munsif was upheld and the learned Judges pointed out that where a decree is set aside on the ground of fraud, an injunction restraining execution is necessarily consequential thereon, even where no other relief is sought, and that such a decree is more than a mere declaratory decree. They followed their previous decision in *Sarthakram Maiti* v. *Nundo Ram Maiti* (11) and also another decision, *Pran Nath Roy* v. *Mohesh Chandra Moitra* (16), which was confirmed by the Privy Council. *Radha Raman Shaha* v. *Pran Nath Roy* (17) and *Khagendra Nath Mahata* v. *Pran Nath Roy* (18). In these cases the main question in dispute was whether a party who had applied to the Court which passed the decree, under sections 108 and 311 of the old Code, to set aside an *ex parte* decree and a sale in execution of it, can sue to set them aside on the ground of fraud in a fresh suit. Their Lordships in the Privy Council confirming the judgment of the High Court held that he can; but these cases are important for the present purpose for two reasons. In the first place, though relief by way of recovery of possession of immoveable property sold in execution of the fraudulent decree was asked, their Lordships do not appear to think that this made any difference, for they describe the suit as one "for setting aside a decree and auction-sale on finding" them to be illegal, fraudulent and collusive; in the next place, though the previous decree was passed and the auction held by the Munsif, and the suit to set them aside was instituted in a different Court, the Court of the Subordinate Judge. These two decisions of the Privy Council appear to me to conclude the question in the present appeal.

(12) (1884) 9 P. D. 70, 53 L. J. P. 58.
(13) (1884) 9 P. D. 210; 53 L. J. P. 109; 51 L. T. 843; 32 W. R. 842.
(14) (1835) 3 Cl. & Fin. 479 at p. 510; 9 Bligh (N. S.) 532; 6 E. R. 1517.
(15) 5 Ind. Cas. 648; 14 C. W. N. 695; 11 C. L. J. 636.
(16) 24 C. 546; 12 Ind. Dec. (N. S.) 1032.
(17) 28 C. 475; 5 C. W. N. 757.
(18) 29 I. A. 99; 29 C. 395; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.).

MA KYI v. MAUNG PAN U.

The latest case in Allahabad is *Jawahir* v. *Neki Ram* (7). There a suit was instituted in the Munsif's Court, Fatehabad (Agra.), to set aside a decree of a Court in Silguri in Bengal. The learned Judges held that the Munsif had jurisdiction. They based their judgment on the ground that a portion of the cause of action at least arose within the jurisdiction of the Fatehabad Munsif, as the fraudulent decree was sought to be executed by attaching properties situate within his local jurisdiction and they followed an earlier case in the same Court, where it was held that it was competent for the Cawnpore Court to set aside a decree of the Calcutta High Court, in *Banke Behari Lal* v. *Pokhe Ram* (6). The decision in *Banke Behari Lal* v. *Pokhe Ram* (6) was followed in this Court in *Arunachellam Chettiar* v. *Velappa Tambiran* (19) by the Chief Justice and Hannay, J.

There was a reference made to section 56 of the Specific Relief Act, but that section has no application to the present case, for the Court is not asked to stay any proceedings in a superior Court.

The respondent broadly contended that there was some principle of law which obliged a party, desirous of setting aside a decree obtained by fraud, to seek relief in the Court which passed the decree; but except the dictum of Pontifex, J., he did not refer to any other authority. If that contention is correct, a Court of Appeal which has no original jurisdiction and a Small Cause Court or a Revenue Court which has only a limited jurisdiction cannot entertain an original suit to set aside its decree, and no other Court can. This, however, does not appear to be the law. In *Flower* v. *Lloyd* (20) the Court of Appeal in England held that that Court had no original jurisdiction to hear an application to set aside their decree passed in appeal on the ground of fraud, but that a fresh action should be brought in a Court having original jurisdiction to set aside the decree. In the same case Baggallay, L. J., no doubt said that under the old practice when a decree had been obtained by fraud a bill was filed in the Original Court in which the suit had been brought for the purpose of setting the decree aside and the same may be done even after the Judicature Acts came into force. I doubt, however, whether the Lord Justice was thinking of Courts of different grades exercising similar jurisdiction. I, therefore, think that the District Munsif of Tiruppur had jurisdiction to entertain the suit, though he had no power to grant the second prayer of the plaint which, however, did not affect the jurisdiction of the Court. It may be mentioned that the plaintiff agreed to withdraw this prayer in the first Court.

Appeal allowed;
Case sent back.

V.R.P.

(19) 28 Ind. Cas. 337; 28 M. L. J. 410; 18 M. L. T. 5.

(20) (1877) 6 Ch. D. 297; 46 L. J. Ch. 838; 37 L. T. 419; 25 W. R. 793.

LOWER BURMA CHIEF COURT.

CIVIL REVISION NOS. 151 AND 152 OF 1916.

June 14, 1917.

Present:—Mr. Justice Maung Kin.

MA KYI—APPLICANT

versus

MAUNG PAN U AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 115, 105—Interlocutory order in appealable case—Revision, whether lies—High Court, power of interference of.

The Chief Court has no power to interfere in revision under section 115 of the Civil Procedure Code with an interlocutory order passed by a lower Court in an appealable case; but under section 105 of the Code, the order can be made a ground of objection in the subsequent appeal against the decree. [p. 943, col. 1; p. 944, col. 2.]

Case-law on the subject reviewed.

Mr. *Ba Tin*, for the Applicant.

Mr. *Villa*, for the Respondents.

JUDGMENT.

IN NO. 151 OF 1916.

The subject-matter of the suit out of which this application for revision arises is the estate of U Po Oh and Ma Za Yu.

The respondent, Maung Pan U, applied for Letters of Administration on the ground that he was the adopted son of the deceased but for reasons, which it is not necessary to state here, his application was dismissed and one Maung Aung Gyaw, a stranger to the deceased, was appointed administrator. Aung Gyaw died before having fully administered the estate, leaving him surviving the applicant as his widow and two minor

children. The widow took charge of the estate. The respondent filed three suits in the Sub-Divisional Court of Prome against the applicant and her labourers for the recovery of different parts of the estate of the deceased. The applicant by her written statement admitted being in possession of the estate but objected to the splitting up of the cause of action. The other defendants claimed no rights and stated that they were merely labourers on the lands. The Court passed an order giving the applicant permission to bring separate suits on the same cause of action. Revision is sought of this order on the ground that it is *ultra vires* being in direct contravention of Order II, rule 2, of the Code of Civil Procedure.

Mr. Villa for the respondents contends that this Court has no power to interfere under section 115 of the Code although it may be of opinion that the order is *ultra vires*, inasmuch as under section 105 of the Code the order can be made a ground of objection in the subsequent appeal from the first decree, and he cites in support the Lower Burma case of *Maung Thaung* v. *Ma Se* (1), *Chattar Singh* v. *Lekhraj Singh* (2), *H. H. The Nizam of Hyderabad, In re* (3), *Motilal Kashibhai* v. *Nana* (4). In regard to *Dhapi* v. *Ram Pershad* (5), in which a contrary view was come to, to that held in the other cases above cited, Mr. Villa says that it has been dissented from in some of those cases and that in the Lower Burma case it was not noticed in the judgment, though it was cited at the Bar.

In the Lower Burma case, Irwin, J., followed the previous rulings of Madras and Allahabad in *H. H. The Nizam of Hyderabad, In re* (3) and *Chattar Singh* v. *Lekhraj Singh* (2) respectively, and held that section 622 of the Code of 1882 (section 115 of the present Code) does not apply to an interlocutory order in a case, in which there will be an appeal against the decree in the proceeding in which the interlocutory order was made.

The Calcutta case of *Dhapi* v. *Ram Pershad* (5), where the contrary view was held, was not mentioned in Irwin, J.'s judgment probably because there was no necessity for doing so, inasmuch as he was following the Bombay case of *Motilal Kashibhai* v. *Nana* (4) which had dissented from it.

In the Calcutta case Norris, J., after noticing the Allahabad cases above mentioned, observes: "These cases no doubt decide in so many words that section 622 of the Civil Procedure Code does not apply to interlocutory orders when there is an appeal from the final decree. I confess that, after a careful consideration of the judgments, I am unable to concur in the interpretation placed on section 622 of the Civil Procedure Code. I think that the word 'case' in section 622 of the Civil Procedure Code is wide enough to include an interlocutory order....It is easy to imagine cases where irremediable injury may be done to a party by an interlocutory order made without jurisdiction, and unless the words of the section are clear beyond all doubt to the contrary, I cannot believe that the Legislature intended such injury to remain without a remedy." In *Motilal Kashibhai* v. *Nana* (4) Sargent, C. J., in delivering the judgment of the Court dealt with the views of Norris, J., in the following words: "The expression 'case' in section 622 of the Civil Procedure Code may be, as stated by the Court in *Dhapi* v. *Ram Pershad* (5), wide enough to include an interlocutory order. But a word of such general import must be controlled by due regard to the purpose with which section 622 was framed. This, it cannot be doubted, was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court, when there would otherwise be no remedy. In the case of these interlocutory orders (such as the present one) against which no immediate appeal lies, a remedy is still supplied by section 591, which provides that the order may be made a ground of objection in the appeal against the final decree".

In *Damodar* v. *Laghunath* (6) Fulton, J.,

(1) 8 Bur. L. R. 323.
(2) 5 A. 293; A. W. N. (1883) 39; 3 Ind. Dec. (N. S.) 281.
(3) 9 M. 256; 3 Ind. Dec. (N. S.) 575.
(4) 18 B. 35; 9 Ind. Dec. (N. S.) 532.
(5) 14 C. 768; 12 Ind. Jur. 97; 7 Ind. Dec. (N. S.) 509.
(6) 26 B. 551; 4 Bom. L. R. 267.

in the judgment of the Court followed the Allahabad case of *Chattar Singh* v. *Lekhraj Singh* (2).

In *Balamoney* v. *Ramasami Chettiar* (7) the Madras High Court followed the Bombay case of *Motilal Kashibhai* v. *Nana* (4) and its own case of *H. H. The Nizam of Hyderabad, In re* (3).

To turn to Calcutta again, in *Gobinda Mohun Doss* v. *Kunja Behary Doss* (8) it was observed: "There is no possible ground for controversy that if the Court is satisfied that an interlocutory order of the description now before us has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants, this Court has ample power to set matters right under section 15 of Statutes 24 and 25 Vic. Chapter 104". And the learned Judges stated that it was needless to consider whether the case of *Dhapi* v. *Ram Pershad* (5) was correctly decided or to investigate the precise extent of the revisional powers of the High Court under section 115 of the Civil Procedure Code.

This case was followed in *Amjad Ali* v. *Ali Hussain* (9), but without reference to section 115 of the Civil Procedure Code. And in *Sivaprosad Ram* v. *Tricomdas* (10) Chatterjee, J., in delivering the judgment of the Court said that even if it were doubtful whether section 115 does empower the High Court to interfere with an interlocutory order, the powers under section 15 of the Charter Act are wide enough to enable the Court to do justice.

The result of the above review of the authorities on the subject is that Allahabad, Bombay and Madras are against the view expressed in the Calcutta case of *Dhapi* v. *Ram Pershad* (5) and that the later Calcutta cases neither follow nor dissent from this case but proceed on the ground that the Calcutta High Court had power to render aid to the aggrieved party under the Charter Act. This being so, the preponderance of authorities is against the applicant and I feel I should give my decision accordingly. The applicant is at liberty, if she is so advised, to make the order she now complains of a ground of objection in the appeal from the final decree in any of the suits.

I express no opinion as to the question whether the order is *ultra vires* or not.

The application is dismissed with costs.

IN No. 152 OF 1916.

For the reasons stated in my judgment in Civil Revision No. 151 of 1916, with which this application was heard, this application is dismissed with costs.

Applications dismissed.

(7) 30 M. 230; 17 M. L. J. 79; 2 M. L. T. 88.

(8) 4 Ind. Cas. 364; 14 C. W. N. 147 at p. 153; 10 C. L. J. 407.

(9) 6 Ind. Cas. 574; 15 C. W. N. 353; 12 C. L. J. 519.

(10) 27 Ind. Cas. 917; 42 C. 926.

CALCUTTA HIGH COURT.

CIVIL SUIT NO. 97 OF 1914.
CIVIL APPEAL NO. 9 OF 1917.
March 2, 1917.

Present:—Sir John Woodroffe KT., and Justice Sir Asutosh Mookerjee, KT.,

RAMENDRA NATH RAY—PLAINTIFF—APPELLANT

versus

BROJENDRA NATH DASS AND OTHERS—DEFENDANTS—RESPONDENTS.

Letters Patent (Cal.), cl. 15—Civil Procedure Code (Act V of 1908), O. I, rr. 1, 3—Judgment, what is—Decision that suit is multifarious and plaintiff must elect, whether judgment—Appeal—Misjoinder of parties and causes of action.

Order I, rule 3, is not limited to joinder of parties but also applies to joinder of causes of action. [p. 946, col. ..]

A decision that a suit is multifarious and has been so constituted as to joinder of parties and causes of action that it cannot be entertained as framed, is a judgment within the meaning of clause 15 of the Letters Patent. [p. 948, col. 1.]

The determination of the question whether or not the suit as framed is open to objection on the ground of misjoinder of parties and causes of action depends upon the allegations made in the plaint. [p. 948, col. 2.]

A suit was instituted against four sets of defendants for the recovery of goods and documents of title relating thereto or, in the alternative, of the value of goods, on the allegation that one of the defendants obtained possession of the goods, which were the plaintiff's property, with the documents of title, by means of fraud and subsequently transferred them to the other defendants. The relief claimed in the suit was not the same against all the defendants, and the Trial Court, holding that there had been a misjoinder of causes of action in the suit, adjourned the suit to a specified date with liberty to the plaintiff to elect meanwhile as against which of the defendants he would proceed, but did not specifically order that on the failure of the plaintiff so to elect, the suit would be dismissed:

RAMENDRA NATH RAY *v.* BROJENDRA NATH DAS.

Held, that the decision of the Trial Court was a judgment, as it was in substance a decision that the suit would not lie as framed, with the result that if the plaintiff did not elect, the suit would be dismissed, and so an appeal lay against it under the Letters Patent. [p. 945, col. 2; p. 948, col. 1.]

Per *Mookerjee, J.* – The true test to be applied in the solution of the question of the competence of an appeal under the Letters Patent from an adjudication is, not the form of the adjudication but its real effect on the suit or proceeding in which it has been made. Whatever the form of the adjudication may be, if it puts an end to the suit, so far as the Trial Court is concerned, the adjudication may properly be deemed a judgment within the meaning of clause 15 of the Letters Patent. [p. 947, cols. 1 & 2.]

The Advocate-General (Mr. *B. C. Mitter* with him Messrs. *S. R. Das* and *K. P. Basu*), for the Appellant.

Mr. *B. L. Mitter*, for the Respondents the Bengal National Bank.

Mr. *C. C. Ghose* (with him Mr. *D. C. Ghose*), for the Respondents Birkmyre Bros.

Mr. *Buckland* (with him Mr. *Surita*, for the Respondents) Lansdowne Jute Mills.

Mr. *Langford James* (with him Mr. *N. Sircar*), for the Respondents Cartwright & Co.

JUDGMENT.

WOODROFFE J. – This suit is brought against four sets of defendants and the point in issue is, whether there has been misjoinder of parties and causes of action. In the judgment under appeal Chitty, J., has held that the plaintiff who claims such right cannot be allowed to proceed in one suit against the defendants, and adjourning the hearing, gave the plaintiff a fortnight to elect against which of the defendants he would proceed. Though the learned Judge does not expressly say so, it is quite clear on the judgment and proceedings that if the plaintiff does not elect and persists in his claim to sue all defendants, his suit will be dismissed. The position is substantially the same as if the Court had dismissed the action unless the plaintiff elected under the liberty given to him. It has been objected that no appeal lies. The first question is whether this is a judgment. It seems to me that it is, for it is an adjudication that the suit cannot lie as framed and cannot proceed as presented and that the Court cannot hear it. Such adjudication was based on the view that the suit is bad for misjoinder of causes of action and parties The Court is said to be unable to entertain the suit, the reason being of a like nature with defect of jurisdiction and not a mere irregularity. A decision to this effect which will be followed by dismissal unless the plaintiff abandons rights to which under the law he claims to be entitled, is, in my opinion, a judgment affecting the merits of the question and determining some right or liability between the parties. It has not been contested that if there were a final order having this effect, it would be a judgment. The argument is that there is no such order, that all the Court has done is to adjourn the suit, that it has not directed an election or dismissed the suit, and that, therefore, the appeal is premature.

We must look at the substance of the matter. The order giving the plaintiff liberty to elect, a liberty he did not desire and an order which he opposes, is nothing but an adjudication that he cannot proceed on the plaint as framed, and such an adjudication necessarily implies the result which follows on persisting with such a suit, namely, dismissal. The judgment makes clear why the plaintiff was called upon to elect. There appears to me to be in substance a decision that the suit will not lie as framed, with the result that if the plaintiff insists on his alleged rights, the suit will be dismissed. I am of opinion that on these facts an appeal will lie.

On the merits the question is this. The frame of the suit is admittedly not supported by Order II, rule 3. It is then said that it is justified by Order I, rule 3. To this, it is replied, *firstly*, that this last rule deals with parties and not joinder of causes of action, and in the alternative and on the supposition that it does deal with joinder of causes of action, the present case does not on the facts fall within the rule. Order I is headed "parties" and Order II "frame of suit." The question of parties involves that of cause of action and *vice versa*. A person is made a party because there is a cause of action against him, and where causes of action are joined, parties are joined. In a perfectly framed Code which dealt in separate chapters with parties and causes of action, the provisions should be exactly parallel, looking at the same matter from its different aspects in a way according to which the provisions of one Order would be in conformity with the provisions of the other. So much may be conceded, and if the solution of the question were doubtful, one might have hesitated on this ground to

hold that a suit might be framed under Order I in a manner not provided for by Order II which, according to its heading, specifically deals with the frame of a suit. But in the present case we have to deal with the wording of a rule, the meaning of which has been construed. There are decisions of the English Courts on rules from which our own are taken. These decisions are subsequent to the year 1896, when Order XVI, rule 1, was amended. It has been held that that Order deals not only with joinder of parties, but also joinder of causes of action, notwithstanding that Order XVI like Order I is headed "parties" only [*Compania Sansinena* v. *Houldar* (1), *Bullock* v. *London General Omnibus Co.* (2), *Markt* v. *Knight Steamship Co.* (3) and *Times Cold Storage Co.* v. *Lowther* (4)].

This, notwithstanding incidental observations to a contrary effect in *Thompson* v. *London County Council* (5), is not disputed before us. The decisions in the Bombay High Court given in 1908 and referred to in *Jankibai* v. *Shrinivas Ganesh Valsankar* (6) do not refer to the latest English decisions. It is conceded before us that it cannot be now contended that Order XVI, from which Order I is taken, does not refer to joinder of causes of action. These decisions were on Order XVI, rule 1, corresponding to Order I, rule 1, but are equally applicable to Order I, rule 3, which is in exactly the same terms as Order I, rule 1, substituting the word "defendant" for "plaintiff." Indeed in England where the rule relating to the joinder of defendants is in differing terms from that relating to joinder of plaintiffs, it has been held that they should be interpreted on similar principles. It must be held then that Order I, rule 3, does refer to joinder of causes of action.

The next question then is whether the joinder in the present case is justified by that rule. It is contended that it is not, it being argued that there are different sets of transactions and no common question of law or fact. The foundation of the case, on which the rest of it depends, is the alleged fraud of B. N. Dass. If such fraud is proved the question is, did the defendants who all claim under B. N. Dass obtain any title? If the plaintiff fails to prove fraud on the part of B. N. Das, the case fails against all the defendants. If he proves fraud, it may be that the defendants may have a different answer by way of defence: but that does not make the case any the less one of a common question of law and fact. The same act or transaction which concerns all parties is the alleged fraud of B. N. Das, and this involves a common question of law or fact. All defendants have derived title from a person who is alleged to have obtained the goods by means of fraud. By reason of this the possession of all is alleged to be wrongful. Whether a common question arises may be tested by seeing what the evidence will be. In the shorthand notes Chitty, J., expressed the opinion that the evidence will be common, and that if there were separate suits they might be heard together with consent. In the judgment the learned Judge qualified this statement by saying that this was true upto a point. It is true so far as the plaintiff's cause of action, as based on the fraud of B. N. Das, is concerned, though there may be some facts which are particular to particular parties being offered in proof of the plaintiff's case (*e. g.*, present possession of the goods as result of such fraud) or by the defendants as part of their defence. The rule does not say that all questions must be common. It is sufficient that there is a common question. In my opinion then, the plaint is within the provisions of Order I, rule 3. It may be conceded that the case of the Bengal National Bank raises points which do not affect other defendants. For the Bank is not concerned with the transactions with Cartwright & Co. or the two Mills which claim through them. Goods covered by Railway Receipt No. 9 have not been stopped in transit, having been already delivered to Lansdowne Mill. The plaint asks for declaration that the plaintiff is entitled to the document (Railway Receipt No. 9) and to the goods covered thereby, which

(1) (1910) 2 K. B. 354; 79 L. J. K. B. 1094; 103 L. T. 333.

(2) (1907) 1 K. B. 264 at pp. 271, 272; 76 L. J. K. B. 127; 95 L. T. 905; 23 T. L. R. 62.

(3) (1910) 2 K. B. 1021 at p. 1036; 79 L. J. K. B. 939; 103 L. T. 369.

(4) (1911) 2 K. B. 100 at p. 107; 80 L. K. 901; 104 L. T. 637; 55 S. J. 442.

(5) (1899) 1 Q. B. 840 at 842; 68 L. J. Q. B. 625; 47 W. R. 433; 80 L. T. 512.

(6) 20 Ind. Cas. 533; 38 B. 120; 15 Bom. L. R. 684.

are said now to be with the Lansdowne Mill. The Bank claims to deal with the goods if it can do so. The common root of title is B. N. Das.

I am of opinion, therefore, that the suit is not bad for misjoinder of parties and causes of action. Should it, however, be convenient, the Court may [See *Umabai Mangeshrao* v. *Vithal Vasudeo Shetti* (7)] direct the successive trial of the issues separately affecting different defendants. Thus the question of the alleged fraud of B. N. Das touching all the defendants may be tried first. If it fails, there is an end of the case. If it succeeds and the Bengal National Bank does not wish to be present at the trial of the issues, so far as they affect the other defendants, *viz.*, Cartwright & Co. and those claiming through them, there is no reason why it should attend. I would, therefore, decree this appeal with costs.

MOOKERJEE, J.—This appeal is directed against a determination by Mr. Justice Chitty that there has been a misjoinder of causes of action in this suit and that the plaintiff cannot be allowed to proceed against the defendants as they at present stand on the record. A preliminary objection has been taken to the competence of the appeal, on the ground that this decision does not constitute a "judgment" within the meaning of clause 15 of the Letters Patent. Stress has been laid on the circumstance that the order as drawn up merely adjourns the suit to a specified date with liberty to the plaintiff to elect meanwhile as against which of the defendants he will prosecute the suit, and does not specifically state, as the order of Channel, J., did in the case of *Frankenburg* v. *Great Horseless Carriage Co.* (8), that, on his failure so to elect, the suit will be dismissed. In my opinion, there is no substance in the preliminary objection.

It is plain that the true test to be applied in the solution of the question of the competence of the appeal is, not the form of the adjudication, but its real effect on the suit or proceeding in which it has been made. Whatever the form of the adjudication may be, there is no doubt that it does, in the present instance, put an end to the suit, so far as the Trial Court is concerned; from this standpoint the adjudication may properly be deemed a judgment, not merely within the test formulated by White, C. J., in *Taljaram Row* v. *Alagappa Chettiar* (9), but also within the definition given by Couch, C. J., in the *Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (10), "judgment in clause 15 means a decision which affects the merits of the question between the parties determining some right or liability." That this does not necessarily involve an actual decision on the right in controversy between the parties is clear from one of the illustrations given by Couch, C. J., himself. He pointed out the obvious difference between an order for the admission of a plaint and an order for its rejection, and added the observation that "the former determines nothing, but is merely the first step towards putting the case in a shape for determination, the latter determines finally, so far as the Court which makes the order is concerned, that the suit as brought will not lie; the decision, therefore, is a judgment in the proper sense of the term." The same view is confirmed by the decision of Couch, C. J., in *Hadjee Ismail Hadjee Hubeeb* v. *Hadjee Mahomed Hadjee Jasoob* (11), where he held that an appeal lies from an order refusing to set aside an order granting leave to a plaintiff to sue under clause 12 of the Letters Patent. The order, he said, was of great importance to the parties, was not a mere formal order or an order merely regulating the procedure in the suit, but one that had the effect of giving a jurisdiction to the Court which it otherwise would not have; it might fairly be said to determine some right between the parties, namely, the right to sue in a particular Court. To the same effect is the decision of the Judicial Committee in *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (12), that an appeal lies against an order which, in

(7) 1 Ind. Cas. 120; 33 B. 293; 11 Bom. L. R. 34; 5 M. L. T. 230.

(8) (1900) 1 Q. B. 504; 69 L J. Q. B. 147; 81 L. T. 684; 7 Manson 347.

(9) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1.

(10) 8 B. L. R. 433; 17 W. R. 364.

(11) 13 B. L. R. 91; 21 W. R. 303.

(12) 9 C. 482; 10 I. A. 4; 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar. P. J. 406; 4 Ind. Dec. (N. S.) 970.

substance, decides a question of jurisdiction. Now, when a Court refuses to proceed with the trial of a suit on the ground of misjoinder of parties and causes of action the Court may fairly be said, in the words of Beverley and Jenkins, J.J., in *Mullick Kefait Hossein* v. *Shee Pershad Singh* (13), to be unable to entertain it and the reason is of a like nature with defect of jurisdiction. As pointed out by Lord Herschell and Lord Russell in *Smurthwaite* v. *Hannay* (14) and by Lord Halsbury in *Subrahmania Ayyar* v. *King-Emperor* (15), an objection that a suit is multifarious is really an objection that the suit has been constituted, as to joinder of parties and causes of action, in a way not authorized by the law and the rules applicable to procedure. The decision that a suit is so constituted and cannot be entertained as framed is, in my opinion, a judgment within the meaning of the Letters Patent. It may further be usefully borne in mind that as was pointed out in *Mathura Sundari Dassi* v. *Haran Chandra Shaha* (16) and *Budhu Lal* v. *Chattu Gope* (17), the various definitions or elucidations of the term "judgment" to be found in a variety of cases in the reports are not statutory definitions, and, while they furnish useful tests, they cannot be deemed inflexible and exhaustive. In the present case, if we look at the nature and the contents of the order, there is no escape from the conclusion that it would be idle to hold that the plaintiff should refuse to elect, should get his suit dismissed, and, then, prefer an appeal against the decree of dismissal as he would be unquestionably entitled to do. I am not disposed to place a narrow construction upon the term "judgment" and thereby to postpone the inevitable determination, by the Court of Appeal, of the controversy as to the constitution of the suit. The preliminary objection must, consequently, be overruled.

(13) 23 C. 821; 12 Ind. Dec. (N. S.) 545.
(14) (1894) A. C. 494; 63 L. J. Q. B. 737; 6 R. 299; 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 485.
(15) 28 I. A. 257; 25 M. 61; 11 M. L J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 2 Weir 271 (P. C.).
(16) 34 Ind. Cas. 634; 43 C. 857; 20 C. W. N. 594; 23 C. L. J. 443.
(17) 39 Ind. Cas 465; 21 C. W. N. 269; 25 C. L. J. 193; 18 Cr. L. J. 497; 44 C. 816.

The determination of the question whether or not the suit as framed is open to objection on the ground of misjoinder of parties and causes of action depends upon the allegations made in the plaint. The suit is framed in the alternative for the recovery of goods and documents of title relating thereto or of the value of the goods. The plaintiff asserts that the bales of jute in controversy were his property and that Brojendra Nath Das by means of fraud obtained possession thereof with the documents of title. The plaintiff further asserts that the goods have subsequently passed into the possession of the Lansdowne Jute Mills and the Hastings Jute Mills through Cartwright & Co, to whom they were transferred by Brojendra Nath Das. The plaintiff next alleges that one of the documents of title, namely, a railway receipt has passed from Brojendra Nath Das to the Bengal National Bank, though the goods covered thereby are in the possession of the Lansdowne Jute Mills. On these allegations, the plaintiff joined as defendants Brojendra Nath Das, Cartwright & Co., the Lansdowne Jute Mills, the Hastings Jute Mills and the Bengal National Bank. The relief he seeks is the recovery of the goods and the documents of title, or, in the alternative, the value of the goods. As regards the alternative claim, he seeks a decree for the entire sum against Brojendra Nath Das and Cartwright & Co. or proportionate sums against the other three defendants according to the value of the goods and documents in the possession of each of them. Before the trial of the suit, the Delhi and London Bank were added as defendants on the application of the Hastings Jute Mills, on the ground that they were interested in the subject-matter of the litigation. Mr. Justice Chitty has held that the suit cannot proceed on the plaint as framed, because not framed in conformity with Order II, rule 3, of the Civil Procedure Code, 1903. He has further held that the plaintiff could not successfully claim the benefit of Order I, rule 3. His view in substance is that Order I, rule 3, is limited to joinder of parties and has no application to questions of joinder of causes of action, which must be deemed to be governed exclusively by Order II, rule 3. For the solution of this, the fundamental question in this

appeal, it is necessary to examine the provisions of Orders I and II.

Order I relates to parties to suits. Order II relates to frame of suits. Consequently, at first sight, it might seem, as if the two Orders related to two distinct topics. Such a view, however, would obviously be based upon an unsubstantial distinction, because when a plaintiff frames his suit, he joins parties as defendants ordinarily because he claims to have a cause of action against them; in other words, when the legislator has to frame rules for joinder of parties and joinder of causes of action, he examines, on the two occasions, the same problem though from different standpoints. Accordingly, in a Code which is ideally arranged with due regard to logic and symmetry, one would expect to find in the chapter on joinder of causes of action provisions which accurately correspond to similar provisions in the chapter on joinder of parties. Codes, however, are rarely, if ever, accurately logical and symmetrical. It would, consequently, be unsafe to assume that because a particular rule finds a place in Order I, which treats of parties to suits, it can have no bearing on questions of misjoinder of causes of action; it is manifestly necessary that some regard at any rate must be paid to the history of the legislation on the subject [*Maharajah Ishuree Persad Narain Sing* v. *Lal Chutterput Sing* (18), *Brown* v. *Mclachlan* (19), *Kripa Sindhu Mukerjee* v. *Annada Sundari Debi* (20)]. Now it is well known that Order I, rule 1, is a reproduction of Order XVI, rule 1, of the Rules of the Supreme Court, in England, while Order I, rule 3, which corresponds to Rules of the Supreme Court, Order XVI, rule 4, is yet substantially different in phraseology therefrom. Order II, rule 3, again corresponds to Rules of the Supreme Court, Order XVIII, rule 1, but differs therefrom in an important respect. Thus as Order I, rules 1, which provides for the joinder of plaintiffs is identical with Rules of the Supreme Court, Order XVI, rule 1, it is consonant to well-established principles of statutory interpretation that we should determine the exact scope of the rule in our Code in the light of the decisions in the superior Courts in England which have explained the true construction of Rules of the Supreme Court, Order XVI, rule 1. As White, C. J., observed in *Lovelock & Lewes* v. *Malabar Timber and Saw Mills* (21), in considering the construction of a section in an Indian Act which is professedly based on an English enactment, which in fact reproduces almost word for word the language of the English enactment, we are in practice, if not in theory, bound by the decisions of the English Court of Appeal. Now, it is well known that the English rule, as it now stands, was introduced on the 26th October 1896, to meet the difficulty created by the decision of the House of Lords in *Smurthwaite* v. *Hannay* (14), to the effect that the rule as it previously stood did not relate to joinder of causes of action but applied only to joinder of parties in respect of the same cause of action. The scope of the rule was greatly extended by alteration, and it can no longer be said that the Order relates only to joinder of parties and not to joinder of causes of action. Reference may, in this connection, be made to the judgment of Bowen, L. J., in *Hannay and Co.* v. *Smurthwaite* (22), which emphasises the distinction between the expression "right to any relief" which was used in the old rule and the phrase "any right to relief" which is used in the rule now in force. The history of this alteration is explained in the case of *Oxford and Cambridge Universities* v. *George Gill* (23), which followed the decision in *Stroud* v. *Lawson* (24). That the altered rule covers joinder of parties as also causes of action must now be treated as indisputable in view of the decisions in *Bullock* v. *London General Omnibus Co.* (2), *Compania Sansinena* v. *Houldar* (1), *Markt* v. *Knight Steamship Co.* (3) and *Times Cold Storage Co.*, v. *Lowther* (4). It is further

(18) 3 M. I. A. 100 at p. 130; 6 W. R. P. C.) 27; 1 Sar. P. C. J. 245; 18 E. R. 435.

(19) (1872) 4 P. C. 543 at p. 550; 9 Moore P. C. (N. S.) 384; 42 L. J. P. C. 18; 21 W. R. 277; 17 E. R. 659.

(20) 35 C. 34; 11 C. W. N. 933; 6 C. L. J. 273 at p. 293.

(21) 18 Ind. Cas. 997; 13 M. L. T. 282.

(22) (1893) 2 Q. B. 412.

(23) (1899) 1 Ch. 55; 68 L. J. Ch. 34; 79 L. T. 338; 47 W. R. 248; 15 T. L. R. 21.

(24) (1898) 2 Q. B. 44; 67 L. J. Q. B. 718; 78 L. T. 709; 46 W. R. 626; 14 T. L. R. 421.

worthy of note that although the phraseology of Rules of the Supreme Court, Order XVI, rule 3, which relates to joinder of defendants has not been altered, its scope has recently been deemed to have been enlarged by reason of the alteration effected in Rules of the Supreme Court, Order XVI, rule 1, which treats of joinder of plaintiffs [*Compania Sansinena* v. *Houldar* (1)]. Consequently as under our Code, the rule relating to the joinder of defendants has been framed on the same lines as the altered rule relating to the joinder of plaintiffs (Order I, rules 1 and 3), there is even much stronger reason here than in England to hold that Order I, rule 3, applies to questions of joinder of parties as also joinder of causes of action. I do not feel pressed by the phrase "save as otherwise provided", which occurs in Order II, rule 3 (1). I am not prepared to read into this rule the words "in this order" after "provided," specially in view of the language used in Rules of the Supreme Court, Order XVIII, rule 1, whereon our rule is based. Nor do I feel embarrassed by the decision in *Thompson* v. *London County Council* (5), *Munday* v. *South Metropolitan Electric Light Co.* (25) and *Greenwood* v. *Greenwood* (26), which do not militate against the view that Rules of the Supreme Court, Order XVI, rules 1 and 3, relate to misjoinder of parties as also causes of action. The decision in *Thompson* v. *London County Council* (5), which overlooks the cases of *Stroud* v. *Lawson* (24) and *Oxford and Cambridge Universities* v. *George Gill* (23), was explained in *Frankenbury* v. *Great Horseless Carriage Co.* (8) and *Compania Sansinena* v. *Houldar* (1). The case is an authority only for this principle, if you have suffered a wrong, it may be that *A* is the person who has committed it, in which case he is liable, but, perhaps, you are not certain that it may not be *B* who has committed it and, if so, *B* is liable; as between *A* and *B* they are strangers to each other in the matter, and, then, because you cannot ascertain whether *A* or *B* committed the wrong, you cannot bring the action for damages against *A* and *B* jointly. The two other decisions mentioned are clearly distinguishable on their special facts. Similarly, *Gower* v. *Couldridge* (27), which followed *Sadler* v. *Great Western Ry. Co.* (28) and was explained in *Frankenburg* v. *Great Horseless Carriage Co.* (8), only illustrates the principle that if you have a cause of action against *A* and *B* for a tort X, and quite a separate cause of action against *B* for tort Y, you cannot in one action unite claims in respect of both torts X and Y against *A* and *B*. Reliance has been placed on behalf of the respondents on the decision of the House of Lords in *Sadler* v. *Great Western Railway Co.* (28) [which was applied in *Gower* v. *Couldridge* (27)] and of the Court of Appeal in *Stroud* v. *Lawson* (24), but neither case lends support to the theory that Rules of the Supreme Court Order XVI, is restricted to joinder of parties and throws no light on questions of joinder of causes of action. The matter is one essentially of substance and not of form, as Romer, L. J., observed in *Frankenburg* v. *Great Horseless Carriage Co.* (8), and I am not prepared to put a narrow construction upon the provisions of Order I. On the one hand, we have the fundamental principle that needless multiplicity of suits should be avoided, on the other hand, we have the equally essential principle that the trial of the suit should not be embarrassed by the simultaneous investigation of totally unconnected controversies. The Legislature has effected a compromise of these two principles by means of the rules embodied in Orders I and II, which may possibly overlap to some extent in their application to concrete cases. It is not the function of Court, however, to determine how far the rules are appropriate. We are bound to interpret them in their natural sense and apply them to the circumstances of each case. I hold, accordingly, that Order I, rule 1, and Order I, rule 3, apply to questions of joinder of parties as also of causes of action, and I respectfully dissent from the contrary view adopted by Davar, J., in *Umabai* v. *Bhavu Balvant* (29) and *Jankibai* v. *Shrinivas Ganesh Valsankar* (6) without examination of or reference to the

(25) (1913) 29 T. L. R. 346; 57 S. J. 427.
(26) (1909) 100 L. T. 68.
(27) (1898) 1 Q. B. 348; 67 L. J. Q. B. 251; 77 L. T. 707; 46 W. R. 214; 14 T. L. R. 165.
(28) (1896) A. C. 450; 65 L. J. Q. B. 462; 74 L. T. 561; 45 W. R. 51.
(29) 3 Ind. Cas. 165; 34 B. 358; 11 Bom. L. R. 499.

later decisions in England as to the scope and meaning of the corresponding rules in that system.

The question next arises, whether the present suit has been constituted in conformity with Order I, rule 3. The determining factors applicable here are, *first*, could the right to relief against the defendants be said to be *in respect of* or *arising out of* (expressions obviously of wider import than *relating to*) the same act or transaction, and, *secondly*, would any common question of law or fact arise, if separate suits were brought. As regards the first test, there can, in my opinion, be no doubt that the right to relief against each of the defendants is based upon the same act, namely, the alleged fraud of Brojendra Nath Das, and this is so, notwithstanding the fact that there may have been subsequent acts or transactions in which the different defendants are individually concerned and which may enable them to raise distinct defences. As regards the second test, it is clear that if different suits were instituted, at least one common question of fact would arise, namely, the exact nature of the act imputed to Brojendra Nath Das, which would have to be investigated presumably on the same evidence separately adduced in the several suits. Here, again, it is important to observe that the Code does not require that all the questions of law or fact which arise should be common to all the parties. The contention of the respondents was, in fact, based upon two fallacious assumptions, namely, first, that the rules require that each of the defendants should have been concerned in all the transactions, and secondly, that, if different suits were brought, no question would arise in which all the defendants were not interested. There is clearly no foundation whatever for either of these assumptions [*cf. Drincqbier* v. *Wood* (30)]. There is further no basis for the hypothesis, put forward at one stage on behalf of the defendants, that questions of joinder of parties and causes of action are governed by different principles according as the claim is founded on breach of contract or on tort; as Collins, M. R., observed in *Bullock* v. *London General Omnibus Co.* (2), there is no reason for such a distinction. In my opinion the case before us is completely covered by Order I, rule 3. I may add that the underlying principle of this conclusion is in exact conformity with what has been the recognised rule in this Court in two well-known classes of cases, namely, *first*, suits by reversioners for recovery of the estate of the last full owner alienated by a limited or qualified owner during her period of possession and enjoyment, and, *secondly*, suits for possession by the real owner against holders under derivative titles from a trespasser as common source. The decision in *Ishan Chunder Hazra* v. *Rameswar Mondol* (31) may be taken as representative of the former class of cases. On the other hand, the decision in *Nundo Kumar Nasker* v. *Banomali Gayan* (32), where Hill, J., refers to the instructive cases of *Hodgins* v. *Hickson* (33) and *Minet* v. *Johnson* (34), may be taken as the type of the second class of cases. I do not feel pressed by the decisions in *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (13) and *Sarala Sundari Dasi* v. *Saroda Prosad Sur* (35), which ruled that under the Code of 1882 there was no provision for joinder of distinct causes of action against distinct defendants. The Code of 1903 brings the rules on the subject in a line with the corresponding rules in England, and the object which the framers of the new Code had in view, would be completely frustrated, were the Courts to allow their effect to be qualified by reference to decisions under the Code of 1882, pronounced on provisions some of which, at any rate, have been omitted or materially altered (see for instance sections 31 and 45 of the Code of 1882).

There is no force in the contention that grave inconvenience will be caused to some of the parties as they will have to be present during the discussion of questions which specially affect others alone. The remedy for any possible inconvenience on this ground is supplied by the provisions of Order II, rule 6, which authorises the Court to order separate trials of causes of

(30) (1899) 1 Ch. 393; 68 L. J. Ch. 181; 79 L. T. 548; 47 W, R. 252; 6 Manson 76; 15 T. L. R. 18.

(31) 24 C. 831; 12 Ind. Dec. (N. S.) 1221.
(32) 29 C. 871.
(33) (1878) 12 Ir L. T. 104; 39 L. T. 644.
(34) (1891) 63 L. T. 507.
(35) 2 C. L. J. 602 at p. 606.

action which though joined in one suit cannot be conveniently tried or disposed of together. As pointed out by Scott, C. J., in *Umabai Mangeshrao* v. *Vithal Vasudeo Shetti* (7), the Court is competent to direct the successive trial of the issues separately affecting different defendants and to record interlocutory judgments thereon to be made the basis of the final judgment at the conclusion of the trial of the whole case.

In my opinion, the suit as framed is not open to objection on the ground of misjoinder of parties and causes of action and should consequently be tried on the merits. I agree that the appeal must be allowed with costs and the order of Mr. Justice Chitty reversed.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 481 OF 1914.

May 22, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT, and Mr. Justice Walmsley.

NAURANG SINGH—DEFENDANT NO. 2—APPELLANT

versus

JANARDAN KISHORE LAL SINGH DEO AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 111 (g)—Lease—Non-payment of rent—Forfeiture—Ejectment, suit for—Cause of action.

Where the rights and obligations of the parties to a lease are regulated by section 111 (*g*) of the Transfer of Property Act, there is no determination of the lease by a forfeiture immediately on breach of a covenant, but the lessor is required to do some act thereafter showing his intention to determine the lease. [p. 953, col. 2.]

The act, however, need not be a formal notice to quit, and may be a demand for possession, oral or written; what is essential is an overt act which intimates to the tenant the intention of the landlord to determine the lease. [p. 954, col. 1.]

The institution of a suit for ejectment of the tenant cannot be regarded as the requisite act showing the intention of the landlord to determine the lease within the meaning of section 111 (*g*). [p. 954, col. 1.]

On non-payment of rent by the lessee the landlord brought a suit for his ejectment on the ground that under the terms of the lease the tenancy was forfeited in consequence of the non-payment:

Held, that a suit for ejectment was not maintainable for want of a cause of action, as it was not even alleged in the plaint that before the institution of the suit the plaintiff had, on the failure of the tenant to pay rent, done any act showing his intention to determine the lease. [p. 954, col. 1.]

Appeal against the decree of the Subordinate Judge, second Court, Burdwan, dated the 19th June 1914.

Babus *Bepin Behari Ghose* and *Gobinda Chandra Dey Roy*, for the Appellant.

Babu *Ram Charan Mitra*, for the Respondents.

JUDGMENT.—This is an appeal by the defendant in a suit for arrears of rent of a colliery held by him under the plaintiffs on the basis of a lease, dated the 25th September 1901. The plaintiffs seek to recover their dues in respect of the years 1313 to 1317 B. S., and pray for ejectment of the defendant on the ground that, according to the terms of the contract between the parties, the lease had been forfeited by non-payment of rent. The Subordinate Judge has decreed the suit. His decision has been assailed in this Court on two grounds, namely, *first*, that a larger sum has been allowed to the plaintiffs than what is really due to them, and, *secondly*, that, on the face of the plaint, the claim for ejectment cannot be sustained.

The first point is sought to be established in two ways, namely, first, that credit should have been allowed for a sum of Rs. 1,500 and secondly, that abatement of rent should have been allowed in respect of seven instead of six *bighas*. There is no force in either of these contentions. Upon the facts found by the Subordinate Judge, it is plain that the sum of Rs. 1,500 paid by the defendant had been rightly appropriated by the plaintiffs in satisfaction of their dues for an earlier period. As regards the amount of abatement legitimately allowable, we see no reason to differ from the Subordinate Judge as to the quantity of land acquired by the Railway Company. In our opinion, the amount decreed by the Subordinate Judge is recoverable by the plaintiffs from the defendant.

The second point raises an important question of law and requires careful consideration. The lease contains the following clause:—

"We will pay the whole amount of the rent, year by year, by the 30 h of *Chaita*. If by non-payment of rent, we keep a *curi* thereof unpaid, you will have power, in the

beginning of the month of *Bysack* of the next following year, to take *khas* possession of the whole land lying within the undermentioned boundaries, including the coal mine thereon made by us, by your own authority, and settle the same with another tenant and realise the amount of arrears with interest from our properties, moveable and immoveable, standing in our own names or *benam* and from our persons."

The plaintiffs contend that as default was made in the payment of rent the tenancy has been forfeited and they have become entitled to possession of the property demised. The Subordinate Judge has given effect to this contention. We are of opinion that his decision overlooks more than one elementary principle. In the first place, no decree for ejectment can be made for a non-payment of the arrears of four years. It is well settled that if rent is claimed for two consecutive years, ejectment cannot be decreed on the ground of forfeiture incurred at the end of the first year, because the very fact that rent is claimed for the second year, shows conclusively that the forfeiture, if any, incurred at the end of the first year has been waived by the landlord. Illustrations of this principle will be found in the cases of *Jogeshuri Chowdhain* v. *Mahomed Ebrahim* (1), *Sitanath Midda* v. *Basudev Midda* (2), *Kalanand Singh* v. *Gunpat Singh* (3), *Raj Mohan De* v. *Mati Lal Saha* (4). In the second place, a decree for ejectment cannot be made in this case, even on account of default of payment of rent of the fourth year, as, on the face of the plaint, there was no completed forfeiture of the tenancy at the date of the institution of the suit. The statutory provision on the subject is embodied in section 111, clause (*g*), of the Transfer of Property Act, and, may, for the purposes of this case, be enunciated in the following terms: "a lease of immoveable property determines by forfeiture, in case the lessee breaks an express condition which provides that on breach thereof the lessor may re enter or the lease shall become void; and the *lessor or his transferee does some act showing his intention to determine the lease.*" This makes it plain that where the rights and obligations of the parties are regulated by section 111 (*g*) of the Transfer of Property Act, there is no determination of a lease by forfeiture immediately on breach of covenant, but the lessor is required to do some act thereafter, showing his intention to determine the lease; in other words, the breach must be followed by an overt act on the part of the lessor before the tenancy can be deemed to have determined in the eye of the law. This view was adopted by this Court in the case of *Anandamoyee* v. *Lakhi Chandra Moitra* (5), which was accepted as a correct exposition of the law in *Qadir Bakhsh* v. *Prag Narain* (6). The distinction as regards the question of forfeiture, between cases governed by the Transfer of Property Act and by other Statutes, has been repeatedly pointed out in Madras, where it has been surmised that the requirements of a further act is probably a relic of the antiquated technicality of the Common Law which required the formality of re-entry by the lessor of leased lands before the lease could be determined for breach of covenant [Warvelle on Ejectment, section 47, Newell on Ejectment, Chapter VIII, section 17, *Venkataramana Bhatta* v *Gunduraya* (7), *Padmanabaya* v. *Ranga* (8), *Chengiah* v. *Damara Kumara Thimma* (9), *Korapalu* v. *Narayana* (10), *Ramakrishna Mallay* v *Baburaya* (11), *Vidyapurna Thirtha Swamiar* v. *Ringappayya* (12), *Sivarama Aiyar* v. *Alagappa Chetty* (13)]. The requirements of the Transfer of Property Act are perfectly plain and its express provisions cannot be ignored or treated as surplusage, whatever may have been the history of the development of the law on the subject in England [*Goodright* v. *Cator* (14), *Evans* v.

(1) 14 C. 33; 7 Ind. Dec. (N. s.) 23.
(2) 2 C. L. J. 540.
(3) 11 Ind. Cas. 974; 16 C. W. N. 104.
(4) 33 Ind. Cas. 331; 22 C. L. J. 546.
(5) 33 C. 339; 3 C. L. J. 274.
(6) 14 Ind. Cas. 747; 9 A. L. J. 794.
(7) 31 M. 403; 4 M. L. T. 221.
(8) 6 Ind. Cas. 447; 34 M. 161; 20 M. L. J. 930; 8 M. L. T. 110; (1910) M. W. N. 462.
(9) 15 Ind. Cas. 445; 21 M. L. J. 263.
(10) 20 Ind. Cas. 930; 38 M. 445; 25 M. L. J. 315; (1913) M. W. N. 655.
(11) 17 Ind. Cas. 947; 23 M. L. J. 715; 12 M. L. T. 656.
(12) 21 Ind. Cas. 405; 25 M. L. J. 486; 14 M. L. T. 344; (1913) M. W. N. 901.
(13) 31 Ind. Cas. 211; (1915) M. W. N. 845; 2 L. W. 946.
(14) (1780) 2 Dougl. 477; 99 E. R. 304.

Davis (15), *Jones* v. *Carter* (16), *Fenn* v. *Smart* (17), *Baylis* v. *Le Gros* (18), *Roberts* v. *Davey* (19), *Serjeant* v. *Nash* (20), *Moore* v. *Ullcoats Mining Co. Ltd.* (21), *Grimwood* v. *Moss* (22)]. It is further obvious that the institution of the suit for ejectment cannot be rightly regarded as the requisite act to show the intention of the landlord to determine the lease within the meaning of section 111, clause (*g*). The forfeiture must be completed and the lease determined before the commencement of the action for ejectment, for there must be a cause of action in existence antecedent to the suit [*Deo Nandan Pershad* v. *Megha Mahton* (23)]. The act, however, need not be a formal notice to quit and may be a demand for possession, oral or written; what is essential is an overt act, which intimates to the tenant the intention of the landlord to determine the lease. In the case before us, the plaint does not even allege such an act on the part of the landlords. Consequently there is no escape from the position that the plaint does not disclose any cause of action for the claim in ejectment.

The result is that this appeal is allowed in part and the decree, in so far as it entitles the plaintiffs to eject the defendant, is cancelled; but it will stand in all other respects. Each party will pay his own costs in this Court.

Appeal partly allowed.

(15) (1879) 10 Ch. D. 747 at p. 763; 48 L. J. Ch. 223 39 L. T. 391; 27 W. R. 285.

(16) (1846) 15 M. & W. 718; 71 R. R. 800; 10 Jur. 33; 153 E. R. 1040

(17) (1810) 12 East 444; 104 E. R. 173.

(18) (858) 4 C. B. (N s.) 537; 4 Jur. (N. s.) 513; 140 E. R. 1201; 31 L T. (o. s.) 215; 114 R. R. 840.

(19 (1833) 4 B. & Ad. 664; 1 N. & M. 443; 2 L. J. K. B. 141; 110 E. R 606; 38 R. R. 348.

(20) (1903) 2 K. B. 304; 72 L J. K. B 630; 89 L. T. 112; 19 T. L. R. 510.

(21) (1908) 1 Ch. 575; 77 L. J. Ch. 282; 97 L. T. 845; 24 T. L. R. 54.

(22) (1872) 7 C. P. 360 at 364; 41 L. J. C. P. 239; 27 L. T. 268; 20 W. R. 972.

(23) 34 C. 57 at p. 63; 5 C. L. J. 181; 11 C. W. N. 225.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 120 OF 1916.

November 22, 1916.

Present:—Mr. Mitra, A. J. C.

BALWANTRAO SON OF SONBA—DEFENDANT—APPELLANT

versus

RAMRAO SON OF KESHORAO—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 70, sub-cl. (5)—Unpartitioned village—Ordinary tenant—Deed executed by tenant for consideration in favour of one of three lambardars—Sale—Surrender—*Registration prohibited—Effect of such registration, whether effected through fraud or ignorance—Trespass.*

An ordinary tenant in an unpartitioned village executed for consideration a registered document, described as a *surrender*, in favour of the plaintiff, who had one-third share in the village and was one of the three *lambardars* each of whom received one-third of the rent from each tenant. The defendant was in possession with the consent of the remaining two *lambardars*. The plaintiff sued in ejectment:

Held, (1) that the document purporting to be a *surrender* must be deemed to be a deed of *sale* inasmuch as the plaintiff, though one of the several co-owners, did not represent and act as agent on behalf of the entire proprietary body; [p. 955, col. 1.]

Ganpatsao v. *Pandurang*, 33 Ind. Cas. 758; 12 N. L. R. 24; *Ramdayal* v. *Gulabia Bai*, 4 N. L. R. 120, relied upon.

(2) that the plaintiff could not rely upon the *sale*-deed in support of his claim for possession, inasmuch as the registration of the *sale*-deed was forbidden by section 70, sub-clause (5), of the Central Provinces Tenancy Act; [p. 955, col. 1.]

(3) that although the document purported to be a *surrender*, the parties to it could not evade the mandatory provisions of the law by giving the transaction the appearance of one not prohibited by such provisions, whether their conduct was influenced by fraud or ignorance; [p 955, col. 1]

Case-law discussed and reviewed.

(4) that as the defendant was in possession as a trespasser to the extent of the plaintiff's share, the latter was entitled to a decree for joint possession to the extent of that share. [p. 956, col. 1]

Second appeal against the decree of the Divisional Judge, Nagpur, in Civil Appeal No. 54 of 1915, dated the 11th November 1915, confirming that of the Junior Sub-Judge, Wardha, dated the 29th March 1915.

Mr. *A. C. Roy*, for the Appellant.

Dr. *H. S. Gour* and Mr. *M. V. Abhyankar*, for the Respondent.

JUDGMENT.—Daulat, an ordinary tenant, died leaving his mother as his sole heir. On the 18th March 1914 he executed a document described as a deed of surrender in plaintiff's favour for consideration of

Rs. 3,000. The plaintiff has one-third share in the village and is one of three *lambardars*. The defendant had set up in the lower Court a prior transfer which, it is now admitted, has not been proved. He is, however, in possession with the consent of the two remaining *lambardars*. The plaintiff sues in ejectment. The defendant has been in possession as sub-tenant. There has been no partition of the village but each of the *lambardars* recovers one-third of the rent from each tenant. Courts below have decreed plaintiff's claim. Defendant files the second appeal. The first point for consideration is whether there was a surrender or sale in favour of plaintiff. The plaintiff did not purport to act on behalf of the proprietary body and the fact of his being one of three *lambardars* in an undivided village does not entitle him to claim to be the agent of the proprietary body [*Ganpatsao* v. *Pandurang* (1)]. The plaintiff, therefore, being one of the several co-owners not representing the entire proprietary body, the transaction must be deemed to be a sale and not a surrender. [*Ramdayal* v. *Gulabia Bai* (2)]. The registration of the instrument is forbidden by section 70, sub-clause 5, of the Central Provinces Tenancy Act. Although the document purports to be a surrender, the parties cannot evade the provisions of the law by giving a transaction the appearance of one not prohibited by that section, whether such conduct is influenced by fraud or ignorance on the part of the parties. I hold that the document was registered in contravention of the terms of section 70, sub-clause 5, of the Tenancy Act. The appellant relies on the ruling of this Court in *Daji Vithal Dhok* v. *Moreshwar Venkatesh Gharpurey* (3), while the respondent relies upon *Ganeshdas* v. *Shankar* (4). In the last cited case Stanyon, A. J. C., was dealing with a case of improper registration due to inadvertence on the part of the Registering Officer. In the case before me the improper registration was due to a misdescription on the part of the parties to the instrument. In *Ganeshdas* v. *Shankar* (4) a *malguzar* who had a right to avoid the transaction was suing a transferee in possession and it was held that his remedy lay in a revenue case. In the present case the defendant is not entitled to object to the transfer in favour of the plaintiff in a Revenue Court. I am fortified in this view by the judgment of the learned Judicial Commissioner in the second appeal of *Nilkanth* v. *Ghulya*, Second Appeal No. 143 of 1912. I entirely agree with the following observations made in that judgment: "It is further urged on behalf of the appellants that the authority of *Daji Vithal Dhok* v. *Moreshwar Venkatesh Gharpurey* (3) has been weakened by the decision in *Ganeshdas* v. *Shankar* (4). In the latter case, however, the plaintiffs were the landlords of the mortgaged occupancy holdings and as such entitled to resort to the remedy provided by section 47 of the Tenancy Act. The plaintiffs in this case have not that remedy open to them. If the latter decision is to be construed as laying down that the prohibition in section 46 of the Act cannot be relied on in a Civil Court by a person to whom the remedy under section 47 is not open, then I must with all respect decline to follow it. I agree with the view taken by Ismay, J. C., in *Bala Sahib* v. *Jatya*, Second Appeal No. 62 of 1901, that the effect of such prohibitions as those contained in section 45 (3), Central Provinces Tenancy Act, 1898 and in section 85 (2), Bengal Tenancy Act, 1885, is to control the provision of the Registration Act. The learned J. C. referred to *Jawanmal Jitmal* v. *Muktabai* (5), in which it was held that a sale-deed registered under the Registration Act but not executed according to the provisions of section 56, Dekkhan Agriculturists' Relief Act, 1879, was inadmissible and inoperative. Starting then with the position that a prohibition in the Tenancy Act is on the same footing as one in the Registration Act, I hold that the registration of the mortgage sued on in the present case is invalid, the position being similar to that in *Razi-un-nissa* v. *Sabir Husain* (6), where the prohibition of the re-

(1) 33 Ind. Cas. 758; 12 N. L. R. 24.
(2) 4 N. L. R. 120.
(3) 1 N. L. R. 112.
(4) 13 Ind. Cas. 909; 8 N. L. R. 22.
(5) 14 B. 516; 7 Ind. Dec. (N. S.) 808.
(6) 26 A. 57; A. W. N. (1903) 195.

gistration in section 35 of the Registration Act, 1877, was ignored, and much more unfavourably to the appellant than in *Mujib un-nissa* v. *Abdur Rahim* (7), where the less mandatory provisions of section 32, *ibid.*, was relied on by their Lordships of the Privy Council."

The plaintiff is seeking to enforce the transfer not on the basis of prior possession, but by virtue of a sale-deed the registration of which was obtained in violation of the mandatory terms of section 70, sub-clause 5, of the Tenancy Act. It is difficult to see how I can solemnly decree the plaintiff's claim with costs, knowing full well that the Revenue Officer, on an application made in this behalf, will set aside the sale-deed. I doubt if this was meant to be laid down by the judgment in *Ganeshdas* v. *Shankar* (4). The conclusion to which I have come is that the plaintiff cannot rely upon the sale deed in support of his claim for possession. But as the defendant is wrongfully in possession as a trespasser, the plaintiff's right to claim joint possession to the extent of one-third share is not seriously disputed, *Daryao Shah Gond* v. *Tiran Shah Gond* (8). The result is that the appeal succeeds. The decree of the Courts below will be modified by giving the plaintiff joint possession of the holding to the extent of one-third share. As the point was not raised in the Courts below nor specifically in this Court, each party will bear his own costs throughout.

Appeal allowed;
Decree modified.

(7) 23 A. 233; 5 C. W. N. 177; 28 I. A. 15; 11 M. L. J. 58; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829.
(8) 2 N. L. R. 45.

CALCUTTA HIGH COURT.
RULE *Nisi* NO. 7 OF 1917.
April 25, 1917.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.
DHARANIDHAR ADITYA AND OTHERS—
PETITIONERS
versus
HEMANGA CHANDRA JANA—
OPPOSITE PARTY.

Decree, ex parte set aside by suit, effect of—Original suit, revival of.

When an *ex parte* decree is set aside by a suit, its effect is to relegate the parties to the position they previously occupied, with the result that the suit which terminated in the *ex parte* decree is revived and must be tried by the Court, if the plaintiff desires to proceed with it. [p. 956, col. 2; p. 957, col. 1.]

Kshetra Mohan v. *Man Gobinda Pal*, 6 Ind. Cas. 13; 14 C. W. N. 558, dissented from.

Khajooroonissa v. *Rowshan Jehan*, 2 C. 184; 3 I. A. 291; 26 W. R. 36; 1 Ind. Dec. (N. S.) 412, followed.

Rule against the order of the Munsif, first Court, Midnapore, in Miscellaneous Suit No. 151 of 1916.

Babu *Debendra Nath Mondal*, for the Petitioner.

Babu *Amarendra Nath Bose*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to consider the propriety of an order whereby the Court below has refused to revive a suit for arrears of rent and to try it in accordance with law. The suit was decreed *ex parte* on the 15th December 1914. The defendant in the suit was an infant represented by his mother as guardian *ad litem*. After the *ex parte* decree had been made, a suit was instituted on behalf of the infant by another guardian to set aside the *ex parte* decree on the ground that the infant was not properly represented and that the decree in fact had been obtained by fraud. This suit was decreed on the 30th June 1916 and the *ex parte* decree was set aside. On the 11th September 1916, the plaintiff applied to the Court to revive the original suit and to try it in accordance with law. The Court refused the application on the 20th November 1916. In support of this order, reliance has been placed upon the decision in *Kshetra Mohan* v. *Man Gobinda Pal* (1). It is not disputed, however, that this decision is contrary to the view taken by the Judicial Committee, in *Khajooroonissa* v. *Rowshan Jehan* (2) which was not brought to the notice of the Court. The Judicial Committee has ruled that when a consent decree was set aside, the result was to relegate the parties to the position they previously occupied, with the result that the suit which had terminated in the consent decree had to be retried when the

(1) 6 Ind. Cas. 13; 14 C. W. N. 558.
(2) 2 C. 184; 3 I. A. 291; 26 W. R. 36; 1 Ind. Dec. (N. S.) 412.

consent decree was vacated. The same course was followed by the this Court in the case of *Raj Kumar Roy* v. *Hara Krishna Chakravarty* (3), where it was pointed out that a similar view had been adopted by the House of Lords in *Neale* v. *Gordon Lennox* (4) [*Bibee Soloman* v. *Abdool Azeez* (5), *Sharat Chunder Ghose* v. *Kartik Chunder Mitter* (6), *Sarbesh Chandra Basu* v. *Hari Dayal Singh* (7), *Chatterjee Brahmin* v. *Durgadutt Agarwalia* (8), *Fateh Chand* v. *Narsingh Das* (9)]. No doubt, in the present case, the suit terminated in an *ex parte* decree and not a consent decree. That, however, makes no difference in point of principle. The suit was terminated by an *ex parte* decree. That decree has been set aside by a Court of competent jurisdiction. The effect is that the decree whereby the suit was terminated stands cancelled, and the suit remains on the file of the Court as an undisposed of suit. In these circumstances, it is incumbent upon the Court to proceed with the trial of the suit. If the plaintiff does not wish to proceed with the trial of the suit, the Court must dismiss it. But if the plaintiff desires to proceed with the suit, it must be tried in accordance with law.

The result is that the Rule is made absolute and the order of the Court below discharged. The suit for rent will stand revived and will now be tried in accordance with law. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at one gold *mohur*.

Rule made absolute.

(3) 10 Ind. Cas. 355; 15 C. L. J. 217.

(4) (1902) A. C. 465; 71 L. J. K. B. 939; 87 L. T. 341; 51 W. R. 140; 66 J. P. 757; 18 T. L. R. 791.

(5) 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446.

(6) 9 C. 810; 12 C. L. R. 453; 4 Ind. Dec. (N. S.) 1188.

(7) 5 Ind. Cas. 236; 11 C. L. J. 346; 14 C. W. N. 451.

(8) 34 Ind. Cas. 394; 23 C. L. J. 436; 20 C. W. N. 943.

(9) 16 Ind. Cas. 988; 22 C. L. J. 383.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 14, 1916.

Present:—The Lord Chancellor, Lord Atkinson, Lord Wrenbury and Mr. Ameer Ali.

NAROTTAM DAS, SINCE DECEASED NOW REPRESENTED BY MANU BIBI—PLAINTIFF—APPELLANT

versus

KEDAR NATH SAMANTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific performance, suit for—Appeal—Pleas of inadequacy of consideration and ignorance of pardanishin *vendor, whether can be raised—Consideration, payment of—Evidence.*

Where the widow of a deceased Hindu and his executor entered into a contract with the plaintiff for the sale to him of certain lands but subsequently sold the lands to another and the plaintiff brought a suit for specific performance, in which the defendants failed to take the pleas of inadequacy of consideration and the ignorance of the *pardanashin* vendor:

Held, that it was not open to vendors to raise the pleas for the first time in appeal. [p. 958, col. 2.]

Where the question is whether the plaintiff paid a certain amount to the defendant and it appears that under the contract for sale he was contractually bound to advance the same to the defendant, the consideration "whether he would be willing to advance so large a sum" is entirely out of place. [p. 959, col. 1.]

Appeal from the decree and judgment of the Calcutta High Court (Coxe and Teunon, JJ.), dated the 18th August 1911 and reported as 13 Ind. Cas. 879, reversing those of the Subordinate Judge, Hooghly.

Mr. *A. M. Dunne* for the Appellant.

Mr. *Le Gruyther*, *K. C.*, and Sir *W. Garth*, for the Respondent Samanta.

JUDGMENT.

LORD WRENBURY.—The appellant-plaintiff sues for specific performance of a *bainapatra*, or contract for sale, dated the 19th February 1905. The persons named respondents to the appeal are his vendors and two persons who were subsequent purchasers under a *kobala*, dated the 1st April 1905 and registered the 3rd April 1905, purporting to convey the property to the respondent Samanta, who was *benami* for his co respondent Uttam Charan Ghosh. A suit by the vendors to set aside the *kobala* on the ground of duress and fraud has failed, but upon this appeal their Lordships are not concerned with the merits or demerits of the purchasers under the *kobala*. Samanta, who alone appears, admits

that, if as between the appellant-plaintiff and his vendors the plaintiff is entitled to specific performance, he is equally entitled as against the second purchasers, that the second purchasers cannot rely on the registration of the *kobala*, and that they took with notice of the plaintiff's earlier contract. The existence and validity of the plaintiff's contract is again not in dispute. The vendors do not appear on the appeal. The only respondent who contests the plaintiff's right to judgment is Samanta. As already stated, he was *benami* for Ghosh. Ghosh has not filed a case and does not appear. The appellant's Counsel put forward the contention that under these circumstances the appeal must, in any case, succeed. Their Lordships do not think it necessary to consider this contention further, inasmuch as in their judgment the appeal succeeds on the merits.

The *bainapatra* of the 19th February 1905 was an agreement for the sale by Srimati Khetramoni Dasi, widow of Madhab Chandra Ghose, and Nibaran Chandra Banerji, his executor, of certain *maurasi mokarrari* lands, in consideration of Rs. 2,500 of which Rs. 51 were paid as earnest money; and it was provided that if the vendors should require money before the execution and registration of the *kobala*, the plaintiff would pay them the said money upon their asking for the same and would take from them separate receipts for the same.

As regards the pleadings, it suffices to state (*a*) that one matter in issue was whether, as the plaintiff alleged, the vendors on the 20th February 1905—representing that they were in need of money for expenses on account of litigation then pending—asked for, and the plaintiff paid them, Rs. 1,500 out of the Rs. 2,500 consideration for the sale, in compliance with his obligation under the *bainapatra* to pay them money on request; and (*b*) that it is not pleaded that the widow was a *pardanashin* woman, and no issue was raised upon that subject, or as to her requiring or not having had advice or assistance of friends.

The Subordinate Judge found all the facts, including those as to the payment of the Rs 1,500, in favour of the plaintiff, and gave judgment for the plaintiff with costs.

The High Court reversed that decision and dismissed the suit. The plaintiff appeals. The only question for their Lordships' decision is whether as between the plaintiff and his vendors the plaintiff is entitled to specific performance.

The judgment of the High Court dwells upon three questions, *first*, whether the Rs. 1,500 were paid—upon this, one of the two Judges, differing from the Subordinate Judge on the question of fact, finds that it was not, assigning reasons with which their Lordships will deal presently. The other of the two Judges agrees in this, for at the conclusion of his judgment he says that the allegation that the plaintiff has paid the bulk of the purchase-money is false. *Secondly*, whether it was open to the present respondent to raise the question of *pardanashin* woman. The one Judge holds that it was not, the other that it was open. *Thirdly*, whether Rs. 2,500 was a fair price. The one Judge finds the evidence as to value too indefinite to justify a decided conclusion that the consideration was inadequate, the other holds that it was grossly inadequate. *Fourthly* (reproducing the first), both Judges hold that the false plea (as they find it to be that the plaintiff had paid the Rs. 1,500 disentitles him to relief.

The third of these their Lordships at once put aside. There was no issue of undervalue at the trial. The Subordinate Judge states in his judgment what the issues tried were—this is not among them and the Subordinate Judge, as might be expected in such circumstances, says nothing about it. The respondent could not subsequently raise and succeed upon that contention.

The second for the like reason is not open. The respondent had not suggested it in the pleadings, the issues, or the grounds of appeal to the High Court. Their Lordships agree with that which Coxe, J., said upon this point.

The only remaining question is as to the payment of the Rs. 1,500. As to this, Coxe, J., says:—

"But with regard to the payment of the sum of Rs. 1,500 out of the consideration, we are not prepared to agree with the learned Subordinate Judge. This payment is not supported by

the evidence of Naresh Mitra, and it appears to us quite irreconcilable with the plaintiff's deposition in the criminal case which followed after the execution of the defendant's *kobala*. It is not likely that the plaintiff would be willing to advance so large a sum before the execution of the conveyance, and on the whole evidence we feel no doubt that this money was never paid."

Their Lordships are unable to agree with this view. The learned Judge appears to have overlooked the fact that, under the contract, the plaintiff was contractually bound to advance if asked to do so, and that a consideration "whether he would be willing to advance so large a sum" is out of place. The evidence upon which the Subordinate Judge acted is quite plain, and there is, in fact, no evidence the other way. Naresh Mitra, the Pleader, speaks to it, and says he sent his clerk, with the vendors, to see the plaintiff about obtaining the money. The clerk, Chakravarti, says that the money was paid in his presence. The entries in the plaintiff's *khata* book bear out the story. The Subordinate Judge found, and their Lordships find, no reason to doubt the genuineness of these entries. Their Lordships cannot find in the plaintiff's deposition in the criminal case anything irreconcilable. The plaintiff's deposition made before the Deputy Magistrate on the 7th September 1905 does not, in their Lordships' opinion, support the view that it is irreconcilable with the payment of the Rs. 1,500. The deposition was taken in proceedings in which the real issue related to the making of the contract, and not to the question of how much of the consideration had been paid. The plaintiff speaks as to the payment of Rs. 50 and says that this was for "executing a sale of the house and some lands," and adds that the receipt is contained in the *bainapatra* - all this being strictly in accordance with the facts, except that the payment was Rs. 51, not Rs. 50. He continues that this money has not been returned and is still on deposit, and adds: "I have not got back yet the Rs. 50 advanced. I do not wish to realise it by Court." It is chiefly on this statement that the assumption is drawn that the Rs. 1,500 could not have been advanced, but this conclusion depends on regarding the answer already quoted as meaning that the Rs. 50 was the total advance, and not only is there no statement to this effect, but there is nothing to show that any question was asked to which such an answer was required. He was asked nothing about the Rs. 1,500.

For these reasons their Lordships find themselves unable to agree with the conclusions of the High Court. They will humbly advise His Majesty that this appeal ought to be allowed, the judgment and decree of the High Court set aside and the decree of the Subordinate Judge restored, with costs against the respondent Samanta in the High Court and before this Board.

Appeal allowed.

Solicitors for the Appellant : Messrs. *Theodore Bell and Co.*

Solicitors for the Respondent : Messrs. *Watkins & Hunter.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 100 AND 101 OF 1914.

April 23, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KAILAS CHANDRA DUTTA AND OTHERS—DEFENDANTS – APPELLANTS

versus

PADMA KISHORE ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal, second—Civil Procedure Code (Act V of 1908), s. 100 (1) (a), (b)—*Appeal, second—Custom or usage, existence of, whether question of fact or law—Evidence.*

A decision that an alleged custom is not established by the evidence on the record is a decision on a question of fact, with which the High Court cannot interfere in second appeal. [p. 961, col. 2.]

But although the question of the existence of an alleged custom is a question of fact, the decision is liable to attack in second appeal on the ground that irrelevant evidence has been received or that relevant evidence has been excluded, or that there is no evidence of the alleged custom, or that the finding as to the existence of the custom is based on legally insufficient evidence, or that the facts found do not constitute evidence of the alleged custom or that in the determination of the question in controversy legal principles or tests have been erroneously applied, *e. g.*, that the Court has not correctly appreciated the essential attributes of a custom or has overlooked the distinction between a custom and a usage. [p. 962, col. 2; p. 963 col. 1.]

KAILAS CHANDRA DUTTA *v.* PADMA KISHORE ROY.

The question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage or whether a custom is reasonable and valid, is a question of law, which may be discussed in second appeal. But the mere question of the sufficiency of the evidence adduced to establish a custom is not a ground of second appeal. [p 963, col. 1.]

Under section 100 (1) (*a*), (*b*),Civil Procedure Code, the High Court is not entitled in second appeal to determine whether the evidence of the existence of an alleged usage is or is not credible, though it is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law. [p. 963, cols. 1 & 2.]

Though the question whether a given state of facts establishes a binding custom or usage is a question of law, the question whether such a state of facts has been proved by evidence is a question of fact. [p. 963, col. 2.]

Letters Patent Appeals against the decrees of Mr. Justice D. Chatterjee in Appeal from Appellate Decrees Nos. 4155 and 4156 of 1910.

FACTS.—Plaintiffs-landlords brought these suits for recovery of possession, on the ground of non-transferability of an occupancy holding belonging to one Ramjoy Pal which had been purchased by defendants 1st party from Hara Sundari, daughter of Ramjoy. Defendants 1st party alleged that the *jote* did not belong to Ramjoy but to Joytara, wife of Ramjoy, as her *stridhan* and that on her death Hara Sundari succeeded to the same and afterwards she sold it to them. Defendants 2nd party alleged that the *jote* belonged to Ramjoy and on his death it devolved on Joytara, his widow, and that Hara Sundari being a childless widow could not succeed to the same and that they purchased the *jote* from the next reversioners, Durga Charan and Purna Chandra Pal, and obtained recognition from the landlords but subsequently surrendered the lands, and thus they supported the case of the plaintiffs-landlords.

The first Court held that the *jote* belonged to Ramjoy and not to Joytara and that there was no custom of transferability of *jote* rights in the *mahal* which could be said to have grown up and that the plaintiffs were entitled to succeed.

On appeal the lower Appellate Court held that the disputed *jote* was the *stridhan* of Joytora and on her death Hara Sundari, her daughter, succeeded to the same and the defendants 1st party being unauthorised transferees could not resist the suit. On the issue as to transferability the lower Appellate Court did not uphold the contention of the defendants that in *khas mahal* lands (the disputed holding being situated in a *khas mahal*) the usage of transferability prevailed, but on the contrary held that there was no sufficient evidence on the point and on the whole the said Court agreed with the first Court in its opinion that the evidence was not sufficient or conclusive to enable the Court to hold that occupancy rights were transferable by usage in the quarter in which the disputed land was situate.

On second appeal Mr. Justice D. Chatterjee held that the appeal was concluded by the findings of fact arrived at by the lower Appellate Court and dismissed it with costs.

Against this decision an appeal was preferred under section 15 of the Letters Patent.

Dr. *Jadunath Kanjilal* (with him Babus *Birendra Chandra Das* and *Jogendra Kumar De*), contended on behalf of the appellants that the High Court was competent to go into the evidence of custom of transferability adduced in this case, in order to arrive at a conclusion whether that evidence was sufficient to establish the custom. Evidence on the record was amply sufficient to prove the custom. It ought to have done so and examined the evidence for the purpose of seeing whether the inference as to non-existence of the custom would legally follow from that evidence. In support of his arguments he cited *Vishnu* v. *Krishnan* (1), *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (2), *Bhogirath Chandra Mandal* v. *Sital Chandra Sarkar* (3), *Sreemutty Kurani Dassi* v. *Sajoni Kant Singh* (4). And it was also submitted that one of the plaintiffs made admissions in course of his deposition regarding the usual rate of *nazarana* for recognition. That admission went to prove a modified custom of transferability, See *Sekh Chand* v. *Romoni Mohan Roy* (5).

Babu *Upendra Kumar Roy*, for the Respondents, was not called upon.

(1) 7 M. 3; 2 Ind. Dec. (N. S.) 588.
(2) 29 M. 24; 16 M. L. J. 8.
(3) 17 Ind. Cas. 15; 16 C. W. N. 955.
(4) 12 C. W. N. 539.
(5) 17 Ind. Cas. 603; 17 C. W. N. 1105.

JUDGMENT.

MOOKERJEE, J.—These appeals have been preferred, under clause 15 of the Letters Patent, against the judgments of Mr. Justice Digambar Chatterjee in two suits for recovery of possession of land. The plaintiffs alleged that the lands in dispute constituted non-transferable occupancy holdings and yet the tenants had transferred them to the defendants. The plaintiffs consequently prayed that the defendants might be ejected as trespassers. The defendants contended that the holdings were transferable by custom and local usage. Thereupon an issue was raised in these terms: "Whether *raiyati* lands are transferable by usage and custom without the consent of the landlord." The Court of first instance ruled, on the authority of the decision in *Peary Mohan Mukerjee* v. *Jote Kumar Mukerjee* (6), that to prove a custom or usage that occupancy holdings are transferable in any locality, it is not sufficient to show simply that such holdings are sold in the village or neighbouring villages, as the essence of usage of transferability is that transfers made to the knowledge of but without the consent of the landlord are valid and must be recognised by him. The Court examined the evidence from this point of view and came to the conclusion that it was quite insufficient to establish the alleged custom or usage. The Court held expressly that the evidence showed that the names of transferees were not recorded in the office of the landlord unless a bonus was paid and that even when bonus was offered by the transferee to the landlord, the latter had the option either to accept or refuse the same. In this view the Court decreed the suits. Upon appeal by the defendants, the Subordinate Judge confirmed the findings of the Trial Court and held that the evidence did not go to show that occupancy holdings were transferable by custom or usage. With reference to instances of transfer adduced by the defendants, the Subordinate Judge observed that, as ruled in the case of *Rajendra Kishore Adhikari* v. *Chandra Nath Dutt* (7), a growing usage of transferability was of no effect against the landlord and that the usage to be effective must have already grown up [*Buzlul Karim* v. *Satish Chandra* (8)]. In this view, the Subordinate Judge dismissed the appeals. On second appeal to this Court, Mr. Justice Digambar Chatterjee has held that the appeals were concluded by the findings of fact arrived at by the lower Appellate Court. On the present appeals, Dr. Jadu Nath Kanjilal has argued that the evidence on the record is sufficient to establish the existence of the alleged custom or usage of transferability, and he has invited us to read the whole of the evidence on the record. In support of the course we have been asked to adopt, reference has been made to the decisions in *Vishnu* v. *Krishnan* (1) and *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (2).

We have the authority of the Judicial Committee for the proposition that a decision that an alleged custom is not established by the evidence on the record is a decision on a question of fact. In the case of *Muhammad Kamil* v. *Imtiaz Fatima* (9) the plaintiff contended that the rights of the parties were regulated by the Muhammadan Law of inheritance; the defendants set up a family custom whereby female heirs were excluded. The Trial Court held that the alleged custom was not established by the evidence and this conclusion was confirmed by the Judicial Commissioner on appeal. Sir Arthur Wilson observed that the existence of the custom was a question of fact, and as the Courts in India had concurred in their judgment as to this question, their Lordships saw no reason why they should not follow their usual practice of accepting concurrent findings of fact. Precisely the same language was used by Lord Collins in another case decided by the Judicial Committee, *Anant Singh* v. *Durga Singh* (10). There the question arose whether succession in a Hindu family was regulated by a special family custom or by the ordinary Mitakshara Law. The Judicial Commissioners, disagreeing with the Trial

(6) 11 C. W. N. 83.

(7) 12 C. W. N. 878.

(8) 10 Ind. Cas. 325; 13 C. L. J. 418; 15 C. W. N. 752.

(9) 4 Ind. Cas. 457; 31 A. 557; 10 C. L. J. 297; 11 Bom. L. R. 1210; 14 C. W. N. 59; 19 M. L. J. 697; 13 O. C. 183; 36 I. A. 211 (P. C.).

(10) 6 Ind Cas 787; 32 A. 363; 14 C. W. N. 770; 7 A. L. J. 704; 12 C. L. J. 26; 12 Bom L. R. 504; 8 M. L. T. 79; 20 M. L. J. 604; 13 O. C. 163; (P. C.); 37 I. A. 191; (1911) M. W. N. 324.

Court, held that the evidence adduced by the plaintiff was not sufficient to establish the special custom. The Judicial Committee held that the question involved was one of fact only and they saw no reason whatever to differ from the opinion of the Judicial Commissioners. The view that the question as to the existence of a custom is a question of fact is supported by numerous decisions of high authority in English Courts. Thus in *Nelson* v. *Dahl* (11) Sir George Jessel, M. R., observed that the question whether there was a specified custom or usage in the Baltic wood trade was a question of fact and like all other customs it must be strictly proved. In *Postlethwaite* v. *Freeland* (12) Lord Blackburn held that the question whether an alleged custom of the port was established by the evidence was rightly left to the Jury. To the same effect is the decision in *Goodwin* v. *Robarts* (13). Similarly, Channel, J., observed in *Moult* v. *Halliday* (14) that the question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the Courts take judicial notice of it. A similar view has prevailed in this Court for at least half a century. Thus in *Hureehur Mookerjee* v. *Judoonath Ghose* (15) Jackson, J., held that the question whether the disputed tenure was transferable by custom, was a question of fact on which the lower Court alone could pass a decision, and on which the High Court could not interfere on second appeal. To the same effect is the judgment of Glover, J., in *Joy Kishen Mookerjee* v. *Doorga Narain Nag* (16). Again Kemp, J., observed in *Syud Ali* v *Gopal Doss* (17) that a finding upon a question of custom after going into evidence was a finding on a question of fact with which the High Court could not interfere in second appeal. Precisely the same view was taken by Farran, C. J., in *Bai Shirinbai* v. *Kharshedji* (18), where he ruled that sitting in second appeal, it was not open to the Court to arrive at an independent finding as to whether the evidence established, as the Courts below concurrently held it did, the existence of a custom amongst Parsis which validated and rendered binding marriages contracted between children of tender age.

But, although the question of the existence of an alleged custom is a question of fact, it is conceivable that the decision may involve an error of law so as to justify the interference of the High Court in second appeal. Thus, the decision is liable to attack in second appeal on the ground that irrelevant evidence has been received, as in *Palakdhari Rai* v. *Manners* (19) and *Durga Charan Mahto* v. *Raghunath Mahto*(20), or that relevant evidence has been excluded, as in *Dalglish* v. *Gazuffer Hassain* (21) and *Sariatullah Sarkar* v. *Pran Nath Nandi* (22). The decision may also be successfully attacked on the ground that there is no evidence of the alleged custom, or, as it is sometimes said, that the finding as to the existence of the custom is based on legally insufficient evidence[*Peary Mohan Mukerjee* v *Jote Kumar Mukerjee* (6), *Hashim Ali* v. *Abdul Rahman* (23), *Ram Bilas* v. *Lal Bahadur* (24)]. The decision may again be assailed on the ground that the facts found do not constitute evidence of the alleged custom [*Durga Charan Mahto* v. *Raghunath Mahto* (20), *Hanumantamma* v. *Rami Reddi* (25), *Mirabivi* v. *Vellayanna* (26) and *Subhadra* v. *Tribhuan Dat* (27)]. The decision may, further, be liable to attack on the ground that in the determination of the question in controversy,

(11) (1879) 12 Ch. D. 568, on Appeal *Dahl* v. *Nelson Dankin*, (1881) 6 App. Cas. 38; 50 L. J. Ch. 411; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392.

(12) (1880) 5 App. Cas. 599; 49 L. J. Ex. 630; 42 L. T. 845; 28 W. R. 833; 7 Asp. M. C. 302.

(13) (1875) 10 Ex. 337, on Appeal (1876) 1 App. Cas. 476; 45 L. J. Ex. 748; 35 L. T. 179; 24 W. R. 987.

(14) (1898) 1 Q. B. 125 at p. 129; 67 L. J. Q. B. 451; 77 L. T. 794; 46 W. R. 318; 62 J. P. 8; 14 T. L. R. 109.

(15) 10 W. R. 153.

(16) 11 W. R. 348.

(17) 13 W. R. 420

(18) 22 B. 430; 11 Ind. Dec. (N. S.) 869.

(19) 23 C. 179; 12 Ind. Dec. (N. S.) 119.

(20) 20 Ind. Cas. 810; 18 C. W. N. 55; 18 C. L. J. 559.

(21) 23 C. 427; 12 Ind. Dec. (N. S.) 284.

(22) 26 C. 184; 13 Ind. Dec. (N. S.) 723.

(23) 28 A. 698; A. W. N. (1906) 187; 3 A L. J. 467.

(24) 30 A. 311; 4 M. L. T. 169; 5 A. L. J. 456; A. W. N. (1908) 112.

(25) 4 M. 272; 1 Ind. Dec. (N. S.) 1025.

(26) 8 M. 464; 9 Ind. Jur. 267; 3 Ind. Dec. (N. S.) 317.

(27) 15 Ind. Cas. 247.

legal principles or tests have been erroneously applied, for instance that the Court has not correctly appreciated the essential attributes of a custom [*Mahamaya Debi* v. *Haridas Haldar* (28), *Desai Ranchhoddas* v. *Rawal Nathubhai* (29), *Prodyote Kumar Tagore* v. *Rakhal Chandra* (30)] or of a usage [*Dalglish* v. *Gazuffer Hassain* (21) and *Palakdhari Rai* v. *Manners* (19)], or has overlooked the distinction between a custom and a usage [*Nelson* v. *Dahl* (11)]. Consequently, the question, whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage, is a question of law which may be discussed in second appeal [*Durga Charan Mahto* v. *Raghunath Mahto* (20), *Lalman* v. *Nand Lal* (31)]. Obviously, the question whether a custom is reasonable or valid, is a question of the law [*Hurry Churn Dass* v. *Nimai Chand* (32), *Gurai Kar* v. *Kuarmoni Singha* (33)]. Subject to these qualifications it is plain that the mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal [*Sreemutty Kurani Dassi* v. *Sajoni Kant Singh* (4), *Hashim Ali* v. *Abdul Rahman* (23), *Rao Girraj Singh* v. *Lala Haragobind Sahai* (34), *Makund Murari Dass* v. *Krishna Dhone Ghose* (35), *Ganesh Dat Singh* v. *Sukhraj Singh* (36), *Lalman* v. *Nandalal* (31) and *Mahadeo Prasad* v. *Nabi Bukhsh* (37)]. We are not unmindful that a contrary view was adopted in the case of *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (2), in which it was ruled that it is the duty of the Court in second appeal, when a question of custom is raised, to examine the evidence not merely with a view to ascertain whether all the essential elements have been proved to exist but also whether the evidence is credible. We respectfully dissent from this view, which, in our opinion, finds no support from section 100 (1) (*a*), (*b*) of the Civil Procedure Code, 1908. No doubt, a second appeal lies to the High Court on the ground that the decision is contrary to, or has failed to determine some material issue of, "usage having the force of law." But this does not entitle the High Court in second appeal to determine whether the evidence of the existence of the alleged usage is or is not credible, though the High Court is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law. In so far as the contrary view was taken in the cases of *Ram Harakh Tewari* v. *Ishardat Tewari* (38), *Shahbaz Khan* v. *Rahiman* (39), *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (2) and possibly also to some extent in *Vishnu* v. *Krishnan* (1), we are not prepared to accept them as correct expositions of the law. The substance of the matter is that while the question whether a given state of facts establishes a binding custom or usage is a question of law, the question whether such a state of facts has been proved by the evidence is a question of fact.

In the case before us no question of law obviously arises upon the facts found by the lower Appellate Court in concurrence with the Court of first instance, and we are clearly of opinion that Mr. Justice Digambar Chatterjee properly declined to examine the oral and documentary evidence, with a view to determine whether the Subordinate Judge was correct in his conclusion as to its insufficiency to establish the alleged custom or usage. The appeals fail and must be dismissed with costs.

BEACHCROFT, J.—I agree.

Appeals dismissed.

(28) 27 Ind. Cas. 400; 42 C. 455 at p. 471; 20 C. L. J. 183; 19 C. W. N. 208.
(29) 21 B. 110; 11 Ind. Dec. (N. S.) 75.
(30) 5 Ind. Cas. 243; 11 C. L. J. 209; 14 C. W. N. 487; 37 C. 322.
(31) 20 Ind. Cas. 894; 17 O. C. 1.
(32) 10 C. 138; 13 C. L. R. 207; 5 Ind. Dec. (N. S.) 94.
(33) 29 Ind. Cas. 312; 19 C. W. N. 1188.
(34) 4 Ind. Cas. 304; 32 A. 125; 7 A. L. J. 36.
(35) 9 Ind. Cas. 839.
(36) 14 Ind. Cas. 12.
(37) 25 Ind. Cas. 104.
(38) 3 Ind. Cas. 558.
(39) 11 Ind. Cas. 536.

KHONDKAR MEHDI HOSSEIN *v.* UMESH CHANDRA.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2402, 2501 AND 2502 OF 1912.

May 22, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

KHONDKAR MEHDI HOSSEIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

UMESH CHANDRA MUKHERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Chowkidari chakran *lands comprised within* putni, *resumption of*—Putnidar, *rights of—Payment of additional rent.*

A *putnidar* is entitled to recover possession of the *chowkidari chakran* lands situate within the ambit of the lands comprised in his *putni* lease, which on resumption by Government under the Bengal Chowkidari Act have been settled by the Collector with the *zemindar*, and to hold them as part and parcel of his *putni* under the *zemindar* on payment of the sum assessed as revenue upon those lands under the Chowkidari Act, and in addition a fair share of the profits of the land, unless it is shown that in assessing the *putni* rent at the time of the *putni* lease the profits of all the lands including the *chakran* lands were fully taken into account. [p. 967, col. 2; p. 968, col. 1.]

Appeals against the decrees of the Subordinate Judge, Birbhoom, dated the 6th May 1912, modifying those of the Munsif, second Court, Rampurhat, dated the 25th March 1911.

FACTS material for report are briefly as follows:—

Certain *chowkidari chakran* lands, which were situate within the ambit of the plaintiffs' *putni taluqs* under the *zemindari* of the defendants, were resumed and transferred to the defendant *zemindars* under the provisions of the Bengal Chowkidari Act. As the plaintiffs were not given possession of those lands by the *zemindars*, they brought the present suit against the *zemindars* for recovery of possession of the resumed *chowkidari chakran* lands, on the allegation that according to the terms of the *putni puttah* they were entitled to those lands as they were situate within the boundary of their *putni taluqs*. The Munsif decreed the suit and ordered that the plaintiffs should be given possession of those lands on payment of the new assessment of the revenue made by the Collector under the Chowkidari Act *plus* half the profits of the land to the *zemindar* defendants.

The defendants appealed and the plaintiffs filed cross-objections. The Appellate Court confirmed the decision of the Munsif as regards the plaintiffs' right to those lands but allowed the cross-objection, directing that the plaintiffs were not bound under the terms of their *puttah* to pay any share of the profit of the lands to the *zemindars*, but that they were only liable to pay the new assessment of revenue made upon those lands by the Collector.

Against the decision of the Appellate Court, this second appeal was preferred on the grounds, *inter alia*, (1) that the plaintiffs' suit was barred by limitation, (2) that the plaintiffs were not entitled to the *chowkidari chakran* lands, and (3) that the plaintiffs were liable to pay additional rent or profits over and above the revenue assessed upon those lands under the Chowkidari Act.

Extracts from the translation of the *putni puttah* which are material to the report are given below:

"This *pattah* in respect of the *mofussili patni taluk* settlement is executed to the effect that *tarafs* Basora and Durgapur within *Pergana* Koar Protap borne on the *towji* of the Collectorate of District Murshidabad in No. 278, constitute the *zemindari* of me and my sisters. A four-anna share of all the lands appertaining thereto is in my distinct right. You now having applied for a *mofussali pat i taluk* settlement in respect of my four-annas share of the aforesaid *tarafs*, that is to say, the *tarafs* Basora and Durgapur at the annual *jama* of Rs. 501 exclusive of the expenditure of the *iswar shera* and the collection charges, I grant your application and having received to-day in cash to my full satisfaction the proper amount of consideration of Rs. 1,000 and fixing the annual rent of the aforesaid four-annas share of the *tarafs* at Rs. 501 grant you this *mofussali patni taluk* settlement, and you have of your free will admitted the same and executed a *kabuliat* and submitted it into my *sherista*. Entering into possession of the aforesaid *tarafs* in *patni* right you shall continue to pay according to the *kist-bandi* given below the aforesaid fixed annual *jama* into my *zemindari sadar catchary* in my own village or any other place instead of the said *catchary* where I wish you to make payment of the rent. In case of default of payment of any *kist* you shall pay interest at the rate of 1 per cent. per mensem. In paying the rent at which you take this *mofussali patni taluk* settlement you shall not take any

objections on the excuse of profit or loss, realization or non realization (of rent), death, desertion, the land being *patit*, absconding, drought, inundation, flood, the land being washed away by river or occupied by roads, covered with sands, and possession or dispossession, providential visitations or on any other excuses, but you shall pay the full amount of *jama* as stated above and take *dakhilas* from me bearing my seal. If you plead any payment made without a *dakhila* the same will not be accepted. Neither you nor your heirs and representatives shall ever advance any claim for abatement of the aforesaid fixed amount of rent of Rs. 501 on any of the grounds on which an abatement may be claimed. If you do any, the same will be rejected by me as well as by all the Courts. I, too, shall not be competent to demand any enhanced rent. You shall never apply for mutation of names at any place in respect of the said *patni taluk*. If you or any of your heirs and representatives shall apply for mutation of names, the same will be rejected and be void. You shall keep intact the limits and boundaries of the *tarafs* as before and keep the same in your possession. If owing to any acts of fraud or neglect on your part any other *zemindar* overleaps the boundary, or, the boundaries are interfered with, then you shall bring the same in your own possession at your own costs and exertion. If you fail to do so, you as well as your heirs and representatives shall be liable for compensation and costs. You shall carry out and abide by the orders that are passed by the *hakims* or may be passed by Courts. I having nothing to do with the same. God forbid if any criminal occurrence takes place within the *tarafs* or any other occurrence a report of which is required to be made before the Police, then you shall lodge information before the Police and take proper steps. If you fail to lodge information or take proper steps, you shall be held answerable for the same, I having nothing to do with the same. Acquiring the *patni* right in the *huts*, *ghats*, rivers, *nalas*, *nonkors*, *bankors*, grass *kors*, tanks, *khals*, *khandoka*, *jalkors*, *falkors*, *jungles*, gardens, fruit-bearing and other sorts of trees, *kankar jama*, *jhandi jama*, *hats*, *ghats*, *golas*, *ganjas*, ferry-*ghats* and other things either known or suppressed and in the possession or out of possession, *chaks*, habitations, *hasil* and *patit* lands, with the exception of valid *lakheraj*, you as well as your sons, grandsons, etc., in succession shall continue to peacefully enjoy and possess.

* * * *

You will have like me the power of making measurement of the land of the aforesaid *tarafs*, enhancing the rent, assessing the rent on the *mal* lands held and enjoyed by others as *lakheraj* and *chakran* lands, dismissing the servants as the *patnidar*. You shall make measurement of the land, enhance the rent, assess rent on the *mal* lands including the same into the *mal* lands and appoint and dismiss the servants when necessary and continue to enjoy the profits. You will be interested with the profits in excess of the *patni jama* or the loss, the *sarkar* having nothing to do with the same.

* * * *

I shall get the compensation money that may be awarded for the land of the *tarafs* acquired by Government for the Railways or any other purposes. You shall get an abatement in the *patni jama* to the extent of the amount that may be deducted by the Government from the amount of *sadar jama*. * * * * "

Babu *Ram Chandra Mazumdar* (with him Babu *Nagendra Nath Sen*), for the Appellants.—I shall not dispute the title of the plaintiffs to the *chowkidari chakran* lands as the recent Privy Council decision in *Ranjit Singh* v. *Kali Dasi Debi* (1) shows that the *putnidars* are entitled to those lands. Nor shall I contend that the plaintiffs' suit is barred by limitation as it has been instituted within twelve years from the date of the resumption proceedings. But what I would submit is this, that the *putnidars* are bound to pay not only the revenue assessed upon those lands by the Collector but also a fair share of the profits. These lands were not contemplated by the parties at the time of the creation of the *putni*. Their profits were not taken into consideration in fixing the

(1) 40 Ind. Das 981; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 25 C. L. J. 499; 19 Bom. L. R. 462; 2 P. L. W. 1; (1917) M W N. 459; 6 L. W. 101 (P. C.).

putni rent. Therefore, the *putnidars* are bound to pay additional rent to the *zemindar* for these lands. (Refers to the terms of the *putni* lease.) My next point is that mesne profits have been assessed on a wrong basis. The defendants are bound to pay mesne profits on the basis of the rents received by them in respect of the *chowkidari chakran* lands, and they are not bound to pay the value of the produce of these lands as mesne profits. If the plaintiffs were in possession they would have let out those lands to tenants, so that the loss they suffered by dispossession was not the produce of the lands but the rents which they would have realised from the tenants of those lands.

[MOOKERJEE, J.—Your contention seems to be perfectly reasonable. Let us hear the respondents.]

Babu *Brajendra Nath Chatterjee*, for the Respondents.—Ordinarily a *putnidar* on getting the resumed *chakran* lands is bound to pay additional rent to the *zemindar*. But where the *putni* lease stipulates that the *putni* rent will not be increased or decreased on any account whatsoever, but will remain unalterable for ever, the *putnidar* is not bound to pay additional rent for the *chowkidari chakran* lands. In the *putni puttah* there are clauses which clearly show that the *putnidar* will not be bound to pay any additional rent nor would be entitled to claim any abatement of rent on any ground whatsoever. All the lands comprised within the *mahals* were granted to me in *putni* for a fixed *juma* of Rs. 501 and the *zemindar* stipulated that he would never be entitled to demand any enhanced rent. How can he now demand an additional rent for these *chowkidari chakran* lands which were included in the *putni* at the time of the *putni* settlement?

[MOOKERJEE, J.—If your contention is right, then you are not even bound to pay the revenue which has been assessed upon these lands by the Collector under the Chowkidari Act. But you have no objection to the payment of that revenue. How could you consistently object to the payment of additional rent to the *zemindar*?]

The new revenue assessed by the Collector is revenue payable to Government and not rent payable to the *zemindar*. But even that I was not bound to pay, though I did not object to the payment of the new revenue assessed under the Chowkidari Act. But that cannot estop me from claiming an exemption from the payment of additional rent in respect of these lands. It might be, my clients were ill advised not to urge their right to hold those lands without the payment of anything to the landlords in respect of those lands. I rely upon a recent decision of their Lordships Fletcher and Teunon, JJ., in S. A. No. 1500 of 1914 decided on the 23rd June 1916 [*Nalinakhya Basu* v. *Bijoy Chand Mahatap**], in which it has been held that the *putnidar* is not bound to pay any additional rent for the *chowkidari* lands if the *putni puttah* does not provide for it. This decision has not been yet reported but I ask your Lordships to call for the judgment and look into it. That decision is strongly in my favour, and I would rely upon it.

[MOOKERJEE, J.—That decision might turn upon the particular facts of that case, but we have to decide this case on its own facts.]

No doubt the facts of two cases are never exactly the same, but still the principle of that decision, if accepted by your Lordships, would entitle me to hold these lands without the payment of any additional rent. Here the *putni puttah* does not provide for the payment of any additional rent for the *chowkidari chakran* lands, on the contrary it says that the rent of the *patni* would never be enhanced.

[MOOKERJEE, J.—That is because the resumption of the *chowkidari chakran* lands was never contemplated by the parties.]

My learned friend on the other side has argued that the *chowkidari chakran* lands were not included in the *patni puttah*, but that is not correct. They were included, as the terms of the *puttah* show, and his very concession that the *zemindar* could not claim these lands goes to show that these lands were included in the *putni puttah*. If these lands were included in the *patni puttah*, their resumption was contemplated by the parties at the time of the *putni* lease.

As regards the question of mesne profits, I submit that the amount of the mesne profits depends not upon the loss suffered by the rightful owner who was dispossessed, but upon the amount of the profits which the wrongful possessor received or could have received with due diligence, see section 2, clause

*Has been reported in 40 Ind. Cas. 395—*Ed.*

(12), Code of Civil Procedure. In my suit not only the *zemindars* but also the tenants settled upon these lands by the *zemindar* have been made defendants. So there is no reason why mesne profits should not be assessed on the basis of the produce. However, this is a small matter and I do not like to press for it, but as regards the other question, I do submit most respectfully that the *putnidars* are not bound to pay any additional rent or any share of the profits of the *chowkidari chakran* lands and I rely upon the unreported decision* of Fletcher and Teunon, JJ.

S. A. No. 2402 of 1912.

JUDGMENT.—This is an appeal by the defendants in a suit for recovery of possession of land with mesne profits. On the 27th July 1866, the plaintiffs obtained a *putni* of two villages from the *zemindar* defendants. A bonus of Rs. 1,000 was paid for this lease and the annual rent was fixed in perpetuity at Rs. 501. Within the ambit of the lands comprised in the *putni* lease, there were *chowkidari chakran* lands, at that time in the occupation of *chowkidars*. These lands were subsequently resumed by the Government and transferred to the *zemindars*, in conformity with the provisions of the Village Chowkidars Act, 1870. The *zemindar* took possession of the lands and settled them with tenants. The plaintiffs, who were *putnidars*, thereupon instituted this suit on the 11th June 1910 for declaration of their title and for recovery of possession with mesne profits. The Courts below have concurrently made a decree in their favour; but the two Courts have disagreed as to the terms under which the plaintiffs are entitled to hold this land as part and parcel of their *putni* under the *zemindars*. The Court of first instance held that the plaintiffs were under an obligation to pay to the *zemindars*, not only the sum assessed under the Village Chowkidars Act, 1870, at the time of resumption, but also a share of the profits of the lands they claim to recover. On appeal, the Subordinate Judge has held that the plaintiffs are liable to pay to the *zemindar* nothing beyond the sum assessed at the time of resumption as payable into the *chowkidari* fund. Upon the question of mesne profits also, the two Courts have disagreed. The Trial Court held that the rent payable by the tenants settled on the lands by the *zemindars* was the measure of damages recoverable by the plaintiffs. The Subordinate Judge, on the other hand, has held that the plaintiffs are entitled to the value of the actual produce of the lands in suit. The *zemindars* have appealed to this Court and have raised only those two questions whereon the Courts below have disagreed; they have not disputed the right of the plaintiffs to recover possession of the lands, and it may be added that in view of the decision of the Judicial Committee in the case of *Ranjit Singh* v. *Kali Dasi Debi* (1), the decree for possession cannot possibly be successfully challenged.

As regards the first question, namely, the terms under which the plaintiffs are entitled to recover possession of these lands from the *zemindars* and the tenants inducted by them into the land, we are of opinion that the view taken by the Subordinate Judge is erroneous. It was pointed out by this Court in the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (2) that if in assessing the *putni* rent, the profits of all the lands including the *chakran* lands were fully taken into account, the *putnidar* would not be liable to pay additional rent for the *chakran* lands when they came into his possession; but otherwise the *putnidar* is bound to pay to the *zemindar*, in addition to the fresh amount assessed on resumption, a fair share of the profits derivable from the land. This view has been subsequently approved in the cases of *Rajendra Nath Mukerjee* v. *Hira Lal Mukerjee* (3) *Gopendra Chandra Mitter* v. *Taraprasanna Mukerjee* (4) and *Harak Chand* v. *Charu Chandra Singh* (5). In the first of these cases, Brett, J., pointed out that it was not correct to hold as a general principle of law that the *putnidar* is not bound to pay to the *zemindar* more than the assessment made by the Collector; the *zemindar* would be equitably entitled, not only to payment of the assessment made by the Collector, but also a proportionate share in the profits such as

*See *Nalinakhya Basu* v. *Bijoy Chand Mahatap*, 40 Ind. Cas. 395.—*Ed.*

(2) 34 C. 109; 11 C. W. N. 201; 5 C. L. J. 33.
(3) 7 Ind. Cas. 554; 14 C. W. N. 995.
(4) 7 Ind. Cas. 790; 14 C. W. N. 1049; 37 C. 598.
(5) 8 Ind. Cas. 766; 13 C. L. J. 102 15 C. W. N. 5.

the *zemindar* would, in the circumstances, be entitled to impose on the *putnidar*. We are of opinion that this view is unquestionably sound on principle. In the case before us, there is no indication in the contract between the parties that, at the time of inception of the grant, the *putni* rent was assessed on the basis of the assets of all the lands situated within the ambit of the *putni* inclusive of the *chowkidari chakran* lands. It is, on the other hand, plain that the rent hitherto paid by the plaintiffs to the defendants has not represented the profits derivable from the *chowkidari chakran* lands. Consequently, the terms of the contract between the parties do not entitle the plaintiffs to claim possession of the lands in suit from the *zemindars*, merely on payment of the sum now assessed by the Revenue Authorities under the Village Chowkidars Act, 1870.

Reliance has been placed by the plaintiffs-respondents upon the provisions of section 51 of the Village Chowkidars Act, which however do not really advance their contention. Section 51 provides that the land resumed by the Collector is transferred to the *zemindar*, subject to the prior contracts made by him. The effect of the application of that principle to the case before us is that the plaintiffs can, under the terms of the *putni* lease, recover possession of the lands in suit. But the contract does not show that the plaintiffs are entitled to such possession without payment of any rent to the *zemindar* or without payment of any sum beyond what represents the new assessment. Consequently, on equitable grounds, the *putnidar* and the *zemindar* must be placed in the position they would have occupied, if the *chowkidari chakran* lands had been resumed before the *putni* was created; the assets of those lands would then have been taken into account in settling the amount of *putni* rent, which would have represented the assessment due to the State as also a fair share of the profits. In these circumstances, we are of opinion that the order of the Court of first instance was just and proper and should not have been varied by the Subordinate Judge.

As regards the second question, namely, the basis of calculation of mesne profits, it cannot be disputed that the plaintiffs as *putnidars* would have been entitled to possession of the lands through tenants; the measure of damages payable to them is consequently represented by the rent payable by the actual cultivators to the plaintiffs as *putnidars*. This was the view taken by the Court of first instance, and should not have been rejected by the lower Appellate Court.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. The appellants are entitled to their costs in this Court, but there will be no order for costs before the Subordinate Judge.

This judgment will govern the other two cases, *viz.*, Second Appeals Nos. 2501 and 2502 of 1912, in each of which a similar order will be drawn up.

Appeals allowed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 930 OF 1916.

June 21, 1917.

Present:—Mr. Justice Marten.

PURSHOTAMDAS HARKISONDAS—PLAINTIFF

versus

THE CENTRAL INDIA SPINNING, WEAVING AND MANUFACTURING CO., LD.—DEFENDANTS.

Income Tax Act (II of 1886), s. 11, Sch. II, Part II—Income Tax Amendment Act V of 1916)—Company—Income tax, payment of—Preference share-holders, whether entitled to dividend without payment of income tax.

As between fixed preference and ordinary share-holders of a joint stock company, the former are not entitled to have their preference dividends paid free of income tax in a case where there are no express words to that effect in the contract regulating the rights of the parties. [p. 974, col. ".]

Where the Articles of Association of a company provided that "the preference shares shall confer on the holders thereof the right, out of the net profits of the company, which it shall be determined to distribute in dividends, to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum on the capital amount for the time being paid up thereon respectively.....:"

Held, that it must be taken that the sum which the company determined to distribute by way of dividend included the tax on so much of the profits as, after setting aside certain sums for reserve and so on, belonged to and was distributable amongst the share-holders by way of dividend and that, therefore, the preference share-holders were not entitled to the payment of their five per cent. dividend without deduction of income tax. [p. 974, col. 1.]

PURSHOTAMDAS HARKISONDAS *v.* CENTRAL INDIA SPINNING, WEAVING MANG. & CO., LD.

Mr. *Kanga* (with him Mr. *Tarapurvala*), for the Plaintiff.

Mr. *Strangman* (Advocate-General) and Mr. *Setalvad*, for the Defendants.

JUDGMENT.—This case raises an interesting point on which there is apparently no authority in India, namely, whether, as between fixed preference and ordinary shareholds, the former are entitled to have their preference dividends paid free of income tax, in a case where there are no express words to that effect in the contract regulating the rights of the parties. The Crown is not affected. The full tax on the net profits of the defendant company has admittedly been paid, and the sole question is whether the preference share holders can escape liability for their proportion of the tax. Now, if this case arose in England, the matter would be quite clear. The preference share-holders would undoubtedly have to bear the income tax on their respective shares. If authority is needed for that proposition, I may refer to *Attorney-General* v. *Ashton Gas Company* (1). That was a case where the special Act under which the company was incorporated provided that the profits of the company to be divided amongst the share-holders in any year should not exceed the rate of 10 per cent. per annum on the ordinary share capital, and the question which arose was whether that 10 per cent. included the income tax. It was held in all the Courts that it did and that the company had been wrong in paying the share-holders the 10 per cent. free of income tax.

There in the Court of Appeal, *Attorney-General* v. *Ashton Gas Company* (1), Lord Justice Romer said as follows:—

"I must say, speaking for myself, that the case appears to me to be a reasonably clear one on principle. If such a company as we have to deal with pays income tax on its profits, the income tax, as has been pointed out, is payable out of the profits, and is part of the profits; and if the profits, after deducting the income tax, have subsequently to be distributed amongst the members of the company, that income tax is not payable again by those members so far as they receive their share of the profits, because the income tax is to be taken as having been paid out of their profits, and on their behalf. If, for example, a company such as this had preference share-holders as well as ordinary share-holders, and the preference share-holders were only entitled to receive out of the profits a fixed sum, say 5 per cent., then, when income tax is paid by the company out of its profits, the company must be treated in respect of so much of the profits as is going to the preference share-holders as having paid their income tax in respect of their 5 per cent. Accordingly, to my mind, it is clear on principle in such a case that there ought to be deducted from the dividend warrants payable to the preference share-holders the income tax on the 5 per cent. which had been previously paid on their behalf by the company. The same principle, of course, applies to the share-holders in the present case who are restricted by the provision of the Act, so that they are only to share a limited amount of the profits."

This decision was affirmed by the House of Lords and I may refer in particular to the speech of Lord Halsbury: *Ashton Gas Company* v. *Attorney-General* (2).

But it has been urged by Mr. Kanga in his forcible argument for the plaintiff that the provisions of the English Income Tax Acts are entirely different from the Indian Income Tax Acts, and that the liability in England of the preference share-holders for the payment of the tax rests on the fact that the company is taken to pay on their behalf and that that is the ground of the decision in the *Ashton Gas Company's* case (2), which I have referred to. He argues that under the Indian Income Tax Acts this is not so; that the share-holder is under no liability for the tax; and that the company pays the tax on its own account and not on behalf of the share-holder. Consequently, he says, the fund actually distributable is the fund on which all tax has been paid and there is no reason, therefore, why the preference share-holders should not be paid their 5 per cent. without any deduction.

(1) (1904) 2 Ch. 621 at p. 629; 73 L. J. Ch. 673; 68 J. P. 477; 53 W. R. 49; 20 T. L. R. 601.

(2) (1906) A. C. 10 at p. 11; 75 L. J. Ch. 1; 93 L. T. 676; 70 J. P. 49; 13 Manson 35; 22 T. L. R. 23.

Before turning to the Acts, I should deal shortly with the facts, which are not in dispute. The company was incorporated in 1874 with an original capital of fifteen *lacs* divided into 3,000 shares of Rs. 500 each. The capital was from time to time increased and at the beginning of 1912 consisted of Rs. 46,87,500, part of which capital consisted of shares of Rs. 500 each and part of it of shares of Rs. 200 each. By a special resolution passed at meetings held on the 5th of September and 3rd of October 1912 the capital was increased to Rs. 96,87,500, by the issue of 10,000, 5 per cent. cumulative preference shares of the nominal value of Rs. 500 each. The resolution defined the rights of the preference share-holders, and at the same time the Articles of Association were altered. Article 3 (*b*) which is in similar terms to the resolution provided as follows:—

"The said preference shares shall confer on the holders thereof the right, out of the net profits of the company which it shall be determined to distribute in dividends, to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum on the capital amount for the time being paid up thereon respectively...."

Then after dealing with certain rights in the winding up, the Article concluded: "but shall not confer any further right to participate in profits or any surplus assets."

It will be seen that this Article 3 (*b*) does not expressly make the preference dividends free of income tax, as one would have expected if that had been the intention of the parties. Moreover, it appears from the Circular (Exhibit A) that this issue was underwritten, and one would not expect the underwriters to allow such a point to be left open to doubt if the real agreement was what the plaintiff says it was. It is not contended that in India such an agreement would be illegal or void—I mean an agreement that after payment of tax, the balance of the net profits should be distributable in such a way that the preference share-holders get 5 per cent. free from any deduction for tax. It is said in a note to Palmer's Company Precedents, 11th Edition, Vol. I, page 765, that such an agreement would in England be void having regard to sections 102 and 103 of the Income Tax Act, 1842, but the accuracy of that note may be doubted in view of the recent decision of the House of Lords in *Brooke* v. *Price* (3).

Returning to the facts, the plaintiff is a preference share-holder in the defendant company suing on behalf of himself and all other preference share-holders. His original holding was three preference shares but was subsequently increased to six. The company have declared six half-yearly dividends on the preference shares and in each case they have paid those dividends less income tax. The result is that the plaintiff claims that he has been underpaid in respect of those dividends to the extent of Rs. 11-4-9 as set out in the particulars (Exhibit B) to the plaint, and he claims amongst other things payment of that sum. The last of those dividends, namely, that due in May 1916 became due after the passing of the Act of 1916. The other five dividends all became due prior to the Act which came into force on the 1st of April 1916. The reports and balance sheets of the company for the four years from 1912 to 1916 have been put in but for the moment I will not deal with them. Similarly, for the moment I will not deal with the words in Article 3 (*b*) of the Articles of Association, "which it shall be determined to distribute in dividends", but will assume in the first instance that that article referred to net profits only.

Now, turning to the Acts, I mean the English Income Tax Acts and the Indian Income Tax Acts, one finds these points of similarity. In both cases it is the company by its proper officer who has to make a return of the profits of the company. It is the company which is assessed on those profits and it is the company which is obliged to pay and does pay the tax on those profits. All, therefore, that the share-holder can get is the balance of the profits after paying the tax. The above will be seen by comparing sections 4, 11 and 12 and Schedule II, Part II, of the Indian Income Tax Act, 1886, with sections 40, 54 and 100 of the English Income Tax Act of 1842.

The alleged points of dissimilarity are that there is no express power under the Indian Acts for the company to deduct the tax on the dividends as is contained in section 54 of the English Act. *Further*

(3) (1917) A. C. 115; 86 L. J. Ch. 329.

and this is especially important, that under section 5 (1) (*f*) of the 1886 Act, the share-holder is expressly exempted from liability for the tax on any income which he enjoys as a member of the company provided the company is liable to the tax. And, *thirdly*, that until the Act of 1916 no right of exemption was given to the share-holder, however poor, and on the other hand it was the company which was entitled to exemption under section 5 (1) (*j*) of the 1886 Act, in cases where its income from all sources was less than a particular sum, that sum being under the 1886 Act Rs. 500 per annum and under the Amending Act of 1903 Rs. 1,000 per annum.

Now as regards the *first* point, no doubt this express power of deduction given by the English Acts was largely relied on in the *Ashton Gas Company's* case (2) in all the Courts as showing that the company paid the dividend on behalf of the share-holder. But the answer made here is that that express power is really unnecessary, and for this reason. Obviously the share-holder can only get the balance of the net profits after the Crown has been paid the income tax. It does not, therefore, matter to him whether the company distributes the available balance by in form declaring a higher dividend less tax or by declaring a lower dividend free of tax. In either event, all that the share-holder gets is precisely the same amount in actual cash. Clause 49 of the Indian Income Tax Act of 1886 was not referred to in argument. That section provides that "every person... paying any tax in pursuance of this Act in respect of income belonging to another person is hereby indemnified for the...payment thereof." If the words "income belonging to another person" include income referred to in clause 5 (1) (*f*), *viz.*, "income which a person enjoys as a member of a company," then the company would be expressly indemnified for the payment of tax in the present case. In that event there would be no substantial difference between the Indian and English Acts on the important point as to the company's right of deduction or indemnity and it would be very difficult for the plaintiff to distinguish the *Askton Gas Company's* case (2). As, however, I have heard no argument on clause 49 and have arrived at my decision irrespective of that clause, I think it safer to express no opinion on it and leave the point open for discussion, if necessary, on some future occasion

As regards the *second* point, the answer given by the defendant company was that the reason for clause 5 (1) (*f*) is merely to prevent the share-holder being in effect taxed twice over, although in terms the clause may go further than was intended or was necessary. Then as regards the *third* point, *viz.*, the exemption, it is admitted by the defendant company that the word "person" in clause 5 (1) (*j*) includes a company as was subsequently made clear by the amendment effected by the Act of 1916, but the answer given is that the Indian Acts decided to give the company exemption rather than an individual share-holder and that this policy was subsequently modified by the Act of 1916. Further it is forcibly urged on behalf of the defendants that having regard to the use of the word "refund" in clauses 6 and 7 and in the proviso to Part II of the Second Schedule of the Act of 1916, the Indian Legislature must have contemplated that the tax was paid if not by, at any rate on behalf of, the share holder, for otherwise there could be no "refund" to him.

These, shortly, are the main points in dispute which I have to decide. In my judgment, the true view is that under the Indian Acts as well as the English Acts the income tax is in effect paid on behalf of the share-holder. I think one must look at this matter from a broad point of view. In a narrow technical sense it may be said that the company being a separate legal entity the net profits belong to the company and not to the share-holders, at any rate until a dividend has been actually declared. But in effect these net profits do belong to the share-holders. If, therefore, any sum has to be paid out of those net profits to the Crown for tax, in effect it is the share-holders who have to pay. The provisions of the Income Tax Acts as to assessment on and payment by the company are in effect mere machinery for the collection of the tax, and, as was said by Lord Halsbury in the *Ashton Gas Company's* case (2), the matter is made much clearer if one sweeps

away this machinery and regards the matter as between the Crown and its subject.

If, then, as I think is the case, it is the share-holders who have in effect to bear the tax, how one ought to deal with a case where the balance of the fund after paying the tax is distributable partly amongst fixed preference share-holders and partly amongst ordinary share-holders. We have in such a case a fund which subject to tax consists of £ X *plus* £ Y of which £ X passes to the preference share-holders and £ Y to the ordinary share-holders. But the whole fund, namely, £ X *plus* £ Y is subject to the common burden of income tax. How then must it be borne? Surely the fair way is to apportion the gross amount of the tax between £ X and £ Y according to their respective values. In this way each share-holder, preference and ordinary alike, will bear his proportion of the tax. This would, I think, be the result supposing the case was one of a paramount charge on two properties, White acre and Black-acre, which, subject to the charge, passes to two different owners, *A* and *B*. In such a case I think that in a Court of Equity *A* and *B* would have to bear this paramount charge in proportion to the values of their respective properties, White-acre and Black-acre [see *Flint* v. *Howard* (4)]. This mode of apportionment is consistent with the Act itself, for Part II of the Second Schedule provides that the rate of tax is to be one-anna in the rupee on the whole of the net profits made by the company. In other words, tax has to be paid in respect of every rupee of those profits and consequently it would seem fair that *prima facie* each such rupee should bear its own tax, which is in effect carried out by the method of apportionment which I have suggested. This view receives additional support from the use of the word "refund" which I have already alluded to in the amending Act of 1916.

As regards clause 5 (1) (*j*) of the 1886 Act I can well understand some such provision being inserted for the protection of the share-holder so as to make it quite clear that the tax should not be paid twice over, *viz.*, first, by the company and secondly, by himself But I do not think that this clause gets rid of the fact that in effect it is the share-holder who bears the tax, whatever his legal liability may be.

The exemption point I do not attach any substantial importance to. An exemption is after all a concession by the Legislature. Under the 1886 Act it thought fit to grant the exemption to the company, and to the company alone, and under the 1916 Act it has thought fit to grant an exemption to the share holder also. But here again I do not think this seriously affects the question whether it is in effect the share-holder who bears the tax.

It was further urged before me by Counsel for the plaintiff that the Indian Income Tax Act is really very similar to the new Excess Profits Tax in England and that there are two decisions of Mr. Justice Peterson, namely, *Collins* v *Selgwick* (5) and *Condran, In re* (6), which go to show that this Excess Profits Tax is not paid on behalf of the share-holder and that consequently it must be deducted before you arrive at the net profits available for distribution amongst the share-holders. On the other hand there are decisions in *Williams Hollins & Co., Limited* v. *Paget* (7) and *Thomas* v. *Hamlyn & Co. Limited* (8), where a different result was arrived at in calculating the commissions to be paid on the net profits of a company or business. There Mr. Justice Eve in the one case and Mr. Justice Rowlatt in the other held in effect that Excess Profits Duty stands very much on the same footing as income tax and ought not to be deducted before arriving at the profits on which such commission was to be calculated. I do not propose to discuss the Act under which the Excess Profits Duty was leviable nor to enter on the question which of these somewhat conflicting decisions is to be preferred. I would only say this that under section 38, sub-section 1, of that Act there is an actual charge for the amount of the duty and that under section 35, sub-section (1), there is an express provision for deducting the amount of the Excess Profits Duty before arriving at the amount

(4) (1893) 2 Ch. 54 at pp. 61, 73; 62 L. J. Ch. 804; 2 R. 386; 68 L. T. 390.

(5) (1917) 1 Ch. 179; 86 L. J. Ch. 153.

(6) (1917) W. N. 137; (1917) 1 Ch. 639; 86 L. J. Ch. 464.

(7) (1915) 1 Ch. 187; 86 L. J. Ch. 287.

(8) (1916) 33 L. T. R. 129; (1917) 1 K. B. 527; 86 L. J. K. B. 1009.

of the profits on which the income tax is leviable. It is also questionable whether the differences between the income tax and Excess Profits Duty, which Mr. Justice Peterson relies on in *Collins* v. *Sedgwick* (5), at page 186, exist, at any rate to the extent which the learned Judge relies on.

Apart, then, from the special words of Article 3 (*b*) I should have thought the defendant company in the present case was right in deducting the tax on the preference shares. That brings me to the remaining difficulty, namely, as to the wording of Article 3 (*b*) of the Articles of Association and the course actually adopted by the defendant company in its accounts. Now it will be seen that in Article 3 (*b*) the duty is payable not merely out of the net profits of the company but "out of net profits of the company which it shall be determined to distribute in dividends." If one turns to Article 116 of the Articles of Association it will be seen that previously to recommending any dividend the Directors have power to set aside out of the profits of the company such sums as they think proper to the credit of a reserve fund, a depreciation and renewal fund and an insurance fund respectively. I can quite understand, therefore, the words "determined to distribute in dividends" being used in preference to the more usual phrase "profits available for distribution by way of dividend." But even the latter phrase is not strictly accurate. The net profits on which the tax has to be paid are not available for distribution in their entirety. The tax must be paid first and, therefore, strictly speaking, it may be said that it is only the balance of the profits after paying tax and not the whole of the net profits which are available for distribution by way of dividends. The tax is, however, paid out of and is, therefore, part of the net profits of the company: and taking the view that I do that in effect it is paid on behalf of the share-holders, I think the whole of the net profits may be said to be available for distribution by way of dividend, although in effect a portion, *viz.*, income tax, goes to Government. This, indeed, is the view taken by Mr. Justice Sargant in *Johnston* v. *Chestergate Hat Manufacturing Company, Limited* (9), although no doubt the learned Judge got some help from section 54 of the Income Tax Act, 1842, in arriving at that conclusion. He also points out there that the company pays the tax to Government on an average of three years' profits, whereas the deduction made by the company in respect of the tax is made on the amount which is paid to the share-holders, and that although this matter would adjust itself over a long series of years, it does not follow that in any particular year the two payments would exactly balance each other.

Now does it make any difference here that instead of the words "available for distribution" the words "which it shall be determined to distribute" are used? I think not. I do not mean to say that the ordinary share-holders may not, if they like, make a present of the tax to the preference share-holders, but I think that one should be very cautious in arriving at such a result merely from the date of actual payment of the tax or from the mode in which accountants or auditors have chosen to draw up their accounts and the manner in which they have been assented to and passed at the meetings. Taking for example the report and accounts for the 1st of July 1914 to the 30th of June 1915 (Exhibit C) (3), one finds on page 12 in the Revenue Account that income tax has been paid amounting to Rs. 39,152-15-1 and I am told that this sum includes the tax on the preference shares. The balance of profits arrived at after paying this and other sums is shown at the foot of page 12 and amounts to Rs. 11,54,826-6-7. This balance profit is then brought in to the Profit and Loss appropriation account on pages 14 and 15 and after providing for, amongst other things, depreciation and renewal fund account leaves a balance available for dividends of Rs. 7,60,373-10-1. I turn next to the Directors' report at page 5. They first add together the above balance profit of Rs. 11,54,826-6-7 and the balance brought forward from the last account, namely, Rs. 3,80,297-3-6, making together a total of Rs. 15,35,123-10-1. This total of Rs. 15,35,123-10-1 the Directors deal with as follows. They report that they have paid an interim dividend of, *inter*

(9) (1915) 2 Ch. 338, 84 L. J. Ch. 914.

alia, Rs. 12-3-0 net on the preference shares and that after carrying certain sums to provident fund account, depreciation and renewal fund account and office recreation room fund account they recommend payment of a final dividend due on the 5 per cent. preference shares for the period ended 30th June 1915 after deducting income tax at Rs. 12-3-0 per share, and they further recommend a final dividend on the ordinary shares leaving a balance of Rs. 1,22,873-10-1 to be carried forward to the next account. This report does not state whether the interim dividend on the preference shares was paid less tax but it is common ground that it was so; that the gross amount payable was Rs. 12-8-0 and that the income tax in respect of it was 5 annas, thus leaving the Rs. 12-3-0 per share mentioned in the report. I think it may also be taken as common ground that the dividends as recommended by the Directors were passed at the various meetings. At any rate it was admitted that these were the dividends actually paid and one must assume that they were paid in accordance with resolutions passed at the meetings.

Now the argument for the plaintiff is that on those facts the fund which is determined to distribute by way of dividend was a fund on which all tax had been paid and that consequently the preference share holders were entitled to their 5 per cent. dividend in full. It is quite clear that the only dividend the Directors recommended or the share-holders passed was a dividend less tax in the case of the preference share-holders and I do not think that the accounts and declarations of dividend can be twisted so as to give a right to a dividend free of tax. The true view is, I think, this, *viz.*, that it must be taken that the sum which the company determined to distribute by way of dividend included the tax on so much of the profits as, after setting aside certain sums for reserve and so on, belonged to and was distributable amongst the shareholders by way of dividend. I think, therefore, the plaintiff fails on that point.

Looking, therefore, at the case as a whole, I am of opinion that the company was right in deducting the tax and that accordingly the action fails and must be dismissed.

I accordingly answer the formal issues, *viz.*, (1) whether the defendants rightly deducted the income tax in respect of (*a*) the first five dividends referred to in Exhibit B to the plaint, and (*b*) the last dividend therein referred to; (2) whether the plaintiff is entitled to any and if so what declaration; and (3) general issue, as follows: (1) Yes. (2) No. (3) Action dismissed.

I will only add this, that I have no doubt that if a contrary result had been arrived at, the preference share-holders would be getting an advantage which they never contemplated originally, and a variance would be created between the business practices in the two countries of India and England which has nothing to recommend it so far as I can see from the point of view of either fairness or common sense.

As regards the costs, there will, by arrangement between the parties, be no order as to costs.

Action dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 92 OF 1917.

July 30, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

Mirza MUHAMMAD HAIDAR—PLAINTIFF—APPELLANT

versus

WAZIR ALI—DEFENDANT—RESPONDENT.

Specific Relief Act (*I of* 1877), *s.* 9—*Decision upon question of title, effect of*—Res judicata.

Where a plaintiff files a suit under section 9 of the Specific Relief Act basing his right to relief merely on the fact of his previous possession and pays half the usual Court fee for the determination of his right to that relief, neither the Court nor the defendant has any power to enlarge the scope of that suit or to treat it as if it were an ordinary suit resting on a ground of title. [p. 975, col. 2.]

Where in spite of the limited character of such a suit the Court gave a decision upon the question of title and an appeal was also wrongly filed from that decision:

Held, that in a subsequent suit brought by the defeated party to establish his title to the same property the decision in the previous suit did not operate as *res judicata*. [p. 976, col. 1.]

MUHAMMAD HAIDAR *v.* WAZIR ALI.

Appeal against the decree of the District Judge, Lucknow, dated the 12th December 1916, upholding that of the Munsif, (North) Lucknow, dated the 24th May 1916.

Mr. *Muhammad Mustafa*, for the Appellant.

Mr. *Zahur Ahmad*, for the Respondent.

JUDGMENT.—Wazir Ali filed a suit against Mirza Muhammad Haidar for the recovery of possession of a certain plot of land in the Court of one of the Munsifs of Lucknow, on the allegation that he had been in possession of it for 90 years and that the defendant had wrongfully ejected him in *Bhadon*, 1970 *Sambat*. That suit purported to have been filed under section 9 of the Specific Relief Act (I of 1877) on half the Court fee payable for such a suit. It was filed within the period of six months from the date of dispossession, as required by Article 3 of the Indian Limitation Act (I of 1908). The Court which tried that suit, instead of confining it to the question of possession or dispossession, proceeded to enquire into the question of title and came to the conclusion that the plaintiff was the owner of the land in dispute and had been in possession of it within limitation. It accordingly decreed the claim. Under section 9 of the Act, that decree was final and not open even to review. The only remedy which that section allowed after such a decree was a fresh suit by the defeated party in which the question of title could be litigated in the proper manner free from the limitations which that section imposed. The defendant, however, filed an appeal from that decree in the Court of the District Judge of Lucknow and succeeded in getting the decision of the Court of first instance reversed. There was a further appeal from that decree to this Court, which, after remitting certain issues to the lower Appellate Court, set aside the decree passed by that Court and restored that of the Court of first instance.

In the present suit, which has been filed by the defeated party, for a declaration of his title and confirmation of his possession over the disputed plot or in the alternative for the recovery of possession of the same, the defence was that the decision in the former suit operated as *res judicata*.

Section 9 of the Specific Relief Act (I of 1877) expressly lays down that nothing in that section shall bar any person from suing to establish his title to such property and to recover possession thereof. The learned Counsel for the defendant-respondent contends that the former suit was treated by the plaintiff-appellant, who was the defendant in that suit, as a regular suit, raising a question of title for decision, and that he was estopped by reason of that conduct from taking up an inconsistent position and disputing the validity of the judgments passed by the Courts of first and second appeals in that case. It does not, however, appear from the plaint filed in the preceding suit that any amendment was made or anything done therein, showing that the then plaintiff had enlarged the scope of that suit. If a plaintiff files a suit under section 9 of the Specific Relief Act (I of 1877), basing his right to relief merely on the fact of his previous possession, and pays half the usual Court-fee for the determination of his right to that relief, neither the Court nor the defendant has any power to enlarge the scope of that suit or to treat it as if it were an ordinary suit, resting on a ground of title. The appeal filed by the defendant from the decree passed by the Court of first instance in that suit, and the further appeal filed by the plaintiff to this Court from the appellate decree in that case, were both irregular; and any decision arrived at in those appeals cannot, therefore, be treated as a decision passed by a Court of competent jurisdiction so as to conclude any question of title, which might have been decided therein.

The object of section 9 of the Specific Relief Act (I of 1877) is to provide a summary remedy for obtaining speedy relief, where a person in possession has been ejected by a trespasser or wrong-doer, or in other words to use the language of Edge, C. J., in *Wali Ahmad Khan* v. *Ajudhia Kandu* (1), "to drive persons, who wanted to eject a person, into the proper Court and prevent them from going with a high hand and ejecting such person." In

(1) 13 A. 537; A. W. (1891) 196; 7 Ind. Dec. (N. S.) 340.

a suit brought under that section, the Court cannot, as pointed out in *Tilak Chandra Dass* v. *Fatik Chandra Dass* (2) and *Nazir Ahmad* v. *Abid Ali* (3), give the plaintiff any further relief than possession and the costs of the suit, and the decision of the question of title between the parties is perfectly unnecessary. If the Court in spite of the limited character of such a suit decides any question of title, that decision cannot be regarded as essential for the proper determination of that suit, and it cannot operate as conclusive between the parties in any subsequent suit which might be filed for the determination of the question of title. In *Jai Gopal Mukerji* v. *Lalit Mohan* (4), where a plaintiff filed a suit for the recovery of possession of immoveable property under section 9 of the Specific Relief Act, and while that suit was pending filed a second suit for the cancellation of a deed of gift, under which the defendant claimed a title, it was held that the institution of the two suits did not involve a splitting up of a cause of action and was not irregular. The fact that the then defendant filed an appeal from the decree of the Court of first instance in that suit did not estop him from pleading that the decision arrived at in that appeal or in the appeal that was subsequently filed in this Court operated as *res judicata*, because in a question of law there can ordinarily be no estoppel, and the rule of *res judicata* does not apply where the decision was not passed by a Court of competent jurisdiction. The decision in *Nazir Ahmad* v. *Abid Ali* (3), on which the Courts below have relied, does not apply, because in that case the suit was for the possession of land and damages which were outside the scope of section 9 of the Specific Relief Act.

The appeal is, therefore, allowed and the suit remanded to the Court of first instance with a direction to re-admit it under its original number and to dispose of it on the merits according to law. The costs here and hitherto will abide the event.

Case sent back; *Appeal allowed.*

(2) 25 C. 803; 13 Ind. Dec (N S.) 523.
(3) 11 Ind. Cas. 38 ; 8 A. L. J. 910.
(4) 26 A. 236; A. W. N. (1904) 7.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1971 OF 1916.

November 29, 1916.

Present:—Mr. Justice Scott-Smith.

JIWAN—PLAINTIFF—APPELLANT

versus

Musammat ZEBO AND OTHERS—DEFENDANTS RESPONDENTS.

Guardians and Wards Act (*VIII of* 1890), *s.* 13—*Application to appoint guardian—Procedure.*

The procedure under section 13 of the Guardians and Wards Act is not intended to be summary, and a Court should not reject an application for the appointment of a guardian of a minor without any enquiry at all.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Rawalpindi, dated the 15th June 1916, rejecting the application for appointment as guardian of the person and property of the minor.

Messrs. *Nand Lal* and *Kamar Din*, for the Appellant.

Pir *Taj-ud-Din* and Mr. *Ghulam Rasul*, for the Respondents.

JUDGMENT.—I do not think the lower Court should have rejected Jiwan's application so summarily without any enquiry at all. It was stated that the mother had wasted some of the moveable property, but she was not examined at all either on this point or as to whether she had other moveable property of the minor in her possession. The procedure under section 13 of Act VIII of 1890 is not intended to be summary, see *Sayad Shahu* v. *Hapija Begam* (1) and *Tirhu* v. *Lachhman* (2). It is quite possible that Jiwan may not be a suitable person to be appointed, but it might be advisable to formally appoint the mother making her furnish security.

I accept the appeal, and setting aside the lower Court's order remand the case for enquiry according to law. Costs to be costs in the case.

Appeal accepted.

(1) 17 B. 560 at p. 562; 9 Ind. Dec. (N. S.) 366.
(2) 15 Ind. Cas. 195; 71 P. W. R. 1912; 109 P. L. R. 1912.

NGA SHIN GYI *v.* EMPEROR.

LOWER BURMA CHIEF COURT.
FULL BENCH.
CRIMINAL REVISION No. 246B OF 1916.
May 22, 1917.
Present:—Mr. Ormond, Officiating Chief Judge, Mr. Justice Parlett and Mr. Justice Young.
June 1, 1917.
Present:—Mr. Justice Parlett.
NGA SHIN GYI—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Excise Act (X of 1896), s. 52—Licensee—Master and servant—Servant permitting drunkenness in shop during master's absence—Master, whether liable.

A liquor licensee is responsible under section 50 of the Excise Act for the default of his servants in permitting drunkenness in his shop without his knowledge [p. 979, col. 2; p. 980, col. 2.]

Case-law considered.

Criminal review of the order of the Township Magistrate, Twante, dated the 27th June 1916, passed in Criminal Regular Trial No. 42 of 1916.

FACTS appear from the following order of the Sessions Judge, dated the 3rd August 1916:—

"The petitioner, Shin Gyi, is holder of the license of a liquor shop at Twante and has been convicted by Maung Ba Thein, first class Township Magistrate of Twante, of an offence under section 50 of the Excise Act in that he permitted drunkenness in his shop.

He applies for revision on the grounds:—

1. that the drunkenness took place outside his shop;

2. that there was no complaint or report of the Collector or of an Excise Officer as required by section 57 of the Act;

3. that he ought not to have been convicted of an offence which occurred at Twante when he was admittedly in Rangoon at the time.

The first of these grounds may be disregarded as there is abundant evidence that there was drunkenness in the shop.

The second ground seems to me to be good. The prosecution was instituted by a Sub-Inspector of Police who is not, so far as I am aware, an Excise Officer except for the purpose of sections 36, 37 and 38 of the Act (*vide* section 44 of the Act and the Local Government's Financial Department Notification No. 15, dated 5th April 1909).

The third ground also seems to me to be good. I do not think that a licensee can be held to permit drunkenness which occurs in his absence from the shop, and there is no doubt that the petitioner was absent at the time when the drunkenness occurred.

For these reasons I submit the record to the Chief Court under the provisions of section 438 of the Code of Criminal Procedure with a recommendation that the conviction and sentence be set aside and that the fine which has been paid be refunded."

ORDER OF REFERENCE TO A FULL BENCH.—(TWOMEY, J., *September 4th*, 1916.)—The applicant A Kyi *alias* Shin Gyi, a Chinese licensed vendor of *kasawye* at Twante, was convicted and fined Rs. 25 under section 50, Excise Act. The section makes it an offence for "any person licensed to sell fermented liquor, etc.," to "permit drunkenness in his shop."

The Sessions Judge recommends that the conviction should be set aside because the prosecution was instituted without complaint or report of the Collector or of an Excise Officer, and *secondly*, because the accused was absent from his shop at the time and knew nothing about the drunkenness till afterwards. The conviction is supported by the Assistant Government Advocate on behalf of the Crown.

The first ground for interference suggested by the Sessions Judge is untenable, because section 50 is not one of the sections mentioned in section 57 among those in respect of which a report or complaint of the Collector or an Excise Officer is necessary.

As regards the second ground, there is a ruling of the Special Court, *Ah Shein* v. *Queen-Empress* (1), which lays down that a master cannot be convicted under section 42 (now 53), Excise Act, for breach of a condition of his license when his servant without the master's knowledge sells liquor in contravention of those conditions, and this ruling was followed by the Judicial Commissioner in *Ah Sin* v. *Queen-Empress* (2), which was a case of a licensee's servant selling liquor in excess of the quantity

(1) L. B. R. (1872-1892) 373.
(2) L. B. R. (1893-1900) 489.

allowed by the license. The Special Court considered according to the ordinary rule in interpreting penal enac ments that if it had been the intention of the Legislature to hold the master criminally responsible for offences committed without his knowledge by his servant, this would have been plainly laid down in the Act.

It is noteworthy that in passing the new Excise Act of 1896, the Legislature did not introduce into section 50 or other penal clauses words rendering the licensee expressly liable for the default of his employees, though such words were introduced in certain sections of the Bengal Act VII of 1878, see section 59. From this it might be argued that the Legislature acquiesced in the ruling of the Special Court in 1885.

As regards the servant, the Special Court found that he was criminally responsible and that his plea that he was not the person actually licensed could not prevail. The Court in taking this view followed the principles stated by Couch, C. J., in the case *In re Ishur Chunder Shaha* (3). From a later case in the Calcutta High Court [*vide Kalu Mal Khetri, In the matter of* (4)], it seems doubtful whether a servant would now be held liable criminally for a breach of a condition of his master's license.

But no later ruling has been brought to my notice throwing doubt on the correctness of the Special Court's decision restricting the licensee's criminal responsibility to acts and omissions within his knowledge. The learned Assistant Government Advocate can only refer to an earlier Bengal case of 1876 in which a different view was taken, *Queen* v. *Sristidhur Shaha* (5). The learned Judges in that Bengal case thought it right to hold a licensee responsible for the criminal offences of his servant on the general principle that "if he is obliged to carry on his business by means of servants he must be held responsible for their obedience to the law."

This case was apparently not considered by the Special Court. It raises much the same question as has been raised in cases under the Merchandise Marks Act [*vide Seena M. Haniff & Co.* v. *Liptons, Limited* (6)] as to the criminal liability of a master for acts done by his servants within the scope of their employment. It might perhaps be argued with reference to the Excise Act as under the Merchandise Marks Act that "the effect of the Act is to make the master or principal liable criminally for the acts of his agents and servants in all cases... where the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this that the master or principal may be relieved from criminal responsibility where he can prove that he acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act." Per Russel, L.C.J., in *Coppen* v. *Moore* (7). As in that case the question would be whether having regard to the language, scope and object of the Excise Act the Legislature intended to fix criminal responsibility upon the master for acts done by his servants in the course of their employment, although such acts were not authorized and might have been expressly forbidden.

This aspect of the matter was not considered by the Special Court, and it is a matter of some importance to the Excise Administration. For, if it is held (following the Special Court ruling) that the licensee is not liable for what happens at his shop in his absence, and (according to the Calcutta decisions) that a licensee's servant cannot be punished for breaches of his master's license, the Excise Authorities will be in a serious dilemma and the provisions of section 50 and other penal sections of the Excise Act will be rendered almost nugatory.

I, therefore, refer to a Bench the question whether a liquor licensee under the Excise Act can be held responsible under section 50 of the Act for the default of his servants in permitting drunkenness in his shop without his knowledge.

ORDER OF THE FULL BENCH.

ORMOND, OFFG. C. J.—The petitioner; a

(3) 19 W. R. 34 at p. 35 Cr.
(4) 29 C. 606; 6 C. W. N. 674.
(5) 25 W. R. 42 Cr.

(6) 23 Ind. Cas. 689; 7 L. B. R. 306 at p. 309; 7 Bur. L. T. 116; 15 Cr. L. J. 337.
(7) (1898) 2 Q. B. D. 306; 62 J. P. 453; 67 L. J. Q. B. 689; 78 L. T. 520; 14 T. L. R. 414; 46 W. R. 620.

licensed vendor of fermented liquor, left his shop in charge of a servant who permitted drunkenness on the premises. The question before us is whether he is liable for the act of his servant and, therefore, guilty of the offence of permitting drunkenness in his shop, under section 50 of the Excise Act.

From the order of reference we must take it that it was within the scope of the servant's authority to prevent drunkenness in the shop; and that the servant knew of the drunkenness and permitted it.

The question whether the licensee is liable for the act of his servant in such circumstances, depends upon the object and scope of the enactment. The object of section 50 was to prevent drunkenness on licensed premises; and clearly that object would be frustrated if the licensee could escape liability by absenting himself and leaving the shop in the charge of a servant. The responsibility is thrown on the licensee to take all proper precautions to prevent drunkenness on the premises; and if he absents himself and leaves the shop in the charge of a servant who permits drunkenness, he is liable, see *Bond* v. *Evans* (8).

In *Queen-Empress* v. *Tyab Alli* (9) a licensee was held to have been rightly convicted under section 22 of the Indian Arms Act (XI of 1878) for the wrongful sale by his manager, although the goods were not sold with his knowledge or consent. So in *Babu Lal* v. *Emperor* (10) a licensee was held to have been rightly convicted under section 9 of the Opium Act for the wrongful sale by his servant, although he may not have been aware of the sale. In *Chundi Churn Mookerjee* v. *Empress* (11) a contractor was held to be not guilty of an offence under section 22 of the Indian Ports Act (XII of 1875) of throwing ballast into the river, the act being done by his servants without his knowledge or consent. In that case the learned Judges stated that unless a master's liability for the acts of his servant is specifically declared by Statute, the master is not liable. The opinion is no doubt expressed in general terms, but it must be taken to be limited to the facts of the case. The decision in that case was based upon the wording of that particular Act; and it was not the case of a licensee. Under the Excise Act the licensee is taken to be the person who sells the liquor and he is the person responsible for preventing drunkenness on the premises; although it must have been contemplated from the nature of the business that he would frequently employ servants to sell the liquor for him and to be in charge of the shop. If the licensee does so the acts of his servants are taken to be his acts; and if his servants permit drunkenness on the licensed premises, he (the licensee) has committed the offence under section 50 of the Excise Act. To sum up the licensee's position: he must do his best to prevent drunkenness on the licensed premises, *e. g.*, he must not leave the shop open without a competent person in charge: and he is responsible for the acts of his servants, *e. g.*, if he leaves a competent person in charge and that person permits drunkenness, the licensee is responsible. I would answer the question referred in the affirmative.

PARLETT, J.—Section 50 of the Excise Act of 1896 renders liable to punishment any person licensed to sell retail fermented liquor who permits drunkenness in his shop. The question referred is whether a licensee can be held responsible under section 50 for the default of his servant in permitting drunkenness in his shop without his knowledge. The object and terms of the Act should be looked at to see whether and how far knowledge is of the essence of the offence created. In *Mullins* v. *Collins* (12) a licensed victualler was held liable to be convicted under 35 and 36 Victoria, Chapter 94, section 16, sub-section 2, although he had not knowledge of the act of his servant. The sub-section in question rendered liable to a penalty any licensed person who supplied liquor to any constable on duty unless by authority of some superior officer of such constable. It was pointed out

(8) (1888) 21 Q. B. D. 249; 57 L. J. M. C. 105; 59 L. T. 411; 36 W. R. 767; 52 J. P. 612.

(9) 24 B. 423; 2 Bom. L. R. 52; 12 Ind. Dec. (N. S.) 815.

(10) 14 Ind. Cas. 666; 34 A. 319; 9 A. L. J. 288; 13 Cr. L. J. 282.

(11) 9 C. 843; 12 C. L. R 508; 4 Ind. Dec. (N. S.) 1215.

(12) (1874) 9 Q. B. 292; 43 L. J M. C. 67; 29 L. T 838; 22 W. R. 297.

that if the licensed victualler was held not liable for the act of his servant the enactment would be rendered inoperative.

In *Redgate* v. *Haynes* (13) a conviction was sustained against a licensee of a hotel under section 17 of the same Act, which runs: "If any licensed person suffers any gaming to be carried on on his premises he shall be liable to a penalty." The facts found were that the licensee had gone to bed leaving a porter in charge of the hotel and the porter connived at the gaming. It was held that the licensee was still answerable for the conduct of those whom she left in charge of the hotel when she went to bed, and if those persons connived at the gaming she was responsible. The decision was affirmed in *Bond* v. *Evans* (8), a prosecution under the same section. Both the wording and the object and scope of the section are very similar to those of the part of section 50 of the Excise Act now under consideration, and these two cases appear to me to be strong authorities on the point.

In *Metropolitan Police Commissioner* v. *Cartman* (14) the respondent, a licensed person, gave orders to his servants that no drunken persons were to be served. During his absence one of his servants sold intoxicating liquor to a drunken person. The Licensing Act, 1872, section 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. It was held that the respondent was guilty of an offence under the section; for he was liable for the act of his servant, that act having been done by the servant within the general scope of his employment although contrary to the orders of his master.

In *Emary* v. *Nolloth* (15) the Lord Chief Justice, referring to the class of cases in which the licensee is charged with permitting or suffering an offence to be committed, deduced from the decisions the principle that if the licensee delegates his authority to some one else, thereby delegating "his own power to prevent", and the person left in charge commits the offence, the licensee is responsible for permitting it, and he remarked that this was a reasonable and logical view to take and necessary in order to prevent the Act from being defeated.

I am of opinion that this principle should govern the case now under reference and that the licensee, having left his servant in charge of his shop, is responsible if the servant in his absence permits drunkenness in the shop.

I would answer the question referred in the affirmative.

YOUNG, J.—I agree that the question referred should be answered in the affirmative for the reasons given by Ormond, Officiating Chief Judge, and Parlett, Judge.

Mr. *Villa* for Mr. *Kyaw Htoon*, for the Applicant.

The Assistant Government Advocate, for the Crown.

FINAL ORDER.

PARLETT, J.—(*June* 1, 1917)—In view of the decision of the Full Bench the conviction must be affirmed. The fine is not excessive. It is confirmed.

Conviction affirmed.

(13) (1876) 1 Q. B. 89; 45 L. J. M. C. 65; 33 L. T. 779.

(14) (1896) 1 Q. B. 655; 65 L. J. M. C. 113; 74 L. T. 726; 44 W. R. 637; 18 Cox. C. C. 341; 60 J. P. 357.

(15) (1903) 2 K. B. 264 at p. 269; 72 L. J. K. B. 620; 67 J. P. 354; 89 L. T. 100; 19 T. L. R. 530; 52 W. R. 107; 20 Cox. C. C. 507.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 27 OF 1917.

February 15, 1917.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

PAL SINGH AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 86, 300, fourthly—Murder committed under influence of drink—Intention—Punishment, measure of.

Where the accused under the influence of liquor assaulted the deceased and literally beat him to death with *lathis* without any direct motive:

Held, that the accused were guilty of murder under section 300 of the Penal Code, as they must have known that their act was "so eminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death." [p. 984, col. 1.]

Although section 86 of the Penal Code attributes to a drunken man the knowledge of a sober man when judging of his action, it does not give him the same intention, and, therefore, drunkenness or a state of intoxication affords a sufficient excuse for not exacting the extreme penalty of the law. [p. 984, col. 2.]

PAL SINGH *v.* EMPEROR.

Appeal from the order of the Sessions Judge, Amritsar, dated the 23rd December 1916.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

The Public Prosecutor, for the Respondent.

JUDGMENT.—Pal Singh, son of Khushal Singh, and Surain Singh, son of Kesar Singh, Jats of *Mauza* Padda, have been convicted of having caused the death of one Santu, ex-*lambardar* of their village, and under section 302, Indian Penal Code, they have been sentenced, Pal Singh to death and Surain Singh to transportation for life.

Against their convictions and sentences they have preferred this appeal through Mr. Muhammad Shafi and the case of Pal Singh is also before us under section 374, Criminal Procedure Code, for confirmation of the capital sentence. The facts of this case are given in ample detail in the judgment of the learned Sessions Judge and it is not necessary to recapitulate them here at any length. Briefly stated they are as follows:— On the 23rd August 1916 one Mahanda instituted a criminal complaint under section 426, Indian Penal Code, against Sundar and Bhatti. On the 25th August 1916, Bhatti lodged a complaint under sections 323 and 341, Indian Penal Code, against Mahanda, his son Sharfu, and Santu, the deceased. Both these cases were fixed for hearing before Sardar Budha Singh, Honorary Magistrate at *Mauza* Jhalari, for the 16th September 1916 and on that date the parties with their supporters duly appeared before the Magistrate.

Bhatti is a weaver of 16 years of age and has been practically brought up by Sunder, a *kahar*. With Bhatti on the 16th September 1916 were Chanda Singh, *lambardar*, Sundar and the two appellants. With Mahanda were Dhala, Santa Singh and Santu, deceased. Sardar Budha Singh informed the parties that he would record the evidence on the 21st September on the spot, and the parties accordingly left Jhalari for their homes. It appears that Mahanda and Dhala stayed behind at Jhalari while the deceased Santu and Santa Singh started for Padda by way of Butala. Of the other party, Chanda Singh, Sundar, Bhatti and the two appellants first proceeded to Sathiala, where they purchased some eatables, and then went to the shop of Jhandu, liquor contractor, where they purchased two bottles of liquor some of which they drank there, taking the rest with them to Baba Bakala. Outside Baba Bakala the party drank more of the liquor and while they were drinking Santu came along riding on a mare which he had borrowed from one Ram Singh. With him, it is said, was Santa Singh. Both these were offered liquor, but Santu refused to partake of any and rode on towards Padda. Santa Singh took some liquor which, however, made him vomit and he went into the village of Baba Bakala. After this Bhatti and his party continued their journey towards Padda in the wake of Santu deceased. The liquor he had drunk began to take effect on Sundar and he and Chanda Singh accordingly lagged behind, their companions gradually increasing the distance between them. On nearing China Bath, a village not far from Padda, Chanda Singh called out to the appellants and Bhatti to wait for them but the three did not do so, and according to Bhatti the appellant Pal Singh told him to take no notice of Chanda Singh and Sundar but to hurry on as it was necessary to "do away with Santu to-day." The three then passed along a *khal* and thus arrived at Chah Virkanwala ahead of Santu, and when he arrived there Bhatti was told by Pal Singh to catch hold of the mare, while Pal Singh dragged the deceased off the animal and gave him several thrusts with his *dang*, calling upon Surain Singh to join him in beating Santu. Surain Singh complied and proceeded to strike Santu with his fists and knees. After Santu had been well beaten, it is said by Bhatti that Pal Singh removed Santu's shoes and *khes* and threw them into a sugarcane field close by. Then the two appellants carried Santu to a place called Khangah Shangi Shah near *Mauza* Padda where he was left. Bhatti then let the mare go and finally went home, the two appellants spending the night at their *ghurial*. According to the evidence, Santu's cries brought Gami and Mit Singh, P. Ws. Nos. 6 and 7, to the spot, where they were joined by Jagat Singh, P. W. No. 8, and, as Santu was unable to walk, he was taken to his house on a *charpoy* where he succumbed to his injuries a short while after. According to the evidence of P. W. No. 6 Gami P. W. No. 7 Mit Singh, P. W. No. 8 Jagat Singh, P. W. No. 9 Chanda Singh,

son of Kaura, and P. W. No. 5 *Musammat* Haro, widow of the deceased, Santu before his death named the two appellants as his assailants.

As has been said above Sundar had been overcome by liquor, and according to P. W. No. 11 Chanda Singh, son of Mayya Singh, his companion, Sundar, succumbed to his potations and Chanda Singh was obliged to seek the assistance of a son and nephew of one Jiwan Singh, who live in China Bath, where Sundar was taken and he and Chanda Singh spent the night at the house of Jiwan Singh in that village. Chanda Singh states that he and Sundar started for Padda on the following morning and on nearing their village heard the cries of Santu's sister-in-law, who was weeping and who told them that Santu was dead and that the appellants had killed him. Chanda Singh accordingly went to the Bias Police Station which is some four miles from Padda and there, at 10 A.M., reported the matter detailing the circumstances above given and stating that the wife of Santu was accusing Pal Singh and Surain Singh of having caused the death of her husband. The Police proceeded to the village and there, after carrying out the usual formalities, commenced their investigation with the result that Bhatti made a statement detailing the circumstances of the assault on Santu as already described above. The houses of the two appellants were searched and a *lathi* was found in the house of Pal Singh and a *pagri* in the house of Surain Singh. These were taken into possession for two reasons:—(1) because they bore stains which appeared to be blood stains, and (2) because the *pagri* was said to belong to the deceased. These articles were despatched to the Imperial Serologist, whose report at page 4 of the paper book shows that the *pagri* was stained with human blood while the *lathi* bore bloodstains which were too disintegrated for their source to be determined.

The Civil Surgeon of Amritsar, Lieutenant-Colonel James, held the *post mortem* examination of the body of the deceased, and according to his statement it appears that the deceased bore a wound on the right side of the forehead one inch long, as well as a wound on the front of the left leg three inches long. Injuries detailed in the inquest report by the Police as being present on the neck could not be discovered owing to decomposition. On the right side the 3rd 4th and 5th ribs were broken and on the left from the 4th to the 11th ribs were broken, while the breast bone was broken across the middle. In his opinion the deceased had been beaten to death, and he stated that "it is extremely unlikely that the deceased would have made any statement" after receiving such injuries and that death supervened within an hour or half an hour. In cross-examination he gave it as his opinion that the deceased "became unconscious immediately after receipt of the injuries."

In addition to the evidence above indicated, P. W. No. 3 Bhagwan Singh and P. W. No. 4 Lachhman Singh were sent up by the Police as witnesses who professed to have actually seen the deceased being beaten by the appellants.

Mr. Shafi pointed out that the evidence against his clients consisted of:—

(1) the statement of Bhatti,

(2) the direct testimony of Bhagwan Singh and Lachhman Singh,

(3) the discovery of the *lathi* and *pagri*, and

(4) the statements of witnesses relating to the dying declarations made by Santu.

With regard to (1) it was urged that, as the learned Sessions Judge had held, Bhatti was an accomplice and, therefore, his evidence should not be received without material corroboration.

For the Crown Mr. Mul Chand frankly conceded this and we have no hesitation in holding that Bhatti must be regarded as an accomplice, and further that without corroboration his evidence would not be sufficient.

As to (2) it was pointed out that the learned Sessions Judge had rejected the evidence of Bhagwan Singh and Lachhman Singh. Mr. Mul Chand again quite frankly (and in our opinion quite rightly) admitted that no reliance could be placed on the testimony of these two persons.

As to (3) while admitting the discovery of the *lathi* and *pagri* as alleged by the prosecution, Mr. Shafi criticised the evidence of P. W. No. 5, *Musammat* Haro, and P. W. No. 12, Sardar Budha Singh, regarding the

dentification of the *pagri* as belonging to the deceased. It was pointed out that there were no special marks on the *pagri* and it was urged that the presence of bloodstains on such articles was really of no weight, and that even if the prosecution theory regarding them were taken as correct, there was not sufficient corroboration of Bhatti's statement. Finally we were referred to the evidence of D. W. No. 3, Bhan Singh, and D. W. No. 4, Kesar Singh. The former is the brother of Pal Singh and claimed the *lathi* as his own property, accounting for the bloodstains on it by saying he had used it to kill rats with.

Kesar Singh is the father of Surain Singh and stated that the *pagri* was his property, the bloodstains being due to his nose having bled.

We have carefully considered this portion of the case and are of opinion that the *pagri* belonged to the deceased. It is in evidence that Santu was wearing such a *pagri* when he appeared in the Court of Sardar Budha Singh, P. W. No. 12. This witness is eminently reliable and he has sworn that he noticed the colour of the *pagri* and told Santu that a man of his years should not wear such turbans.

Again it is beyond dispute that when Santu was found his *pagri* was missing. The *khes* and shoes were discovered at the instance of Bhatti from the sugarcane field —and Bhatti said that the appellants had taken away the *pagri*. That it is capable of identification is practically admitted inasmuch as Kesar Singh claims to identify it as his own. His statement is opposed to that of *Musammat* Haro, P. W. No. 5, and after due consideration we do not think that Kesar Singh is speaking the truth. Had the *pagri* really been his and had the stains on it been due to his nose having bled, he would have mentioned this fact to the Police at once. Yet he admits that he did not do so. Again it is strange that he should have kept it for so long without having had it washed. We have no hesitation in holding that the *pagri* belonged to Santu who was wearing it at the time he was assaulted.

As to the *lathi*, it is immaterial whether it belonged to Pal Singh or his brother, but the latter's attempt at accounting for the bloodstains on it is really absurd. He says he killed rats with it, but cannot say when —he also says Pal Singh had a smaller stick—which, however, was not found in the search and has not been produced. We can see no reason to doubt that the *lathi* was used by Pal Singh. The discovery of the *lathi*, however, is not corroboration of any value as against Pal Singh, but the finding of the *pagri* does, in our opinion, afford some good corroboration of Bhatti's evidence as against Surain Singh.

Were this all, however, we would hesitate to hold it to be sufficient, but there remains the 4th portion of the evidence, *viz.*, the dying declarations made by Santu.

With regard to this Mr. Shafi contended that the opinion of the medical witness should be accepted and that we should hold that Santu made no statement at all. Mr. Mul Chand on the other hand referred us to the statements of P. Ws. Nos. 5, 6, 7, 8 and 9 and urged that the opinion of a medical witness could not really refute definite statements such as these witnesses have made, and he contended that their evidence afforded the strongest possible corroboration of Bhatti's statement.

After a careful consideration of all the circumstances and of the evidence relating to the dying declarations, we are constrained to hold, with all respect for the opinion of the Civil Surgeon, that Santu was able to, and did, speak before his death.

We can find no reason why P. W. No. 6, Gami, P.W. No. 7, Mit Singh, and P.W. No. 8, Jagat Singh, should say that Santu named the appellants if as a matter of fact he made no statement at all. We are of opinion that the evidence of these witnesses cannot be brushed aside merely because of the opinion expressed by the Civil Surgeon, and we feel convinced that they are speaking the truth, and that Santu did name the appellants to them as they allege.

It follows, therefore, that Bhatti's statement is amply corroborated as against both the appellants. In this view of the case it is not necessary to discuss Mr. Shafi's suggestion that Santu's assailants were Sundar and Chanda Singh. We need only remark that in our opinion this suggestion had no foundation or force.

We hold, therefore, that Santu met his death at the hands of the appellants, and

the only question that remains is whether the offence committed by them falls within the purview of section 302, Indian Penal Code, or, as suggested by Mr. Shafi, whether section 325 or section 304 (II), Indian Penal Code, is applicable. We have no hesitation in saying that section 325, Indian Penal Code, does not apply, nor, having regard to the merciless nature of the beating inflicted on the deceased, can we allow that the act of the appellants can be brought within the scope of part 2 of section 304, Indian Penal Code.

The medical evidence shows that the assault on the deceased was a brutal one and that he was literally beaten to death. When two men set on to a third and beat him with *lathis* with the violence and brutality evidenced by the result of the *post mortem* in this case, there can be no doubt that they must be held to have known that their act was "so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death" Their act, therefore, would fall within the definition of murder as given in section 300 (fourthly), Indian Penal Code.

The offence committed by the appellants, therefore, is clearly murder, unless they can appeal to any other provision of the Code which would reduce the gravity of their offence.

The only provision even remotely in point is section 86, Indian Penal Code, and though the appellants have not themselves pleaded drunkenness, the case for the prosecution has been from the outset that the appellants were more or less intoxicated at the time when they assaulted the deceased.

In these circumstances we feel that this aspect of the case must be duly considered, and this notwithstanding that we have held that section 300 (fourthly), Indian Penal Code, applies. Bhatti has stated that the appellants had joined him and his other companions in drinking He is corroborated by Chanda Singh, P W. No. 11, Jhandu, P. W. No. 19—the liquor contractor, and P. W. No. 20, Santa Singh, and we consider that this evidence is sufficient to establish the fact that the appellants had been drinking. In fact we can find no direct motive on their part for their murderous attack on Santu, and we feel convinced that their action is attributable to the liquor they had imbibed.

Now under section 86, Indian Penal Code, a person "who does an act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated," and, therefore, in a case such as the present it is clear that the fact that the appellants were intoxicated at the time they assaulted Santu is no excuse and they must be held to have had the knowledge referred to in section 300, fourthly, Indian Penal Code, and must still be held guilty of an offence under section 302, Indian Penal Code.

As far as Surain Singh is concerned this concludes the matter, but in the case of Pal Singh the question remains as to whether the capital sentence should be confirmed.

In this connection the intention with which the assault was made may profitably be considered.

Now the general presumption of law is that a man must be taken to intend the ordinary and natural consequences of his acts. Section 86, Indian Penal Code, attributes to a drunken man the knowledge of a sober man when judging of his action, but does not give him the same intention [*Nga Tun Baw* v. *Emperor* (1)]. This knowledge is the result of a legal fiction and constructive intention cannot invariably be raised. In the absence of an intention to cause death or such bodily injury as is likely to cause death, it may reasonably be urged that drunkenness or a state of intoxication would form a sufficient excuse for not exacting the extreme penalty of the law. In the present case we are unable to find directly or constructively that Pal Singh intended to cause death or such bodily injury as would be likely to cause death, and we, therefore, do not think it necessary to sentence him to death.

Indeed we may say that we cannot see any sufficient reason for differentiating the cases of the two appellants.

In these circumstances we uphold the convictions of both the appellants under

(1) 17 Ind. Cas. 800; 5 Bur. L. T. 175; 13 Cr. L. J. 864; 6 L. B. R. 100.

section 302, Indian Penal Code, and maintain the sentence passed on Surain Singh. We, however, set aside the capital sentence passed on Pal Singh and in lieu thereof sentence him to transportation for life.

Convictions upheld.

PATNA HIGH COURT.

CRIMINAL REVISION No 11 OF 1917.

June 15, 1917.

Present:—Mr. Justice Jwala Prasad.

RANG BAHADUR SINGH AND OTHERS—DECREE-HOLDERS—PETITIONERS

versus

SHEONANDAN SINGH AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTIES.

Criminal Procedure Code (*Act V of* 1898), *s.* 195 (6) —*Civil Procedure Code* (*Act V of* 1908), *s.* 115—*Revocation of sanction by District Judge in appeal*—*Revision*—*High Court, power of interference of.*

The High Court can interfere under its revisional jurisdiction, conferred by section 115 of the Code of Civil Procedure, with an appellate order of a District Judge passed under section 195 (6) of the Criminal Procedure Code. [p. 987, col. 2.]

Case-law reviewed

Criminal Revision against the order of the District Judge, Patna, dated the 24th March 1917.

Mr. *Jayaswal* (with him Mr. *Sunder Lal*), for the Petitioners.

Mr. *Bimala Ch. Sinha*, for the Opposite Party.

JUDGMENT.—This is an application to set aside an order of the District Judge of Patna, dated 24th March 1917, revoking the sanction granted by the Munsif under section 195 of the Code of Criminal Procedure. On 14th August 1916, the petitioners had obtained a rent-decree against Saudagar Singh, Rupnarain Singh and Sakaldip Singh as principal defendants and Ramotar Singh, Palakdhari Singh, Rang Bahadur Singh, Raghoni Singh and *Musammat* Jamna Koer *pro forma* defendants. The *pro forma* defendants were the co-proprietors of the decree-holders.

The decree was executed and a prayer was made in the execution petition for the attachment of standing crops on the lands in respect of which the rent-decree was obtained. This petition was filed on the 13th of November 1916. The writ of attachment was issued under the orders of the Court dated November 16th, 1916. Two peons were directed to attach the moveable property of the judgment-debtors, namely, the crops standing on the lands specified in the schedule attached to the writ The peons deputed by the Court were Amrit Singh and Ram Lakhan Pande. The peons went to the spot and attached the crop standing on the first plot of land mentioned in the writ. When they went to attach the crop standing on the second plot it is said that Sheo Nandan Singh, Palakdhari Singh, Baran Singh, Raghoni Singh, Ramotar Singh, Bahadur Singh and some 11 or 12 other persons arrived at the spot armed with *lathis* and *sotas* and began to abuse the identifier and assaulted him with fists and slaps. They also ran to assault and abuse the Chamar who for fear of death fled away.

The peons in the report further say that they explained to the aforesaid persons that they should not interfere with them in the discharge of their duties and that they should not disobey the orders of the Court, but they paid no heed to that and were prepared to commit breach of the peace and abused them (peons). This happened on the 17th November 1916. The peons submitted their report embodying the above facts on the 20th November 1916 and prayed for necessary orders to be passed.

The decree-holders, who are petitioners here, on the 23rd November 1916 made an application to the Munsif praying for sanction to be granted to them under section 195 of the Code of Criminal Procedure for the prosecution of the persons named therein as having obstructed the attachment of the crops by the Civil Court peons. The application of the decree-holders for sanction was entertained by the Munsif and the opposite party was called upon to show cause why sanction should not be granted. On 20th January 1917, the learned Munsif passed an order granting sanction to the decree holders to prosecute the opposite party under section 185 of the Indian Penal Code. This was an order passed in the presence of both the parties and on consideration of the evidence adduced by them. The Munsif sums up his order in the following words:—

RANG BAHADUR SINGH v. SHEONANDAN SINGH.

"From the evidence of one of the peons and the identifier a strong *prima facie* case has been made out. Some discrepancies have been pointed out in the evidence of the identifier but they do not seem to be very material and it shall be for the trying Court to consider them more fully. I sanction the prosecution of the opposite party under section 186 of the Indian Penal Code."

There was then an appeal to the District Judge under clause 5 of section 195 of the Code of Criminal Procedure. The District Judge disposed of the appeal in the following words by his order of the 24th March 1917 :—

"In view of the previous history for this bond and the fact that there has been litigation about it, the proper course, in my opinion, would have been to proceed under Order XXI, rule 97, etc. I, therefore, revoke the sanction to prosecute criminally. No costs".

The decree-holders petitioners have come up to this Court against the aforesaid order of the District Judge and seek to have it set aside on the ground that the order passed by the District Judge was illegal, and that the District Judge did not consider the case on the merits. There can be little doubt that the order of the District Judge was passed under a misapprehension of the applicability of Order XXI, rule 97, etc, of the Code of Civil Procedure referred to in his order. These rules apply to resistance to delivery of possession to the decree-holder or the purchaser of an immoveable property and do not apply to moveable property. The property to be attached in this case was moveable property, consisting of standing crops on the plots specified in the schedule to the writ of attachment. The writ of attachment expressly directs the attachment of moveable property. Under clause 13, section 2 of the Code of Civil Procedure growing crops come under moveable property. This clause was newly added in the year 1908 and was with a view to facilitate the attachment of agricultural produce under Order XXI, rules 44 and 45 of the Code of Civil Procedure. The attachment of standing crops or the crops stored in the threshing floor is governed by the aforesaid rules, and not by rule 97, Order XXI. The District Judge was, therefore, clearly under a misapprehension but for which he himself, I think, would not have passed the order refusing the sanction.

Now as to the merits of the case, there can hardly be any doubt that there was a *prima facie* case against the opposite party. The previous litigation between the parties over the land upon which the crops were standing would rather go to show that the obstruction by the opposite party was probable. The opposite party are co-proprietors and were defendants in the rent suit As pointed out by the learned Vakil who appeared for them in this Court there was a previous section 145,Criminal Procedure Code, proceeding between the decree-holders and the judgment-debtors on one side and the co-proprietors on the other side in the course of which the possession of the disputed land was declared to be with the opposite party. If that is so, there appears to be a strong motive for the resistance offered by the opposite party to the attachment of the crop standing on the land.

The section 145, Criminal Procedure Code, case occurred some time towards the close of the year 1915 and the rent-decree was obtained in August 1916 and the attachment was in November 1916. It shows that the party in whose favour the order under section 145 was made would not like to have the crops attached at the instance of the decree-holders. We are not at all concerned with the previous litigation between the parties, nor with the result of the section 145 case. We are only concerned with the execution of the decree in the course of which the Court directed the attachment of the crops standing on the land. The peons went, according to their report, to the land to attach the crops. If the opposite party had a grievance against the attachment they had ample remedy provided for that in the Code of Civil Procedure. Under rule 45 of Order XXI the attachment of crops standing on any land does not deprive the judgment debtors or the persons who grew the crops of the possession of them. After the attachment the judgment-debtors or

the opposite party are allowed to cut the crops subject to the supervision and the care of the person deputed to look after the attached crops. So the attachment itself was not going to deprive the judgment-debtors or the opposite party of the possession of the crops, and there was ample time for them after the attachment to come to Court and to put in their claims to the crops attached or to dispute the right of the decree-holders to attach the crops under rule 58, Order XXI, of the Code of Civil Procedure. The act of the judgment-debtors as reported by the peons, if true, was a high handed act. It was an offence against the orders issued by a Court of Justice and if upon a preliminary enquiry made by the Court whose orders were disobeyed, a *prima facie* case in its view was made out, there appears to be no reason why the wrong-doers should not be put on their trial. My only surprise is that the case was dealt with by the Munsif under section 195 of the Code of Criminal Procedure, whereby sanction to prosecute has been given to a private prosecutor who may or may not use the sanction or may compound the offence with the opposite party for any consideration.

The Munsif, to my mind, should have taken action under section 476 of the Code of Criminal Procedure. The peons' report was made on the 20th November 1916, *i. e.*, earlier than the application of the decree-holders, which was made on the 23rd November 1916. But as the Munsif has chosen to take action under section 195, and not under section 476, there appears to be no course open to this Court but to allow the sanction to stand and to set aside the order of the District Judge, which I would have hesitated to do had the learned District Judge considered the case upon merits.

It has been urged by the learned Vakil for the opposite party that this Court has no jurisdiction to set aside the order of the District Judge revoking the sanction given by the Munsif, passed under clause 6 of section 195. In support of this the case of *Hamijuddi Mondol* v. *Damodar Ghose* (1) has been cited. But in that case the order of the District Judge was not affected by any illegality or material irregularity as contemplated by section 622, now section 115 of the Code of Civil Procedure, and the District Judge had dealt with the case on merits. This ruling has no application to the present case where it has been shown that the order of the learned District Judge was illegal and the merits of the case were not considered by him. The Full Bench of the Madras High Court in *Muthuswami Mudali* v. *Veeni Chetti* (2) went further and held that the right of appeal conferred by section 195 (6) of the Code of Criminal Procedure, read with sub-section 7, is not restricted to a right of appeal to the Appellate Court to which the Court of first instance is immediately subordinate and that an appeal lies to the High Court from the order of the first Appellate Court revoking a sanction given by the Court of first instance, or granting a sanction refused by the Court of first instance. Whether or not there is a right of second appeal to the High Court, it is clear to my mind that the High Court can interfere under its revisional jurisdiction, conferred by section 115 of the Code of Civil Procedure, with an order of a District Judge passed under section 195, clause 6.

I would, therefore, allow this application, set aside the order of the District Judge and restore the sanction granted by the Munsif in this case. No order as to costs.

Application allowed.

(1) 10 C. W. N. 1026; 4 Cr. L. J. 168.

(2) 30 M. 382; 17 M. L. J. 266; 2 M. L. T. 239; 6 Cr. L. J. 102.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 1011 OF 1916.

February 19, 1917.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

BISAKHI AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 378, 75—Theft —Cutting string of hass *and forcing its ends slightly*

BISAKHI v. EMPEROR.

apart in order to remove it, whether constitutes sufficient moving of hass—*Enhanced punishment—Charge, previous convictions not specified in, effect of—Criminal Procedure Code (Act V of* 1898), *ss.* 221 (7), 535, 537.

Where the accused cut the string with which a *hass* was fastened round the complainant's neck forcing the ends of the *hass* slightly apart, intending to remove the same from her neck, but on account of the struggle that ensued between him and the complainant the *hass* fell from the latter's neck and was found on the bed later on:

Held, that the act of cutting the string and forcing the ends apart constituted a sufficient moving of the *hass* to bring the act within the purview of section 378 of the Penal Code. [p. 989, col. 2.]

Where an accused who was a previous convict was convicted of theft and sentenced to enhanced punishment under section 75 of the Penal Code, but the charge sheet did not specify the previous convictions as required by section 221 (7) of the Criminal Procedure Code:

Held, that the defect was cured by sections 535 and 537 of the Criminal Procedure Code, inasmuch as there had been no failure of justice nor had the accused been prejudiced in his defence [p. 990, col 2.]

Appeal from the order of the Sessions Judge, Ferozepore, dated the 19th October 1916.

Mr. *Nand Lal*, for the Appellants.

Mr. *Mool Chand*, Public Prosecutor, for the Respondent.

JUDGMENT.—Bisakhi and Mahya, sons of Gulaba, caste Bawarya, of Dharm Singhwala, have been convicted of an offence under sections 379/75, Indian Penal Code, and on account of their previous record as convicts have been sentenced to transportation for life. Against their convictions and sentences they have preferred this appeal through Dr. Nand Lal and we have heard Mr. Mool Chand on behalf of the Crown.

The facts of the case are given in detail in the judgment of the learned Sessions Judge and it is not necessary to recapitulate them here at any length. It appears that one Jhandu, a *Lohar*, lives in Burj Muhammad Shah; with him, in addition to his sons, *Musammat* Umri, his sister, has been residing. On the night between the 6th and 7th June 1916 the whole family was sleeping on different cots in the courtyard of their house. This courtyard consists of an open space of ground in front of the house, which open space is surrounded on all sides by a high wall in which there is a doorway with a reed door known as a *khirki*. This door, however, although it can be closed, is not provided with a hasp and chain. During the night in question *Musammat* Umri, P. W. No. 1, was unable to sleep and was smoking a *huqa*; she heard the *khirki* opened but took no notice as she thought it was one of her nephews. She then felt some one pull at her *hass* which was fastened round her neck. She raised her arms and they fell on the neck of a man who was apparently bending over her, and who was cutting the string with which the *hass* was fastened round her neck. She raised an alarm and seized the *hass* with one hand while with the other she caught hold of the hair of her assailant. P. W. No. 2, Jhandu, her brother, woke on her cries, and, as he got up, was attacked by two persons, the third he saw was struggling with *Musammat* Umri. He closed with one of his assailants and in the struggle that ensued he and the man he had caught passed through the door into the lane in front of the house. His two sons, Muhammad Hussain, P. W. No 3, and Talab Hussain, P.W. No. 4, had also been aroused by the cries and the sound of the struggle and went to his assistance. A free fight ensued with the result that Jhandu, Talab Hussain and Muhammad Hussain received injuries as did the thief they had captured. The villagers came to the spot and the remaining thieves made off. Bisakhi was the man captured by Jhandu.

Among the first to come to the spot were Mohamda, P W. No. 5, and Fattu, P. W. No. 7, closely followed by Nathu *Lambardar*, P. W. No. 6. These persons saw two or three thieves running away. Fattu pursued one, while Mohamda followed the other. The thief chased by Fattu escaped but Mohamda managed to come up with his man in the tobacco field of Shera *Lambardar*, and there knocked him down and with the assistance of Nathu, P W. No 6, and Fattu, P.W. No. 7, who joined him there, the second thief was caught, who turned out to be Mahya, appellant. Shera, *Lambardar*, arrived on the scene and found these two persons in custody, but neither of them would give their names and consequently on the following morning Shera accompanied by the *chaukidar* went to the Police Station Maku, five *kos* distance, and at 7 A.M. reported the occurrence. The Police arrived on the scene

and took over the two appellants and after making the usual enquiry had them and various witnesses, who had been injured, duly examined by the Assistant and Sub-Assistant Surgeons. The evidence of the two Medical Officers, Lala Diwan Chand, Sub-Assistant Surgeon, and Pandit Chandar Shankar, Assistant Surgeon, shows that Umri, Muhammad Hussain, Talab Hussain, Fattu, Jhandu and one Nabi Bakhsh (not produced in Court) had received several injuries which amounted to simple hurt, although the number of their injuries were pretty considerable. Similarly the two appellants had evidently also received severe punishment from their captors. The learned Sessions Judge in agreement with the unanimous opinion of the assessors has accepted the story of the prosecution as detailed above.

We have perused the evidence and considered the criticisms made with regard to it by Dr. Nand Lal and agree that the case has clearly been established against the appellants The defence set up by them was that they, along with other persons, Bawaryas and Jats, had been *shikaring* pig with the aid of dogs; that they had succeeded in killing a sow and that they had gone in pursuit of a young pig which had entered into the tobacco field of Shera causing damage to it; that Shera, and the other villagers belonging to Burj Muhammad Shah had resented the damage caused to the tobacco and a free fight ensued in which a dog had been killed, and because the appellants did not happen to have passes they were detained and this story concocted. An examination of the Police papers shews that this defence was not raised during the investigation, and it was not till the appellants were examined by the Committing Magistrate that they thought of bringing forward this story. We have examined the evidence in support of their defence and we are in full agreement with the view taken of it by the learned Sessions Judge; as pointed out by him, the story told by the witnesses is not only improbable but inconsistent and full of discrepancies. It is not necessary to further discuss this part of the case.

Dr. Nand Lal urged then that section 319, Indian Penal Code, was not applicable inasmuch as the *hass* was not "moved" within the meaning of section 378. After giving careful consideration to all that was advanced in support of this contention we have no hesitation in holding that it has no force. According to the evidence of *Musammat* Umri the string by which the *hass* was fastened to her neck was cut and the ends of the *hass* forced slightly apart, in order to remove the same from her neck, with the result that in the struggle that ensued between her and the thief who was attempting to remove it from her neck it fell from her neck and was found on the bed later on. In our opinion the act of cutting the string and forcing the ends apart constitutes a sufficient moving to bring the act within the purview of section 378, Indian Penal Code, and we hold, therefore, that section 379 has been correctly applied. In this view of the case it is not necessary for us to consider the question raised in the course of the arguments by the learned Counsel for the Crown as to the applicability of section 457, Indian Penal Code.

The next point raised by Dr. Nand Lal was that inasmuch as the charge sheets did not include a charge under section 75 relating to the previous convictions of the two appellants, they were not liable to the enhanced punishment prescribed by that section of the Code. In support of this argument we were referred to *Empress* v. *Haidar* (1); *Queen* v. *Rajcoomar Bose* (2); *Queen* v. *Sheik Jakir* (3); *Queen-Empress* v. *Dorasami* (4) and *Shamjee Nashyo, In re* (5) and our attention was also drawn to section 221 (7) of the Criminal Procedure Code. There is no doubt that section 221 clearly lays down that when it is intended to prove previous convictions against an accused person for the purpose of affecting the punishment, the fact, date and place of the previous conviction shall be stated in the charge, and the authorities cited at the Bar, with the exception of *Shamjee Nashyo, In re* (5), support Dr. Nand Lal's contention as far as they go. The rulings were *passed* under the old Code of 1872, section 439, the last paragraph of which is practically the

(1) A. W. N. (1883) 110; 3 Ind. Dec. (N. S,) 449.
(2) 19 W. R. 41 Cr.
(3) 22 W. R. 39 Cr.
(4) 9 M. 284; 2 Weir 266; 3 Ind. Dec. (N. S.) 595.
(5) 1 C. L. R. 451.

same as section 221 of the present Code; but Mr. Mool Chand has referred us to sections 535 and 537 of the Criminal Procedure Code and has contended that these two sections clearly cure the defect referred to The rulings cited by Dr. Nand Lal have been referred to by us and it appears that the question as to whether the defect could or could not be cured by any other section of the Code then in force was not considered in any one of them. Section 535 is in the main a new section, although section 216 of the Code of 1872 contained a similar provision. Similarly in the case of section 537 of the present Code there is no section directly corresponding with the Code of 1872, but section 203 of that Code laid down that no defect in the complaint or summons shall affect the validity of the proceedings unless it appears that the accused person was actually misled by such defect. Section 283 of the Code of 1872 provided that no finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any error or defect, either in the charge or in the proceedings on or before trial. None of these provisions of the Code of 1872 were referred to in *Empress* v. *Haidar* (1). The same is the case in *Queen* v. *Rajcoomar Bose* (2); *Queen* v. *Sheik Jakir* (3) and *Queen-Empress* v. *Dorasami* (4). In these circumstances we are not pressed by these decisions, and it appears to us that the provisions of section 535 would, as contended by Mr. Mool Chand, cure the omission in the present case. Section 535 lays down that no finding or sentence pronounced or passed shall be deemed invalid merely on the ground that *no charge was framed, unless, in the opinion of the Court of Appeal* or Revision, a failure of justice has *in fact* been occasioned thereby. In the present case it is difficult to see how it can be considered that, *as a matter of fact*, a failure of justice has been occasioned by the omission to include a formal charge relating to the previous convictions of the appellants. They were sent up for trial to the Sessions Court on a charge sheet which clearly contained a note to the effect that a statement of the previous convictions was attached therewith. Each of the appellants was specifically asked whether he had been previously convicted and in these circumstances it seems clear that they could not possibly have been prejudiced in their defence. The only fact that it was necessary for the prosecution to prove in order to render section 75, Indian Penal Code, applicable was the fact of the previous convictions, and this each of the appellants has specifically admitted. In these circumstances we have no hesitation in holding that although the charge on which the appellants have been tried and convicted was defective in that the charge sheets did not contain what is contemplated by section 221 (7), Criminal Procedure Code, nevertheless sections 535 and 537, Criminal Procedure Code, cure this defect inasmuch as there has been no failure of justice nor have the appellants been prejudiced in their defence.

With regard to the sentence Dr. Nand Lal urged that even assuming that his clients were held to have committed theft, still the sentence was out of all proportion to the crime. It appears, however, that the two appellants, who are members of a criminal tribe, were both convicted in 1902 of dacoity. Bisakhi was sentenced to ten years' and Mahya to fourteen years' rigorous imprisonment in that case. In spite of these substantial sentences it is evident that the appellants have not amended their ways and we see no reason to doubt that the sentences are well deserved. We accordingly uphold the convictions, maintain the sentences and dismiss the appeal.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 759 OF 1916.

CRIMINAL REVISION PETITION NO. 614 OF 1916.

April 30, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

In re NAGIREDDY KONDAREDDY AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (*Act V of* 1898), *ss.* 107,

In re NAGIREDDY KONDAREDDY.

177, 192, 528—*Facts forming subject of previous enquiry resulting in discharge, whether ground for fresh enquiry under s.* 107—*Transfer of case by District Magistrate to Magistrate within whose jurisdiction parties do not reside, legality of*—S. 177, *applicability of.*

In initiating proceedings under section 107 of the Criminal Procedure Code, a Magistrate should not rely upon facts and information which formed the subject of a previous enquiry and in which the accused were discharged. There must be fresh materials available on which it can be said that a fresh apprehension has arisen of a breach of the peace being committed by the accused. The same facts cannot form the subject of repeated proceedings either under the Penal Code or under the Criminal Procedure Code. [p. 991, col. 2; p 992, col. 1.]

The Police reported to the District Magistrate of Nellore that they apprehended breach of the peace from certain parties and requested him to take proceedings under section 107 of the Code of Criminal Procedure The District Magistrate, without recording any opinion as to the apprehended disturbance of the peace, transferred the case to the file of the Head Quarters Deputy Magistrate, Nellore, within whose jurisdiction neither of the parties resided. The Head Quarters Deputy Magistrate then issued a notice under section 107 of the Code of Criminal Procedure to the petitioners:

Held, (1) that the order of transfer was bad; [p. 992, col. 2.]

(2) that the District Magistrate could not be said to have taken cognizance under section 192 of the Criminal Procedure Code, of a case falling under section 107 of the Code within the meaning of the Code so as to enable him to transfer it to a Subordinate Magistrate. [p. 992, col. 2.]

The provisions of section 107 of the Criminal Procedure Code do not fall within the scope of section 528, so as to enable a District Magistrate to transfer proceedings under that section to a Magistrate who has no jurisdiction over the matter. Section 177 of the Criminal Procedure Code has no application to such proceedings and the use of the word "ordinarily" in that section excludes trial of cases specifically provided for in section 107 of the Criminal Procedure Code. [p. 993, col. 1.]

Nirbikar Chandra Mukherji v. *Emperor*, 1 Ind. Cas. 78; 13 C. W. N. 580; 9 Cr. L. J. 148; *Surjya Kanta Roy Chowdhry* v. *Emperor*, 31 C. 350; 1 Cr. L. J. 344; *King-Emperor* v. *Munna*, 24 A. 151; A. W. N. (1901) 203, followed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court will be pleased to quash the proceedings of the Court of the Deputy Magistrate, 1st Class, Nellore, in Miscellaneous Case No. 20 of 1916, initialled by its order, dated the 27th September 1916.

Dr. *S. Swaminadhan*, for the Petitioner.

Mr. *P. R. Narayanaswami Aiyar*, for Mr. *E. R. Osborne* (Public Prosecutor), for the Crown.

ORDER.—In this case notice has been issued by the Head Quarters Deputy Magistrate of Nellore, calling on the petitioners to show cause why they should not give security under section 107, Criminal Procedure Code. The matter has a long history. It appears that in the village of Kaluvoy there are two factions, one headed by the first petitioner Nagireddi Kondareddi who has under his protection a number of Muhammadans, some of whom are also petitioners in this matter, and on the other side are the rest of the influential Hindus of that locality. For some time there has been a dispute as regards the right to play music during the *mohurram* before the Hindu temples. On the other hand the Hindus claim the right to play music during their festivals before the local mosque. There seems to be also a private quarrel between the first petitioner on the one side and some of the other leading Hindu residents of that village on the other. There have been a number of cases and proceedings going on since 1914 between the parties and, strange to say, in all these cases the persons accused of the offences were either acquitted or discharged and the proceedings taken under section 107 fell through. The proceedings now in question are the last of the series. Two objections are taken to them. The first is that the facts and the information upon which the proceedings were had, had already been the subject of enquiry in previous proceedings under section 107 and also in certain criminal charges, and that in those proceedings and charges the present petitioners were discharged.

This is undoubtedly so, and further it is clear that there are no fresh materials of any importance available on which it could be said that fresh apprehension arose of a breach of the peace being committed by the petitioners. It is also a fact that since at least September 1916, when the Police applied for proceedings to be taken under section 107, there has been no breach of the peace. We are quite clear that the Magistrate was not entitled to initiate proceedings upon facts and information which had already been the subject of enquiry under section 107, or in connection with charges under the Penal Code brought against the petitioners. The same facts cannot form the subject of repeated proceedings

either under the Penal Code or the Criminal Procedure Code. If fresh facts had occurred upon which the Police and the Magistrate were apprehensive that there was a likelihood of a breach of the peace, then there would have been justification for the initiation of proceedings under section 107. If there had been any such information forthcoming, it was the duty of the Magistrate to set out the substance of such information in the proceedings, but on looking at the preliminary order, we find that the information therein referred to is only what had already been before other Magistrates in connection with other proceedings and had been the subject of orders which must be taken to be final so far as those matters are concerned. The wording of the notice we may also point out in passing, is vague to a degree. All that is stated there is that "seven persons headed by Nagireddi Kondareddi the first accused, a rich and influential resident of Kaluvoy, are addicted to crimes of violence and others involving a breach of the peace and threatened injury to the lives and property of several persons and there is an imminent danger of a breach of the peace." It does not at all state when these threats were uttered, who are the persons who were threatened and when this apprehension of a breach of the peace arose. We think that this above objection is good in law and the proceedings must be quashed on that ground.

But there is also another valid objection to these proceedings. Under section 107, Criminal Procedure Code, it is the District Magistrate or Sub-Divisional Magistrate or any Magistrate of the first class, who is informed that a person is likely to commit a breach of the peace, that may require such person to show cause why he should not be bound down. Sub-section (2) says that "proceedings shall not be taken under this section unless the person informed against and the place where the breach of the peace is likely to occur, are within the locals limits of the Magistrate's jurisdiction." From the operation of this provision the District Magistrate is excepted in so far that he can take cognizance of a matter like this, if either the person informed against or the place where the breach of the peace is likely to occur is within the local limits of his jurisdiction. Then sub-section (3) empowers a Magistrate who is not authorised to act under sub-section (1) to order the arrest of a person who is likely to commit a breach of the peace, and send him to the Magistrate who is empowered to institute proceedings under the section. These provisions of section 107 seem to us to be very specific and clear in laying down this imperative prohibition with regard to Magistrates other than a District Magistrate. Now a Magistrate cannot be said to have taken proceedings under section 107 until he issues notice to the person charged to show cause why he should not be proceeded against under that section. In this case it is clear that the Police reported the matter to the District Magistrate who ordered, without stating that in his opinion as head of the District there was a likelihood of a breach of the peace, the case to be transferred to the file of the Head Quarters Deputy Magistrate within whose jurisdiction neither the accused resided, nor was the place where there was a likelihood of the breach of the peace occurring situate. It was the Head Quarters Deputy Magistrate of Nellore, that issued notice to the accused under section 107 and he must, therefore, be taken to have initiated proceedings under that section. It was suggested that under section 192, the District Magistrate could make over the case to the Head Quarters Deputy Magistrate before any notice was issued. Section 192 of the Criminal Procedure Code is a general section which empowers a District Magistrate to transfer any case of which he has taken cognizance, for enquiry or trial, to any Magistrate subordinate to him. In the matter of proceedings under section 107, it could not be said that a District Magistrate, to whom the Police reported certain facts, had taken cognizance of a case against the accused by reason of that fact alone. Nor do we think that section 528 of the Criminal Procedure Code empowers the District Magistrate in a case under section 107 to make over the initiation of proceedings to a Magistrate who has no local jurisdiction over the matter. That is a general section which empowers a District Magistrate to withdraw any case or recall any case on the file of a Subordinate Magistrate and make it over to any such Subordinate

KISHEN SINGH *v.* EMPEROR.

Magistrate. But section 107 is a specific provision dealing with certain preventive proceedings and its sub-section (2) expressly prohibits proceedings being instituted except by certain Magistrates. It is the District Magistrate or Sub Divisional Magistrate or any other 1st Class Magistrate who is in executive charge of a certain area that is the best person to judge whether there is a likelihood of a breach of the peace within the local limits of his jurisdiction and whether it is necessary or desirable that preventive proceedings should be taken under section 107. It appears to us that the Legislature purposely left it to the discretion of such a Magistrate to say whether proceedings ought to be taken or not, and in this respect the provision of section 107 stands on a very different footing from the provision of section 177. Section 177 says: "Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed." Here the Legislature has, advisedly, used the word 'ordinarily' which does not occur in section 107.

This view of the law finds support from a number of rulings, see *Nirbikar Chandra Mukherji* v. *Emperor* (1), *Surjya Kanta Roy Chowdhry* v. *Emperor* (2) and *King-Emperor* v. *Munna* (3). The proceedings, therefore, in this case were without jurisdiction. On these as well as the other grounds already mentioned, the proceedings must be set aside.

Petition allowed;
Proceedings set aside.

V.R.P.

(1) 1 Ind. Cas. 78; 13 C. W. N. 580; 9 Cr. L. J. 148.
(2) 31 C. 350; 1 Cr. L. J. 344.
(3) 24 A. 151; A. W. N. (1901) 203.

PUNJAB CHIEF COURT.
CRIMINAL REVISION No. 2031 OF 1916.
March 19, 1917.
Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.
KISHEN SINGH—PETITIONER
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 192, 526—Government of India Notifications Nos 515 I. B. and 516 I. B., dated 17th March 1913—Jurisdiction—Offence committed on Railway lands in Native State—Transfer of case by Chief Court and by District Magistrate.

K. was charged with an offence under section 409 of the Indian Penal Code committed within the Railway lands situate in the Jhind State. On the application of the District Magistrate of Rohtak the Chief Court transferred the case to the District Magistrate of Hissar, with the direction that he should either dispose of the case himself or make it over for trial to some competent Magistrate in his District. The District Magistrate of Hissar accordingly made over the case to an Honorary Magistrate, 1st Class, Bhiwani, who tried *K.* and convicted and sentenced him. On appeal to the Court of the Political Agent, Phulkian States, objection being taken to the jurisdiction of the Honorary Magistrate of Bhiwani the Political Agent, Phulkian States, referred the case to the Chief Court:

Held, that the Chief Court had power under section 526 of the Criminal Procedure Code to transfer the case to any Court in the Province and section 192 empowered the District Magistrate of Hissar to transfer it for trial to any Magistrate subordinate to him, that sections 192 and 526 of the Criminal Procedure Code were in force in Railway lands situate in the Jhind State and that the powers conferred on District Magistrates by those sections had not been taken away by the Government of India Notification No. 515 I. B. or No. 516 I. B. and that, therefore, the Honorary Magistrate had jurisdiction to try the case. [p. 995, cols. 1 & 2.]

Case reported by the Political Agent, Phulkian States, and Sessions Judge, Patiala, with his No. 9517 of 17th November 1916.

The Government Advocate, for the Respondent.

JUDGMENT—In the course of the trial of a charge against Bandu and others, Kishen Singh, son of Mahtab Singh, appeared as a witness for the prosecution. The District Magistrate of Rohtak, who was trying the said case, considered that the statement made by Kishen Singh aroused grave suspicions against him, and he accordingly directed the Police to investigate the matter.

This investigation resulted in the Police sending up Kishen Singh for trial on a charge

under section 409, Indian Penal Code. The case came before the same District Magistrate who came to the conclusion that it would be better that he should not try the case, and considering there was no other Magistrate in the Rohtak District qualified to try it, referred the matter to this Court with the request that the case be transferred to another District.

This Court on the 19th June 1916 transferred the case to the District Magistrate of Hissar, with the direction that he should either dispose of the case himself or make it over for trial to some competent Magistrate in his District.

The District Magistrate of Hissar accordingly made over the case to Khan Bahadur Mir Abid Hussain, Honorary Magistrate, 1st Class, Bhiwani, who tried Kishen Singh and committed and sentenced him.

The offence of which Kishen Singh had been convicted was committed within Railway lands situate in a Native State (Jhind) and the appeal was, therefore, filed in the Court of the Political Agent, Phulkian States. At the hearing of the appeal objection was taken to the jurisdiction of Khan Bahadur Mir Abid Hussain, on the ground that as a Magistrate of the 1st Class he was not competent to try an offence committed on Railway lands situate in a Native State.

This objection was based on a ruling of a former Political Agent, which was to the effect that according to Schedule I to the *Government of India Notification* No. 516-I.-B, dated 17th March 1913, such cases could only be tried by the Deputy Commissioner as District Magistrate.

The present Political Agent was not satisfied with the correctness of this ruling of his predecessor and has accordingly referred the case to this Court in order to obtain a definite decision.

After hearing the learned Government Advocate and after a careful consideration of the relevant notifications we are of opinion that Khan Bahadur Mir Abid Hussain had jurisdiction to try this case.

By *Government of India Notification* No. 515-I. B, dated 17th March 1913, the following provision was made for the administration of all "lands lying within the States specified in the second column of the schedule hereto annexed, which are, or may hereafter be, occupied by the Railways specified in the first column of the said schedule.....:—

(1) *All laws* for the time being in force in the Districts of the Punjab specified in the third column of the said schedule shall be in force in the lands lying within the States specified in the corresponding entry in the second column which are occupied by the portions of the Railways specified in the corresponding entry in the first column thereof .....

(3) *All Courts* having for the time being jurisdiction within the said Districts shall have the like jurisdiction within the said lands."

Under this notification it is clear that the present case was triable in the Courts of the Rohtak District competent to try offences of this nature if committed within that District.

By *Government of India Notification* No. 516-I. B., *dated* 17*th March* 1913, certain arrangements were made '*for the purposes of criminal jurisdiction*" and it was notified that—

"(1) Within the lands occupied by the Railways as aforesaid, the officers and the Court mentioned in the corresponding entries in the 3rd, 4th and 5th columns of the First Schedule shall exercise respectively —

(*a*) the powers of a District Magistrate including all powers conferrable on a District Magistrate;

(*b*) the powers of a Court of Session; and

(*c*) the powers of a High Court as described in the Code of Criminal Procedure, 1898, as for the time being in force in the said lands."

According to the schedule referred to, so far as the present case is concerned, the Deputy Commissioner of Rohtak, the Political Agent, Phulkian States, and the Chief Court of the Punjab were to exercise the powers referred to in (1) (*a*), (*b*) and (*c*) respectively. This has apparently been taken to mean that the only Court in the Rohtak District competent to try offences committed within the lands referred to was that of the Deputy Commissioner, a view that appears to us to be obviously erroneous, having regard to the fact that the Deputy Commissioner is empowered, under 1 (*a*), to exercise "the powers of a District Magistrate *including all powers conferrable on a District Magistrate*".

Now under *Government of India Notification No.* 517 *I. B., dated* 17*th March* 1913, the

Code of Criminal Procedure, 1898, has with some slight omissions and variations (which, however, have no bearing on the point under consideration) been extended to these lands.

Sections 190 and 192 of the Criminal Procedure Code are in force in these lands, and the powers conferred on District Magistrate by these sections have not been taken away by either of the notifications referred to. Indeed the wording of (1) (*a*) of Notification No. 516-I. B. clearly indicates that *all* the powers conferred on District Magistrates by the Criminal Procedure Code are to be exercised by the Deputy Commissioners specified.

Section 192 (1), Criminal Procedure Code, empowers a District Magistrate to transfer "any case of which he has taken cognizance, for enquiry or trial, to any Magistrate subordinate to him" and it follows, therefore, that a Deputy Commissioner has, under this notification, No. 516 I. B., the power to transfer cases of this nature to a Magistrate subordinate to him.

No doubt in the Rohtak District a Magistrate of the 1st Class could not take cognizance of an offence committed within such lands, but the "Deputy Commissioner" could confer the necessary jurisdiction on such a Magistrate by taking action under section 192, Criminal Procedure Code.

Khan Bahadur Mir Abid Hussain, however, is a Magistrate of the Hissar District and ordinarily could not exercise jurisdiction in the present case.

This Court, however, transferred the case to the District Magistrate of Hissar thus conferring on that officer jurisdiction to dispose of it.

Section 526, Criminal Procedure Code, is in force in these lands and this Court had clearly power to make the said order of transfer. The District Magistrate of Hissar was directed to either try the case himself or make it over for trial to some competent Magistrate subordinate to him. He obviously acted under section 192, Criminal Procedure Code, and the trying Magistrate had, therefore, the necessary jurisdiction.

We accordingly hold, that, under the notifications referred to above, the Deputy Commissioner, as District Magistrate, has the power to try the offences governed by the said notifications, or to transfer them under section 192, Criminal Procedure Code, to some Magistrate subordinate to him, and that this Court is empowered to transfer under section 526, Criminal Procedure Code, all such cases for trial by any Court in the Province. Khan Bahadur Mir Abid Hussain had jurisdiction to try this case and we accordingly return the record to the Political Agent, Phulkian States, for disposal of the appeal on the merits.

Record returned.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 260 OF 1917.

April 27, 1917.

Present:—Justice Sir George KNOX, KT.

MATHURA PRASAD—APPLICANT

versus

EMPEROR——OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Sanction to prosecute—Affidavit, false, filed before Munsarim—*Preliminary enquiry.*

An affidavit, written in English, was presented to the *Munsarim* of the Court. It purported to be signed by the deponent in Urdu. It was not proved that it was read or explained to the latter. The Judge held the statements contained in the affidavit to be false and exaggerated and gave sanction under section 476 of the Criminal Procedure Code for the prosecution of the deponent:

Held, (1) that the case was one in which a preliminary enquiry should have been made before an order was passed under section 476 of the Criminal Procedure Code; [p. 996, col. 2]

(2) that inasmuch as the matters contained in the affidavit had not taken place before the Judge, the affidavit should have been rejected on the spot. [p. 996, col. 2.]

Criminal Revision from an order of the Second Additional Sessions Judge, Aligarh.

Mr. *Satya Chandra Mukerji*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—A paper was presented apparently before the *Munsarim* of the Second Additional Judge's Court of Aligarh. It bears date the 12th of December 1916. It is paper No. 7A on the record. It is written in English, purports to be signed in Urdu by one Mathura

MATHURA PRASAD v. EMPEROR.

Parsada *bakalam khud*. There is an endorsement upon the back of the paper. This endorsement is evidently by an India rubber stamp and so far as it is legible it runs thus:—

"Solemnly affirmed before me by Mathura Prasada who was identified by Babu Mohan Lal Tingal, a Pleader at this (here follows a word illegible) having the contents hereof admitted the same to be correct.

Nawal Kishore, *Munsarim*, Second Additional Judge's Court."

The allegations made in it are:—

"(*a*) I solemnly affirm on oath that A. Hamilton, Esq., I. C. S., Magistrate of Etah, is a Member and Chairman of the Sub-Committee of Buildings of the Municipal Board of Kasganj and that he took an active interest in sanctioning the prosecution of Balkishen appellant.

"(*b*) I solemnly affirm on oath that the said Magistrate before commencing the trial of Balkishen appellant expressed his opinion to convict and fine him Rs. 150.

"(*c*) I solemnly affirm on oath that the said Magistrate being overpowered with excitement caught hold of Balkishen's neck and gave him a rude push at the time of inspection of the locality."

The Second Additional Sessions Judge, holding that the first and second allegations were false and the allegation in the third paragraph exaggerated, came to the conclusion that there were good grounds for holding that Mathura Prasada had committed an offence under section 193 of the Indian Penal Code. He sent the case to the learned District Magistrate with a request that he should make it over for trial to one of his Subordinate Magistrates.

The application before me is an application for criminal revision against this order, on the ground that the order is not a proper one; that the affidavit filed is substantially true, and there is no statement in it which was wilfully false: that the applicant had not committed an offence under section 193 of the Indian Penal Code.

As a rule I never interfere with orders passed under section 476 of the Code of Criminal Procedure. Those orders are orders passed by a responsible officer for an offence which that officer considers to have been committed in the course of a judicial proceeding before him, and to be passed after a preliminary enquiry when necessary, but the case before me has evidently been so carelessly—I regret to have to use the word—considered that I am not prepared to confirm the order of the Additional Sessions Judge. I express no opinion of any kind upon the matters alleged in the so-called affidavit, beyond pointing out that the Joint Magistrate whose conduct is impugned has in an explanation given a totally different account of what took place. The case was eminently one in which a preliminary enquiry should have been made before an order was passed under section 476 of the Code of Criminal Procedure. The matters contained in the so-called affidavit and the explanation had not taken place before the Additional Sessions Judge. The so-called affidavit should have been rejected on the spot. I am informed that Mathura Prasada is not acquainted with English. The carelessness with which affidavits are taken by many *Munsarims* in the Courts below is a matter of experience and I have, in making inspections specially at Aligarh, called attention to this want of care. That the *Munsarim* should have considered that he was certifying to that affidavit by endorsing on it an India rubber stamp partly illegible and which, even if legible, would not show that the affidavit had been read and explained either by himself or by some other competent person in his presence and after he was satisfied that the person proposing to make the affidavit understands the contents thereof, speaks for itself. The words in each paragraph, "I solemnly affirm on oath" show that the *Munsarim* has no idea of what is required from him when he is making the certificate. There is not the slightest reason to infer from the India rubber stamp that Mathura Prasada knew or had explained to him the contents of the affidavit or that he ever admitted that the statements contained in the affidavit were correct. It is moreover quite clear that the *Munsarim* has never discovered what is practically a clerical error in the stamp, 'having' for the word "hearing." Without any further

comment, I again repeat that the case called strongly for a preliminary enquiry and that preliminary enquiry should have been made. I also notice that the learned Additional Sessions Judge accepted an explanation which very carefully and no doubt properly says that the matters detailed in it are matters to the recollection of the person making the explanation. This is not enough in a judicial enquiry.

I have passed by smaller matters of detail which will be found if the *Munsarim* takes the trouble to read Order XIX of the Book of Rules framed by the High Court of Judicature, N. W. P., under section 22 of the Code of Criminal Procedure, but they all show the extreme want of care with which affidavits are taken and acted upon in this Aligarh Court. For the above reasons I set aside the order of the 17th of March. The security, if furnished, will be discharged.

Order set aside.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION No. 60 OF 1917.

May 16, 1917.

Present:—Mr. Justice Shah and Mr. Justice Marten.

CHIMANLAL MANEKLAL AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Bombay Prevention of Gambling Act (IV Bom. of 1887), ss 4 to 7—Gambling in house occupied temporarily by picnic party—Presumption under s. 7, whether rebuttable.

The presumption arising under section 7 of the Bombay Prevention of Gambling Act is rebuttable. [p. 997, col. 2.]

On the occasion of the annual fair at Shuklatirtha some of the accused went there and occupied a house. In pursuance of a warrant under section 6 of the Bombay Prevention of Gambling Act, a search was made, when the accused were found playing cards and some money also was found which was the result of small stakes while playing cards. The Magistrate who tried the case, relying upon section 7 of the Act, presumed that the house where the play was going on was a common gaming house within the meaning of the Act and convicted the accused under sections 4 and 5 of the Act:

Held, that the fact that the accused occupied the house temporarily, when they were out on a picnic party and were playing there for small stakes, was sufficient to rebut the presumption arising under section 7 of the Act that it was a common gaming house. [p. 997, col. 2.]

Criminal application from convictions and sentences recorded by the Magistrate, first class, Broach.

Mr. *G. N. Thakor*, for the Accused.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—The petitioners before this Court were tried by the first class Magistrate of Broach on charges under the Bombay Prevention of Gambling Act of 1887. The accused Nos. 1 to 27 were convicted under section 5 and accused No. 28 was convicted under section 4 of the Act.

On the occasion of the annual fair at Shuklatirtha some of these persons had gone there and occupied the house in question. In pursuance of a warrant under section 6 of the Act, a search was made, when these persons were found playing cards and some money also was found which was the result of small stakes while playing cards. The learned Trial Magistrate has relied upon section 7 of the Act and has presumed that the house where the play was going on was a common gaming house within the meaning of the Act. But that section shows that the presumption is rebuttable. In this case the facts found by the Magistrate, stated in his own words, are as follows: "They were a party of friends out on a picnic. They amused themselves for a time by playing with cards for small stakes. They were joined by some others who hailed from the same town." The money that was found there is not proved in the case to have been collected for the gain or profit of any persons owning, occupying or using the house. The book in which the entries are made, in my opinion, does not show that the purpose of noting the small entries was to show the gain or profit to any particular persons. Apart from this, it seems to me that the fact that these persons occupied the house temporarily when they were out on a picnic party and were playing there for small stakes is sufficient under the circumstances to rebut the presumption under section 7 that it was a common gaming house. The fact that the persons found in the house belonged to different castes is in no way against the accused under the circumstances. There is no evi-

dence in the case to show that the owner of the house, accused No. 28, had any knowledge whatever of what was going on in the house, nor is there anything to show that he had let out the house for any improper purpose. On the facts of this particular case it seems to me that the presumption which the learned Magistrate has relied upon is sufficiently rebutted and that the house is not a common gaming house within the meaning of the Act.

I would, therefore, make the Rule absolute, set aside the convictions and sentences of all the petitioners and direct that the fines, if paid, be refunded.

MARTEN, J.—I agree. In my opinion the presumption arising under section 7 is rebutted under all the circumstances of the case as regards accused Nos. 1 to 27. As regards accused No. 28 I think there is no evidence at all.

Rule made absolute.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 662 OF 1917.

June 29, 1917.

Present:— Mr. Justice Teunon and Justice Sir Shamsul Huda, KT.

UMESH CHANDRA ROY—COMPLAINANT—PETITIONER

versus

SATIS CHANDRA ROY AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 494—*Order permitting withdrawal of prosecution, whether judicial—Court, duty of, to record reasons for order.*

In withholding or according consent to the withdrawal of a prosecution under section 494, Criminal Procedure Code, the Court acts in a judicial capacity and for its order, as for every order judicially made, it ought to give and record its reasons. [p. 999, col. 1.]

Criminal Revision against an order of the Sub-Divisional Magistrate, Uluberia, dated the 16th May 1917.

FACTS of the case appear from the judgment.

Mr. *P. N. Dutt* (with him Babu *Hit Lal Guha*), for the Opposite Party, in showing cause submitted that the consent given by the Magistrate to the withdrawal by the Public Prosecutor from the prosecution of the accused persons was not liable to be reviewed by the High Court under section 435, Criminal Procedure Code. A 'consent' not being a "finding, sentence or order" did not come within the purview of section 435. It was not a judicial order at all, but must be regarded as a mere executive or ministerial act for which the Magistrate need not record reasons. See *Sadayan, In re* (1).

The Magistrate, upon a proper consideration of the facts and circumstances of the case, rightly exercised his discretion and jurisdiction, and there is nothing in the case justifying your Lordships' interference with the discretion and decision arrived at by the lower Court.

Mr. *B. N. Sasmal* (with him Babu *Sisir Kumar Ghosal*), for the Petitioner.—It appears that the learned Magistrate has not recorded any reason whatsoever for the consent given by him to the withdrawal from the prosecution as well as for his subsequent order of discharge. The question is whether he was bound to do so. My submission is that unless the Court assigns some reason for its acts, it would be utterly impossible to say whether or not it has exercised its discretion rightly and properly. If the consent was given improperly the order of discharge was also improper.

It can, however, be said that in giving his consent the Magistrate was not acting judicially, and it is indisputable that for every order passed judicially some reason should be assigned.

JUDGMENT.—This Rule is directed against an order made by the Sub-Divisional Officer of Uluberia under the provisions of section 494 (*a*) of the Code of Criminal Procedure.

It appears that on the application of the Court Sub-Inspector acting as Public Prosecutor the Magistrate accorded his consent to the withdrawal by the Public Prosecutor from the prosecution of three persons, who under the provisions of section 170 of the Code had been sent up for trial on charges of rape and murder. For this order according his sanction to the withdrawal from the prosecution and to the subsequent or consequential order discharging the accused, the Magistrate

(1) 4 Ind. Cas. 1126; 5 M. L. T. 216; 11 Cr. L. J. 193.

gave no reasons. As from the petition presented by the complainant it appeared that one of the persons put on their trial had made a confession implicating himself and the others, we were of opinion that these orders should be examined by this Court.

The learned Counsel who has appeared to oppose this Rule on behalf of the accused persons has contended that the consent given by the Court under the provisions of section 494, Criminal Procedure Code, is to be regarded as a mere ministerial or executive act for which it is not necessary that the Magistrate should set out any reason; and in support of this view he refers us to a case decided by two learned Judges of the Madras High Court and reported as *Sadayan, In re* (1). With all deference to the opinion there expressed by these learned Judges we are unable to assent to the view there taken, or to the view now urged upon us by the learned Counsel appearing in the present case. The only prosecutor who may under the provisions of the Code of Criminal Procedure withdraw from a prosecution without obtaining the consent of the Court and without giving reasons is the Advocate-General. No other Public Prosecutor is placed in that privileged position; and if the consent of the Court is to be regarded as a ministerial act or merely an executive act, we do not understand why it should have been necessary for the Legislature to insert such a provision in the section of the Code with which we are now dealing. It is clear to our minds that in either withholding consent or in according consent the Court is acting in a judicial capacity, and for its orders as for every order judicially made it ought to give and record its reasons. We are fortified in this view by a consideration of the provisions of sections 435 and 437 of the Code of Criminal Procedure. If the consent has been improperly accorded, it is clear that the consequential discharge must also be looked upon as improper. For these reasons we are of opinion that when a Court acting under section 494 of the Code gives its consent to a withdrawal from a prosecution, it should record its reasons in order that this Court may be in a position to say whether the discretion vested in the Court has been properly exercised.

In the present case the Magistrate has now submitted to this Court in his explanation the reasons which led him to make the order under consideration. We are not satisfied that the first reason in which he refers to the action of the Superintendent of Police is a good or sufficient reason. We are not certain that the discretion vested in the investigating officer by the provisions of section 170, Criminal Procedure Code, can be controlled in the way suggested by the Superintendent of Police; or so controlled after the discretion has been exercised. But the other reasons that have been given by the Magistrate appear to us to be of a more substantial character. We have examined for ourselves what was put forward to us as a confession implicating the confessing accused and his co-accused; and when we read it we find that he, the confessing accused, does not in fact implicate himself. In the course of the argument before us, reference has been made to a confession said to have been made by the same accused in his village in the presence of a number of villagers. But it would appear that that confession was made while the accused was in the presence and practically in the custody of Police Officers, so that also becomes inadmissible.

Having now considered the reasons which led the Magistrate to consent to the withdrawal from the present prosecution, we are of opinion that in the present case we ought not to interfere. But we desire to point out that after all the ultimate order is one only of discharge, and that if and when evidence becomes available it will still be open to the Crown or to the Court to re-open this prosecution

Rule discharged.

SITA RAM *v.* EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL REVISION NO. 222 OF 1917.
February 24, 1917.
Present:—Mr. Justice Leslie Jones.
SITA RAM AND OTHERS—PETITIONERS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *ss.* 133, 137—*Procedure—Evidence, recording of, whether necessary.*

In proceedings under section 137 of the Criminal Procedure Code a Magistrate should proceed as in a summons case. [p. 1000, col. 2.]

A Magistrate noticed that accused had erected a *thara* in a village which took up part of an open space. On a report by the *Girdawar Kanungo* the Magistrate issued a conditional order under section 133 of the Criminal Procedure Code, calling upon the accused to show cause why the order should not be made absolute. The accused put in a written statement to the effect that no obstruction to the thoroughfare had been caused and produced a number of witnesses who gave evidence to the same effect. Nevertheless the Magistrate, who had not recorded any evidence for the prosecution, made the order absolute under section 137 (3) of the Criminal Procedure Code:

Held, that the procedure adopted by the Magistrate was irregular and the order passed by him was consequently illegal. [p. 1000, col. 2.]

Maha Daji Sadashiv Tilak, In the matter of the petition of, 11 B 375; 6 Ind Dec (N. S.) 246; *Hingu* v. *Emperor*, 3 Ind. Cas. 482; 31 A. 453; 6 A. L J. 685; 10 Cr. L. J. 297; *Srinath Roy* v *Ainaddi Halder*, 24 C. 395; 1 C. W. N. 217; 12 Ind. Dec. (N. S.) 930; *Emperor* v. *Karam Chand*, 147 P. L. R. 1901, relied upon.

Case reported by the District Magistrate, Rohtak, with his No. 126 G, dated the 2nd January 1917.

GROUNDS.—The Sub-Divisional Magistrate, Sonepat, has made absolute under section 137, Criminal Procedure Code, an order dealing with the demolition of two platforms situated in village Pilana, and alleged to be obstructing the roadway.

The main ground of objection taken to the order is that no prosecution evidence has been recorded by the Magistrate. I have examined the file. There is evidence in it, but it appears to be all defence evidence. For prosecution purposes the Magistrate has relied on his inspection of the site.

This won't quite do. *Vide* the words "as in a summons case" in section 137, Criminal Procedure Code, and also *Maha Daji Sadashiv Tilak, In the matter of the petition of* (1), *Srinath Roy* v. *Ainaddi Halder* (2) and *Hingu* v. *Emperor* (3). No doubt prosecution evidence had to be placed on record.

I am assured that the order in fact seriously affects applicants. I, therefore, forward the case to the Honourable Judges, Chief Court, with the recommendation that it be set aside, and proceedings commenced anew if that course be thought desirable by the Sub-Divisional Magistrate.

Mr. *Rup Ram*, for the Accused.

ORDER.—This is a case reported by the District Magistrate of Rohtak. It appears that one Amin Lal, a Jat of Pilana, filed a complaint in the Court of the Magistrate that a certain wall belonging to Dhanna, etc, was in a dangerous condition. The Sub-Divisional Magistrate visited the spot and issued a conditional order under section 133, Criminal Procedure Code. That order was afterwards complied with, but during the course of his inspection he appears to have noticed that Dhanna, etc., had erected a *thara* which took up part of an open space in the village. The *Girdawar Kanungo*, acting probably under the instruction of the Magistrate, wrote out a report in which he referred to the fact that the Magistrate had already seen the *thara* himself. As regards the *thara* another conditional order was issued under section 133, Criminal Procedure Code, the accused being called upon to show cause why the order should not be made absolute. The accused then put in a written statement to the effect that no obstruction to the thoroughfare had been caused, and afterwards they produced a number of witnesses who gave evidence to the same effect. Nevertheless the Magistrate who had not recorded any evidence for the prosecution made the order absolute under section 137 (3), Criminal Procedure Code.

The Magistrate should have proceeded as in a summons case. There is ample authority, *vide*, *Maha Daji Sadashiv Tilak, In the matter of the petition of* (1), *Srinath Roy* v. *Ainaddi Halder* (2), *Hingu* v. *Emperor* (3) and *Emperor* v. *Koram Chand* (4), for holding that the order passed was illegal.

(1) 11 B. 375; 6 Ind. Dec. (N. S.) 246.

(2) 24 C. 395; 1 C. W. N. 217; 12 Ind. Dec. (N. S.) 930.

(3) 3 Ind. Cas. 482; 31 A. 453; 6 A. L. J. 685; 10 Cr. L. J. 297.

(4) 147 P. L. R. 1901.

The revision is, therefore, allowed and the order of the Magistrate under section 137, Criminal Procedure Code, is set aside.

Revision accepted.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 223 OF 1911.

July 20, 1917.

Present:—Mr. Justice Shah and Mr. Justice Marten.

NAGANGOWDA NILAPAGOWDA—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Practice, criminal—Appeal—High Court—Review of judgment.

Under the provisions of the Criminal Procedure Code, 1898, the High Court has no power to review its own judgment. [p. 100', cols. 1 & 2.]

Mr. *Setalvad* (with him Mr. *R. A. Jahagirdar*), for the Accused.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—This is an application by the petitioners, who were original accused Nos. 1 and 5, for a review of the decision of this Court, dated the 16th May last, and for a re-trial on the ground that certain fresh evidence is now available to them. The petitioners state that they are informed by the Local Government that the power to order re-trial rests with this Court and that they have been directed to apply to this Court for ordering a re-trial.

We have now heard the learned Government Pleader on behalf of the Crown in support of the view that this Court can review its judgment; but he admits frankly and fairly that he is not able to support the view that this Court has any jurisdiction to review its own judgment. The learned Counsel for the petitioners also has not seriously contended that this Court has any such jurisdiction. It is quite clear from the provisions of the Code of Criminal Procedure and from the various decisions of the different High Courts, that the High Court has no power to review its own judgment. It is enough to refer to the following cases decided under the Code of 1882: *In the matter of Gibbons* (1), *Queen-Empress* v. *Durga Charan* (2), *Queen-Empress* v. *Fox* (3), *Queen-Empress* v. *Mohun Abhesing* (4), *Queen-Empress* v. *Bhimappa* (5) and *Queen-Empress* v. *Ganesh Ramkrishna* (6). The last two cases no doubt refer to the power of the Sessions Court to review its judgment, but the principle underlying the decisions is the same. There is no difference on this point between the Code of 1882 and the Code of 1893 now in force; and so far as I know, in practice this view has been consistently followed. I feel quite clear that we have no jurisdiction to entertain this application. On this ground, and on this ground alone, I would discharge the rule.

The only remedy open to the petitioners, in my opinion, is by way of an application to the Local Government or to the Governor-General-in-Council under section 401 of the Code of Criminal Procedure for the suspension or remission of the sentences passed on them. It seems to me that it will be open to the Government to make such inquiry in connection with the letter which is now relied upon on behalf of the petitioners as new evidence and to make such further inquiry in connection with the case in the light of this new evidence, as they may think proper. We can properly express our opinion on the application under section 401, if required to do so by the Government under sub-section (2) of that section.

Having regard to the gravity of the case, I desire to express my opinion that it will be proper to postpone the execution of the sentences passed on the petitioners, until the inquiry above alluded to has been finished and the final conclusion on the application of the petitioners under section 401 of the Code of Criminal Procedure arrived at by the Government.

(1) 14 C. 42; 7 Ind. Dec. (N. S.) 29.
(2) 7 A. 672; A. W. N. (1885) 177; 4 Ind Dec. (N. S.) 867.
(3) 10 B. 176; 5 Ind. Dec. (N. S.) 502.
(4) (1895) Unrep. Cr C 791.
(5) 19 B. 732; 10 Ind. Dec. (N. S.) 490.
(6) 23 B. 50; 12 Ind. Dec. (N. S.) 33.

A copy of this judgment should be sent to the Government.

MARTEN, J.—I entirely agree and have nothing to add.

Rule discharged.

PATNA HIGH COURT.
CRIMINAL REVISION NO. 217 OF 1917.
June 17, 1917.
Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.
JHUNA LAL SAHU AND ANOTHER—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 190, cl. 1 (c), 200—Magistrate, power of, to proceed on information—Complaint by private person—Investigation by Police—Magistrate, whether can proceed on Police report—Examination of complainant, necessity of—Irregularity.

Where a private party informed a Magistrate that he suspected that forgery had been committed in the records of a case then pending in a Civil Court and asked for an investigation by the Criminal Investigation Department, and the Magistrate ordered such an investigation and on the report of the Criminal Investigation Department ordered the prosecution of the accused:

Held, that under section 190, clause 1 (c), Criminal Procedure Code, it was not open to the Magistrate to take cognisance upon the report of any Police Officer or on the complaint of the complainant without examining him on oath, and that the proceedings directing the prosecution of the petitioners were so irregular as to be likely in the event of their commitment to the Court of Session to result in the commitment being quashed. [p. 1003, cols. 1 & 2.]

Thakur Perhsad Singh v. *Emperor*, 10 C. W. N. 775; 3 Cr. L. J. 473; *Thakur Prosad Singh* v. *Emperor*, 10 C. W. N. 1090; 4 Cr. L. J. 217; *Chamru Sahu* v. *Emperor*, 11 C. W. N. 170; 5 Cr. L. J. 13, distinguished.

Queen v. *Surrendra Nath Roy*, 13 W. R. Cr. 27; 5 B. L. R 274, followed.

The power of a Magistrate to proceed upon information is intended to be used in cases in which a Magistrate has good reason to believe that there has been a serious infringement of the law but is unable to take action in the ordinary manner for the reason that the party aggrieved is unwilling or unable to prosecute. [p. 1003, col. 1.]

Criminal revision against an order of the District Magistrate, Darbhanga, dated 18 May 1917.

Messrs. *Manuk* and *Hasan Jan*, for the Petitioners.

Messrs. *Pugh* and *Sultan Ahmad* (Government Advocate), for the Opposite Party.

JUDGMENT.—The facts of this case are that on the 6th of July 1915 *Musammat* Sukhdei Koer filed a suit against Rai Mohamaya Prasad Singh Bahadur and others in the Court of the Subordinate Judge of Darbhanga for the recovery of 22 lacs of rupees, and on the 9th of July asked that the defendants might be ordered to produce in Court their *khesra* and *lekha bahis* for the years 1311, 1314, 1315, 1316, 1317, 1318, 1319 and 1320 *F. S.* and certain other papers. In January 1916 the defendant, Rai Mohamaya Prasad Singh Bahadur, filed a petition before the District Magistrate of Darbhanga, saying that he had no certain knowledge of the facts but had heard that the plaintiffs had taken steps to abstract from the Court of the Munsif, where a number of papers had been filed in a previous suit, papers in connection with the present suit and had employed Kripa Ram and others to introduce by forgery entries therein, which would support their (the plaintiffs') case. He did not ask the Magistrate to take any action in the way of summons or the issue of warrants against the accused, but desired only that a confidential enquiry be made by the Criminal Investigation Department. The Magistrate passed orders that such an enquiry should be made and as a result of that enquiry issued warrants against Kripa Ram and others under the forgery sections. The matter was brought before this Court during the vacation and the vacation Judge, without going into the merits of the case or the legal points involved, directed that the matter should stand over till after the suit had been decided in the Subordinate Judge's Court. That suit has now been decided and the District Magistrate has without further enquiry ordered that the proceedings against Kripa Ram be continued. Kripa Ram himself does not make any application to this Court, but the other two accused Jhuna Lal and Balmakund Das apply to have the proceedings quashed on the ground that they have no legal basis. In support of this contention a series of cases has been quoted: *Thakur Pershad Singh* v *Emperor* (1), *Thakur Prosad Singh*

(1) 10 C. W. N. 775; 3 Cr. L. J. 473.

v. *Emperor* (2) and *Chamru Sahu* v. *Emperor* (3), as authority for the proposition that where a Magistrate purports to act under section 190, clause 1, sub-clause (*c*), it is required that the source from which the information was derived be recorded and the statement of the informant reduced to writing. We do not think the cases quoted have any application to the case before us. But we are in entire sympathy with the views of Phear, J., as expressed in the case of *Queen* v. *Surrendra Nath Roy* (4). The power of the Magistrate to proceed upon information is intended to be used in a case in which a Magistrate has good reason to believe that there has been a serious infringement of the law but is unable to take action in the ordinary manner for the reason that the party aggrieved is unwilling or unable to prosecute.

The informant in the case before us was a Rai Bahadur. He was obviously willing to prosecute and able to prosecute if indeed any criminal offence had been committed. He was unwilling to lodge a first information at the *thana*. He preferred to make a definite complaint before the District Magistrate on an eight anna stamp. That complaint contained a distinct assertion that an offence had been committed, and definitely accused Kripa Ram as the principal offender. It was without doubt a complaint within the meaning of section 190 (1) (*a*). The Magistrate was required under section 200 to immediately examine the complainant on oath. The Magistrate may have been right in ordering an enquiry by the Criminal Investigation Department. But upon receipt of the result of this enquiry the Magistrate should either have called upon the Rai Bahadur to lodge a further complaint and examine him on oath or should have directed the officer of the Criminal Investigation Department to file a complaint. If the report of the Police Officer is correct, a serious crime has been committed. But as we read section 190 (1) (*c*), it is not open to the Magistrate to take cognizance upon the report of any Police Officer under that clause and as we have indicated, it was not open to him to take cognizance on the complaint of the Rai Bahadur without examining him on oath. The proceedings directing the prosecution of the petitioners before us must be regarded as so irregular as to be likely in the event of the commitment of the accused to the Court of Session to result in his commitment being quashed. We, therefore, set them aside at this stage.

If, having regard to the serious nature of the offence alleged, the District Magistrate feels it his duty to proceed further, it is open to him to receive a new complaint either from the Rai Bahadur or from the Police who conducted this investigation. The complainant will then be examined on oath under section 200 and upon the result of his inspection of the Police Officer's report and a consideration of the judgment of the learned Subordinate Judge in the case between the parties, the Magistrate will take such action as he may think necessary under Chapters XVI and XVII of the Criminal Procedure Code.

Proceedings quashed.

(2) 10 C. W. N. 1090; 4 Cr. L. J. 217.
(3) 11 C. W. N. 170; 5 Cr. L. J. 13.
(4) 13 W. R. Cr. 27; 5 B. L. R. 274.

PUNJAB CHIEF COURT.

CRIMINAL REVISION NO. 169 OF 1917.

March 30, 1917.

Present:—Mr. Justice Scott Smith.

GURDITTA—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Workman's Breach of Contract Act (XIII of 1859), s. 2, applicability of - Cartman, whether labourer.

A cartman is not a labourer to whom the provisions of Act XIII of 1859 apply. [p. 1004, col. 1.]

Case reported by the Sessions Judge, Ferozepore, with his No. 34 J. of 22nd January 1917.

FACTS.—In this case the Magistrate has held that accused is a labourer who had received an advance for work from the complainant. The Magistrate has held that the accused has refused to work for his advance and has ordered that either the money due must be paid or that the accused must work off the advance.

The accused, on conviction by Muhammad Aslam Hayat Khan, exercising the powers of a Magistrate of the 1st Class in the Ferozepore District, was sentenced, by order dated the 30th day of September 1916, under section 2 of Act XIII of 1859, to pay Rs. 32 11-0 to the complainant or to work for him to that extent.

GROUNDS.—In my opinion Act XIII of 1859 does not apply to this case for the following reasons:—

The accused borrowed money from the complainant and agreed that in re-payment of this sum he would cart *kankar* from Ferozeshah to Ferozepore. The agreement did not imply any personal labour on behalf of the accused. This is admitted by the complainant himself. The Magistrate did not admit this argument as the accused are sweepers. This seems no sufficient reason for importing into an agreement conditions which were not contained therein. It is also argued with some force that Act XIII of 1859 does not apply to this agreement and on this point *Fazal Illahi* v. *Emperor* (1) was referred to. A more direct authority is contained in *High Court Proceedings*, 13*th July* 1877, *No.* 1427 (2). I recommend, therefore, that the order of the Magistrate be set aside.

Mr. *Qamr-ud Din*, for the Accused.

Mr. *P. D. Khanna*, for the Complainant.

ORDER.—As pointed out by the learned Sessions Judge, *High Court Proceedings*, 13*th July* 1877, *No.* 1427 (2), is authority for holding that a cartman is not a labourer to whom the provisions of Act XIII of 1859 apply. I agree with the view there taken. I accept the revision, and set aside the order of the Magistrate and acquit the accused.

Revision accepted.

(1) 32 Ind. Cas. 678; 2 P. R. 1916 Cr.; 3 P. W. R. 1916 Cr. 17 Cr. L. J. 86.

(2) 1 Weir 690.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No 660 OF 1917.

July 4, 1917.

Present:—Mr. Justice Newbould and Justice Sir Shamsul Huda, KT.

BHUPENDRA MOHAN PAL CHAUDHURI AND OTHERS—PETITIONERS

versus

THE CHAIRMAN OF MADARIPUR MUNICIPALITY AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *s.* 144, *order under—Magistrate, whether bound to state grounds for order—Jurisdiction.*

A Magistrate has jurisdiction and is fully justified in passing an emergent order under section 144, Criminal Procedure Code, without setting out in the order the grounds of his action, where on the facts reported by the Police and accepted by the Magistrate, there appears to be no doubt that a most serious riot is apprehended. [p. 1005, col. 1]

FACTS of the case appear from the judgment.

Babu *Dasarathi Sanyal* (with him Babu *Debendra Narayan Bhattacharji*), for the Petitioners.—It is clear from the facts and circumstances of the case that the Magistrate obviously acted without jurisdiction, and, therefore, the petitioners are entitled to ask for interference by your Lordships in revision. The Magistrate did not state the material facts which he was bound in law to do in passing the orders that he did. Section 144, clause (1), of the Criminal Procedure Code lays it down as imperative that the Magistrate must state "the material facts of the case" before he can be empowered to pass orders under the aforesaid section of Criminal Procedure Code. There is authority of this Court also for the above proposition in *Kar olal Sajawal* v. *Shyam Lal* (1). Notwithstanding the fact that there was apprehension of a serious riot, the Magistrate was bound to state the material facts and his not doing so makes his order one without jurisdiction. The fact that the order of the Magistrate was an emergent one, does not make the least difference and does not entitle the Magistrate to override the provisions of section 144 of the Criminal Procedure Code.

Dr. *Dwarkanath Mitter* (with him Babus *Manindra Nath Banerjee* and *Ashita Ranjan*

(1) 32 C. 935; 9 C. W. N. 864; 1 C. L. J. 216; 2 Cr. L. J. 215.

Ghosh), for the Opposite Party.—The Municipality should have gone to a Civil Court for an injunction instead of trying to set the Criminal Law in motion. Refers to *Ram Autar Sahu* v. *Kishnuput Ram* (2). The Magistrate could not have passed an *ex parte* order as he did under the circumstances.

Babu *Manmatha Nath Mookerjee* appeared for the Commissioners of the Municipality.

JUDGMENT.—We think this Rule must be discharged. The only point that requires serious consideration is whether the Magistrate acted without jurisdiction in passing the order without stating the material facts in the order. For the petitioners, reliance is placed on a decision of this Court in the case of *Karoolal Sajawal* v *Shyam Lal* (1), and that at first sight seems to support the contention that the statement of material facts is necessary to give the Magistrate jurisdiction to pass an order under section 144, Criminal Procedure Code. On reading the ruling as a whole it appears that the real reasons for the decision were based on the ground that it did not appear from the proceedings that the Magistrate was of opinion that immediate prevention or speedy remedy was necessary.

In the present case there can be no doubt on the facts reported by the Police and accepted by the Magistrate that there was a most serious danger of a riot which was likely to be attended with bloodshed and possibly with murder. It appears that in the dispute between the Municipality on the one hand and the first and the second parties on the other about the right to collect tolls from a certain piece of land both the first and the second parties collected *lathials*, and it also appears from the subsequent explanation of the Magistrate that there is further dispute between the first and the second parties themselves as to their rights. In their affidavits neither party has denied the serious allegation that they were prepared to assert their right by armed force. In these facts we think that the Magistrate was fully justified in issuing the emergent order he did. It would have been, however, better had he in his order set out the grounds of his action. But this was done in the formal order subsequently drawn up and served on the petitioners.

Considering these facts we are unable to hold that there was any defect of jurisdiction which would justify us in interfering with the order of the Magistrate in the exercise of our powers under the Government of India Act. The Rule is, therefore, discharged.

Rule discharged.

(2) 4 Ind. Cas. 577; 13 C. W. N. 188; 5 M. L. T. 92; 11 Cr. L. J. 11.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 2098 OF 1916.

April 10, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

AJAIB SINGH—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *ss.* 476, 195—*Offence committed during Police enquiry—Sanction, necessity of—Person not named in sanction, whether can be proceeded against.*

An offence committed during a Police inquiry and before any proceedings have been taken in Court does not require sanction under section 195 of the Criminal Procedure Code. [p. 1006, col. 2.]

Jagat Chandra Mozumdar v. *Queen-Empress*, 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103; *Putiram Ruidas* v. *Mahomed Kasim*, 3 C. W. N. 33, relied upon.

Khanderao Yeshwant, In re, 15 Ind. Cas. 799; 14 Bom. L. R. 361; 13 Cr. L. J. 527, distinguished.

Section 195, Criminal Procedure Code, operates as a bar to the trial of certain *offences*, and the test of the necessity for the grant of sanction is the character of the offence and not of the *offender*; once the bar imposed by section 195, Criminal Procedure Code, to the trial of an *offence* has been removed, the Magistrate before whom the trial takes place is not barred from issuing process against and trying persons who have not been specifically named in such a sanction under section 195, Criminal Procedure Code, or in an order under section 476, Criminal Procedure Code, as the case may be. [p. 1007, col. 1.]

Case reported by the Sessions Judge, Lyallpur, with his No. 1309 of 16th December 1916.

GROUNDS.—The learned District Magistrate of Lyallpur is of opinion that he can proceed against Ajaib Singh without any sanction. It is important that this point

be decided before conviction because after conviction, by reason of section 537, Criminal Procedure Code, such an objection cannot legally be raised, unless the want of sanction has in fact occasioned a failure of justice.

The Additional Sessions Judge acting under section 476, Criminal Procedure Code, directed the prosecution of Ganpat Rai and Amolak Ram. He did not direct the prosecution of Ajaib Singh and it is admitted that he did not give any sanction for his prosecution. Under these circumstances I am of opinion that the charge framed against Ajaib Singh is illegal and should be cancelled. Section 476, Criminal Procedure Code, does not contemplate that the Magistrate to whom the accused are sent for trial is authorised to take action against any other accused not so sent to him for trial.

Section 195 (*b*), Criminal Procedure Code, directs that no Court shall take cognizance of any offence punishable under section 193, Indian Penal Code, when such offence is committed in, or in relation to, any proceeding in any Court except with the previous sanction or on the complaint of such Court or of some other Court to which such Court is subordinate. There is no sanction by the Additional Sessions Judge, nor any complaint by that Court against Ajaib Singh. The offence for which Ajaib Singh is charged is abetment of fabricating false evidence which as a matter of fact was produced at the trial, so the offence, if any, was committed "in, or in relation to, any proceeding in Court." I forward the proceeding to the Hon'ble Judges of the Chief Court with a recommendation that the charge against Ajaib Singh be cancelled.

Lala *Hakumat Rai*, for the Accused.

The Government Advocate, for the Crown.

ORDER.—The point for determination in this case is whether in the circumstances detailed in the referring order sanction under section 195, Criminal Procedure Code, is necessary for the prosecution of Ajaib Singh. It is not necessary to give the facts in detail. Suffice it to say that an order was passed under section 476, Criminal Procedure Code, by the learned Additional Sessions Judge of Lahore directing the prosecution of Lala Ganpat Rai and Amolak Ram for an offence under section 466, Indian Penal Code. The case was sent to the District Magistrate, who directed the Police to make an enquiry into the allegations and to prepare the case for trial. This the learned District Magistrate was competent to do under section 476 (2), Criminal Procedure Code. As a result of this enquiry the Police reported that Ajaib Singh had instigated the offence committed by the persons above named. Ajaib Singh was accordingly summoned to appear before the District Magistrate, who directed his arrest and proceeded to try him jointly with Ganpat Rai on charges under sections 193 and 193/109, Indian Penal Code. At the instance of Ajaib Singh the learned Sessions Judge (Mr. Harris) referred this case to this Court with a recommendation that the proceedings against Ajaib Singh be quashed, on the ground that they were bad for want of sanction under section 195, Criminal Procedure Code. The case was referred to a Division Bench owing to a conflict of authorities and we have heard Mr. Hakumat Rai on behalf of Ajaib Singh and the learned Government Advocate on behalf of the Crown. Against Ajaib Singh the allegation is that he instigated fabrication of false evidence at a time when there were no proceedings whatsoever in any Court. The Police were at that time making an enquiry into the circumstances that led to the murder of one Sazawar, and the object of this fabrication was to prepare an *alibi* for one Budha. According to *Jagat Chandra Mozumdar* v. *Queen-Empress* (1) and *Putiram Ruidas* v. *Mahomad Kasem* (2), an offence committed in such circumstances, that is, during a Police enquiry and before any proceedings had been taken in Court, did not require sanction under section 195, Criminal Procedure Code. To some extent this view is supported by *Noor Mahomad* v. *Kaikhosru* (3) as well as by *Emperor* v. *Tabarak Zaman Khan* (4), cited by Mr. Bevan Petman. On the other hand *Khanderao Yeshwant, In re* (5) is a case which appears to some extent to be in conflict with the

(1) 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. s.) 1103.

(2) 3 C. W. N. 33.

(3) 4 Bom. L. R. 268.

(4) A. W. N. (1907) 288; 30 A. 52; 4 A. L. J. 790; 6 Cr. L. J. 396.

(5) 15 Ind. Cas. 799; 14 Bom. L. R. 362; 13 Cr. L. J. 527.

decision referred to above. It can, however, be distinguished, inasmuch as the offence under consideration in that case was one under section 211, Indian Penal Code, while in the present case the offence falls within the purview of section 193, Indian Penal Code. In any event in our opinion the view taken by the Calcutta High Court is correct and we accordingly hold that sanction is not necessary for the prosecution of Ajaib Singh in this case.

It also seems to us that the learned District Magistrate was justified in the action he took, inasmuch as under section 476, Criminal Procedure Code, the complaint had been made to him of an offence. Under section 475, sub-clause 2, Criminal Procedure Code, the learned District Magistrate was empowered to make an enquiry either by himself, or through the Police in the first instance, and if, in the course of this enquiry it transpired that persons other than those already arraigned before the Court were concerned in the offence, or an offence disclosed by the facts stated, the said District Magistrate was perfectly justified in issuing process against and trying such persons. Section 195, Criminal Procedure Code, operates as a bar to the trial of certain *offences*, and the test of the necessity for the grant of sanction is the character of the offence and not of the *offender*; once the bar imposed by section 195, Criminal Procedure Code, to the trial of an *offence* has been removed, the Magistrate before whom the trial takes place is not barred from issuing process against and trying persons who have not been specifically named in such a sanction under section 195, Criminal Procedure Code, or in an order under section 474, Criminal Procedure Code, as the case may be. We, therefore, direct the return of this case to the District Magistrate who will dispose of the same in accordance with law.

Revision rejected.

PATNA HIGH COURT.

CRIMINAL REVISION No. 8 OF 1917.

May 2, 1917.

Present:—Mr. Justice Mullick.

RAM NIGAH SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 476, 195—Mutation application, dismissal of, by Deputy Collector—False claim—Succeeding Deputy Collector, whether competent to sanction prosecution for offence under Penal Code (Act XLV of 1860), s. 209—Jurisdiction.

One *R.* applied to a Land Registration Deputy Collector for mutation of his name in the place of one *S.* whom he alleged to be dead, but an application purporting to be on behalf of *S.* was also made to the Deputy Collector stating that she was alive. The mutation application of *R.* was dismissed on 16th December 1916, in the absence of both *R.* and *S.* On 16th March 1916, an application purporting to be on behalf of *S.* was made to the successor of the Deputy Collector by whom the mutation application was dismissed, praying for sanction to prosecute *R.* for an offence under section 209, Indian Penal Code, and he recorded an order under section 476, Criminal Procedure Code, directing the prosecution of *R.*:

Held, (1) that the Deputy Collector had no jurisdiction to make the order as he had no judicial proceeding pending before him in the course of which the offence under section 209, Indian Penal Code, could be said to have been brought to his notice; [p. 1008, col. 1.]

(2) that the proper course would have been to give sanction under section 195, Criminal Procedure Code. [p. 1008, col. 1.]

Criminal revision against the order of the Deputy Collector, Chapra, dated the 20th of March 1917.

Mr. *Baikunth Nath Mitra*, for the Petitioner.

JUDGMENT.—One *Musammat* Sakla was the recorded proprietor of the properties of her deceased husband Diloo. On the 29th of September 1916 the petitioner Nigah Singh applied to the Land Registration Deputy Collector Mr. McLeod Smith for the substitution of his name for that of Sakla in respect of the property of Diloo Singh, in consequence of the death of Sakla. An objection was put in by a person who claimed to be Sakla Koer herself, although the petitioner maintained that she was one Ramraji Koer. The mutation application was eventually dismissed on the 16th of December 1916, because neither party appeared before the Deputy Collector.

On the 16th of March 1917 a petition alleged to be filed on behalf of *Musammat* Sakla Koer was made to Moulvi Saiyid

Muhammad Masud, the officer who had succeeded Mr. McLeod Smith as the Land Registration Deputy Collector, for sanction to prosecute Nigah Singh for an offence under section 209, Indian Penal Code.

On the 20th of March 1917 the learned Deputy Collector recorded an order under section 476, Criminal Procedure Code, directing the prosecution of Nigah Singh. The present petition is made against that order.

Now it is quite clear that the learned Deputy Collector had no jurisdiction to make the order. The land registration proceeding ended on the 16th of December 1916, and on the 20th of March 1917 Moulvi Saiyid Muhammad Masud had no judicial proceeding pending before him in the course of which the offence under section 209, Indian Penal Code, can be said to have been brought to his notice. The proper person to have taken proceedings under section 476, Criminal Procedure Code, was Mr. McLeod Smith himself. Moulvi Saiyid Muhammad Masud would also have been competent to direct a prosecution if the proceedings had been pending when he took over charge from Mr. McLeod Smith, but that was not the case. The application, made three months after the dismissal of the mutation proceedings by the opposite party, cannot be called a judicial proceeding instituted before the Deputy Collector; nor can it be said that the application was a judicial proceeding in the course of which the offence was brought under the notice of the learned Deputy Collector.

If it is a fact that *Musammat* Sakla Koer was alive at the time when Nigah Singh made the mutation application, it is difficult to see how Nigah Singh can plead *bona fides* and I agree that the circumstances required some action on the part of the Deputy Collector. His proper course was to give sanction under section 195 and not to proceed under section 476, Criminal Procedure Code.

The order directing the prosecution under section 476, Criminal Procedure Code, is, therefore, set aside.

Order set aside.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1472 OF 1916.

February 10, 1917.

Present:—Mr. Justice Chevis.

RAM RICHPAL—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Companies Act (VI of 1882), s. 75—Failure to hold general meeting within six months of Memorandum of Association being registered—Offence—Act, repeal of, effect of.

An offence punishable under an Act and committed while the Act is in force cannot be punished after the Act is repealed.

Where after the repeal of the Companies Act of 1882, the accused was convicted of not holding a general meeting within six months of the Memorandum of Association being registered, under section 75 of that Act:

Held, that the conviction was bad and must be set aside.

Petition for revision of the order of the District Magistrate, Ludhiana, dated the 13th June 1916, affirming that of the Magistrate, first class, Ludhiana, dated the 19th February 1916.

Mr. *Ganga Ram*, for the Petitioner.

JUDGMENT.—The petitioner Ram Richpal has been convicted under section 75 of Act VI of 1882 and fined Rs. 32. The offence of which he has been convicted is that he and other Directors of a Company did not hold a general meeting within six months of the Memorandum of Association being registered.

It was urged *inter alia* before the District Magistrate that the conviction could not stand as Act VI of 1882 was repealed before this prosecution started. But the District Magistrate overruled the contention, holding that an offence punishable under an Act and committed while the Act was in forced could be punished after the Act was repealed.

I think this view is wrong. When the Act is no longer in existence, I do not understand how there can be any conviction under it. The section in questions says, "every Director shall be liable." But when the Act is repealed the liability ceases.

Apparently there is no such penalty under the new Act, see section 77 of Act VII of 1913.

I accept this application and reversing conviction and sentence, I acquit the petitioner and order the fine, if paid, to be refunded.

Revision accepted.

END OF VOLUME XLI.

GENERAL INDEX

VOLUME XLI—1917.

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ABANDONMENT (82

ABATEMENT OF APPEAL 430, 730

ABWAB—Regulation V of 1812, S. 3, *construction of—Rent, meaning of.*

In a *kabuliyat* executed in the year 1883 in respect of a *patni* tenure, the rent was fixed at Rs. 3,315-4-0 and in a subsequent clause it was stipulated by the tenant, "besides this I shall continue to pay in the month of *Bhadra* every year the sum of Rs. 15 as the *mamuli* for the Iswar Thakur (idol) at your house." In the details of instalments, the said sum of Rs. 15 was not included. The sum of Rs. 3,315-4-0 was referred to throughout the *kabuliyat* as the rent, and the Rs. 15 was neither described nor treated as part of the rent in any part of the *kabuliyat*:

Held, that the sum of Rs. 15 could not be recovered by the *zemindar*, as it was an *abwab* and was not intended by the parties to form part of the rent or to be payable in respect of the use and occupation of the land.

Per *Chatterjea, J.*—Even assuming that the sum of Rs 15 did form part of the consideration for the use and occupation of the land, it was not recoverable under Regulation V of 1812 as it did not form part of the rent, nor was it treated by the parties as part of the rent

The concluding portion of section 3 of Regulation V of 1812 does not mean that the Court is to enforce payment of every sum which is not indefinite and which may have been specifically agreed upon between the parties, but it is only the rent, and not any other item, though neither indefinite nor arbitrary and though agreed upon to be paid in the written engagement of the tenant, which can be recovered under the Regulation.

The interpretation of section 3 of Regulation V of 1812 by the Full Bench in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri*, 17 C. 726 at p. 759; 8 Ind. Dec. (N. S.) 1026, adopted.

Per *Chatterjea, J.*—As regards the question whether an additional sum (claimed by the landlord) under a *kabuliyat* is or is not an *abwab* there is no difference between a *ryoti* holding and a permanent tenure.

For the purpose of deciding whether a certain sum specified in a *kabuliyat* is or is not an *abwab*, every consideration for a lease is not necessarily "rent" within the meaning of section 3 of Regulation V of 1812.

ABWAB—concld.

The fact that a certain item is dealt with in a *kabuliyat* in a separate clause or that it is not included in the instalments of rent specified, has an important bearing upon the question of the intention of the parties to the *kabuliyat*, as to whether the item is or is not rent.

Per *Sanderson, C. J.*—Whether a particular sum specified in a lease or agreed to be paid by the tenant is or is not an *abwab*, must depend upon the proper construction of the contract made by the tenant and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, *i. e*, if it is really part of the rent although not described as such, the landlord can recover it. **C** BEJOY SINGH *v.* KRISHNA BEHARI BISWAS, 21 C. W. N. 959 561

ACCUSED, *examination of, object of.*

The object of examining an accused person is to afford him an opportunity of explaining away evidence against him. Each point appearing in evidence should be put to the accused and he should be invited to offer his explanation or comment on it. Anything in the nature of cross-examination should be avoided. **U B** NGA SAN NYEIN *v.* EMPEROR, 3 U B. R. (1917) 3; 18 CR. L. J. 774 150

ACT, *repeal of, effect of.*

An offence punishable under an Act and committed while the Act is in force cannot be punished after the Act is repealed. **P** RAM RICHPAL *v.* EMREROR, 18 CR. L J. 896; 41 P. W. R. 1917 CR. 1008

ACTS—GENERAL.

ACT 1859—XIII. *See* WORKMAN'S BREACH OF CONTRACT ACT.

— 1860—XLV. *See* PENAL CODE.

— 1863—XX. *See* RELIGIOUS ENDOWMENTS ACT.

— 1865—III. *See* CARRIERS ACT.

— 1869—IV. *See* DIVORCE ACT.

— 1870—VII. *See* COURT FEES ACT.

— 1870—XXI. *See* HINDU WILLS ACT.

— 1871—I. *See* CATTLE TRESPASS ACT.

— 1871—IX. *See* LIMITATION ACT.

— 1872—I. *See* EVIDENCE ACT.

ACTS GENERAL—concld.

ACT 1872—IX. *See* CONTRACT ACT.
—— 1872—XV. *See* CHRISTIAN MARRIAGE ACT.
—— 1877—I. *See* SPECIFIC RELIEF ACT.
—— 1877—XV. *See* LIMITATION ACT.
—— 1878—XI. *See* ARMS ACT
—— 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.
—— 1881—V. *See* PROBATE AND ADMINISTRATION ACT.
—— 1882—II. *See* TRUSTS ACT.
—— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
—— 1882—VI *See* COMPANIES ACT.
—— 1882—XIV. *See* CIVIL PROCEDURE CODE.
—— 1882—XV. *See* PRESIDENCY SMALL CAUSE COURTS ACT.
—— 1886—II. *See* INCOME TAX ACT.
—— 1887—IX. *See* PROVINCIAL SMALL CAUSES COURTS ACT.
—— 1889—VII. *See* SUCCESSION CERTIFICATE ACT.
—— 1890—VIII. *See* GUARDIANS AND WARDS ACT.
—— 1890—IX. *See* RAILWAYS ACT.
—— 1890—XI. *See* PREVENTION OF CRUELTY TO ANIMALS ACT.
—— 1893—IV. *See* PARTITION ACT.
—— 1894—I. *See* LAND ACQUISITION ACT.
—— 1896—XII *See* EXCISE ACT.
—— 1897—X. *See* GENERAL CLAUSES ACT.
—— 1898—V. *See* CRIMINAL PROCEDURE CODE.
—— 1899—II. *See* STAMP ACT.
—— 1903—I. *See* VALIDATION ACT.
—— 1907—III. *See* PROVINCIAL INSOLVENCY ACT.
—— 1908—V. *See* CIVIL PROCEDURE CODE.
—— 1908—IX. *See* LIMITATION ACT.
—— 1908—XVI. *See* REGISTRATION ACT.
—— 1909—IV. *See* WHIPPING ACT.
—— 1913—VI. *See* MUSSALMAN WAKF VALIDATING ACT.
—— 1913—VII. *See* COMPANIES ACT.
—— 1914—VI. *See* PROVINCIAL SMALL CAUSES COURTS (AMENDMENT) ACT.
—— 1916—V. *See* INCOME TAX (AMENDMENT) ACT.

ACTS—(LOCAL)—BENGAL.

—— 1859—XI. *See* BENGAL LAND REVENUE SALES ACT.
—— 1866—IV. *See* CALCUTTA POLICE ACT.
—— 1870—VI. *See* BENGAL VILLAGE CHOWKIDARI ACT.
—— 1875—V. *See* BENGAL SURVEY ACT.
—— 1876—VII. *See* LAND REGISTRATION ACT.
—— 1880—IX. *See* BENGAL CESS ACT.
—— 1884—III. *See* BENGAL MUNICIPAL ACT.
—— 1885—VIII. *See* BENGAL TENANCY ACT.
—— 1895—I *See* PUBLIC DEMANDS RECOVERY ACT.
—— 1897—V. *See* BENGAL ESTATES PARTITION ACT.
—— 1899—III. *See* CALCUTTA MUNICIPAL ACT.
—— 1908—VI. *See* CHOTA NAGPUR TENANCY ACT.

ACTS—(LOCAL)—BIHAR AND ORISSA.

—— 1913—II. *See* ORISSA TENANCY ACT.

ACTS—(LOCAL)—BOMBAY.

—— 1845—XI. *See* BOMBAY ACT.
—— 1865—III. *See* BOMBAY ACT.
—— 1865—XII. *See* SIND COURTS ACT.

ACTS—(LOCAL)—BOMBAY—concld

ACT 1887—IV. *See* BOMBAY PREVENTION OF GAMBLING ACT.
—— 1901—III. *See* BOMBAY DISTRICT MUNICIPALITIES ACT.

ACTS—(LOCAL)—BURMA.

—— 1899—I. *See* BURMA GAMBLING ACT.

ACTS—(LOCAL)—C. P.

—— 1898—XI. *See* C. P. TENANCY ACT.

ACTS—(LOCAL)—MADRAS.

—— 1865—VII. *See* MADRAS IRRIGATION CESS ACT.
—— 1884—IV. *See* MADRAS DISTRICT MUNICIPALITIES ACT.
—— 1905—III. *See* MADRAS LAND ENCROACHMENT ACT.
—— 1908—I. *See* MADRAS ESTATES LAND ACT.

ACTS—(LOCAL)—PUNJAB.

—— 1887—XVI. *See* PUNJAB TENANCY ACT.
—— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
—— 1900—XIII. *See* PUNJAB ALIENATION OF LAND ACT
—— 1913—I. *See* PUNJAB PRE-EMPTION ACT.
—— 1914—III. *See* PUNJAB COURTS ACT.

ACTS—(LOCAL)—U. P.

—— 1876—XVIII. *See* OUDH LAWS ACT.
—— 1886—XXII. *See* OUDH RENT ACT.
—— 1901—II *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P LAND REVENUE ACT.

REGULATIONS.

REG 1806—XVII. *See* REGULATION.
—— 1812—V *See* REGULATION.
—— 1819—VIII. *See* PUTNI REGULATION.
—— 1872—III. *See* SONTHAL PARGANAS REGULATION.

STATUTES.

1861—24 & 25 VIC. C. 104 *See* HIGH COURTS ACT
1915—5 & 6 GEO. V C 61. *See* GOVERNMENT OF INDIA ACT.

ADMISSION *of co-party, whether admissible against others.*

Where several persons are jointly interested in the subject-matter of a suit, an admission by any one of these persons is admissible not only against himself, but also against the others, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and is made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.

The admission of one co-plaintiff or co-defendant is not admissible against another merely by virtue of his position as a co-party in litigation but because of some privity of title or of obligation which justifies

ADMISSION—concld.

the use of the admission of one against the other. **C** AMBAR ALI *v.* LUTFE ALI, 25 C. L. J. 619; 21 C. W. N. 996 116

ADVERSE POSSESSION 845

———*Jungle land—Presumption as to owner's possession.*

Where it is difficult or impossible, as in the cases of expenses of jungle land, to ascertain who is in actual possession, the presumption in that possession follows title. Mere casual acts of cutting wood in a large tract of jungle or occasional acts of cultivation need not be treated as an ouster of the owner's possession, such possession as the property is capable of. There must be some clear assertion of adverse title, or some conduct from which may be inferred an intention to exclude the actual owner. But once it is shown that acts of adverse possession were committed to the knowledge of the owner, the said presumption does not arise. **O** RATIPAL *v.* BIPIN CHANDRA CHATTERJI, 4 O. L. J. 354 89

——— *of limited interest—Acquisition of mortgagee rights by prescription.*

Where a person has been in possession of land in the open assertion of a definite and specific right as mortgagee, it is not open to the owner of the land to question his right after the expiry of more than twelve years from the date when such open assertion was made within his knowledge or within the knowledge of his predecessor-in-title. **O** BIHARI *v.* ADYA NATH, 20 O. C. 208 862

———Ouster, necessity of, proof of. 39

———*Possession prior to conveyance, nature of—Hindu Law—Alienation by widow—Reversioners, rights of—Estoppel—Consideration, refund of, to vendees—Probate and Administration Act (V of 1881), s. 90—Alienation, prohibition against.*

The defendants who were in possession of certain land got a conveyance executed by a Hindu widow in respect of that land which belonged to her husband's estate, on paying a consideration for it. The widow was an executrix under the Will of her husband of which she had taken probate. On her death her daughter instituted a suit for the recovery of possession of the land on setting aside the conveyance and on the latter's death her sons, who were the reversionary heirs, continued the suit:

Held, (1) that limitation in favour of the defendants did not begin to run prior to the date of the conveyance as their previous possession could not have been adverse, inasmuch as by the payment of consideration to the widow for the conveyance executed by her, they recognized that she had some title to the land;

(2) that the fact that the grandsons of the widow were aware of the sale and raised no objection could not estop them from challenging the legality of the sale, because at that time they had no right to the property, as their mother was still alive;

(3) that as the power of alienation of the widow was restricted by the Will, section 90 of the Probate and Administration Act was a bar to the alienation by the widow of the property in suit;

ADVERSE POSSESSION—concld.

(4) that in the absence of any proof that the consideration received for the conveyance was spent for the benefit of the estate no order could be made in favour of the defendants for a refund of the same. **C** CHAIRMAN, BALLY MUNICIPALITY *v.* PRAMATHA NATH MOOKHERJEE 775

AFFIDAVIT *by person who does not know Court language, value of.*

An affidavit as to what was argued in a case, sworn by a person who did not know the language in which the argument was made, is worthless. **C** AKIYANNESSA *v.* ABDUL GANI SADAGAR 1

AGRA TENANCY ACT (II of 1901), Ss. 4, 167—*Suit for share of fruit of grove, whether suit for rent—Jurisdiction—Revenue Courts.*

A suit for the share of the value of the fruits of a grove payable on account of the grove by the tenants is a suit for rent and is cognizable by the Revenue Courts. **A** RAGHUBIR RAI *v.* MADHO, 15 A. A. L. J. 623 908

ALLUVION AND DILUVION 682

APPEAL, (CIVIL)—*Court-fee—Mortgage—Redemption suit—Preliminary decree declaring plaintiff's right to redeem, appeal against—Decree on accounts, appeal against—Consolidation of appeals.*

In a redemption suit the defendant denied the plaintiff's right to redeem and also challenged the amount on which redemption was sought. The Court held that the plaintiff had the right to redeem and directed that accounts be taken. Defendant appealed against this decree, and the Trial Court in the meantime went into the accounts and found a certain sum to be due. The defendant again appealed, claiming a higher sum:

Held, that the two appeals should be consolidated and considered as one and that the full amount of Court-fee should be realised as if the two appeals were one appeal. **A** LALTA PRASAD *v.* SHEORAJ SINGH, 15 A. L. J. 464; 39 A. 452 346

——— *decided without reference to admissible evidence—Procedure—Remand.*

Where a District Judge decided an appeal holding erroneously that a copy of a *chitta*, which was admitted without objection in the first Court, was not admissible in evidence:

Held, that, as the District Judge had come to his conclusions without considering evidence which was legally admissible, the case should be remitted to him for re-consideration. **C** JAMINI MOHAN BHATTACHARJEE *v.* NARENDRA MOHAN CHAKRABARTY 71

———, hearing of—Appellant, duty of, to furnish address of respondent 889

———Party, addition of 65

———Pleas of inadequacy of consideration and ignorance of *pardanashin* vendor, whether can be raised 957

———, presentation of 918

———*Respondent wrongly named, effect of.*

Where in an appeal the respondent was wrongly named, the mistake being due to a clerical error in the decree appealed against:

Held, that the mistake was not fatal. **C** GOLAPDI MEAH *v.* PURNA CHANDRA DUTTA, 21 C. W. N. 774 37

———, *right of, by person who ought not to have been made party to suit,*

APPEAL (CIVIL)—contd.

In order that a person may have a right of appeal it must be shown that he was adversely affected by the decree.

If a person who ought not to have been made a defendant is impleaded as such, he is not a person who ought to be allowed to figure as an appellant.

Per *Jwala Prasad, J.*—No person has a right of appeal from a decision unless his interest is prejudicially affected by it.

Where in a suit for declaration of title to and recovery of possession of certain landed property, a person in whose favour a contract to sell the property in consideration of a sum of money, which was alleged to have been received by the plaintiffs, was impleaded as a defendant, and the suit was dismissed on appeal and the plaintiffs did not appeal to the High Court:

Held, that the defendant, with the said contract in his favour, had no such interest in the property in suit as to entitle him to maintain an appeal. **PAT** NAND LAL PAL *v.* NARESH CHANDRA DEB, 2 P. L. W. 108 **468**

——— *to Special Judge dismissed for default—Application to re-hear, dismissal of—Appeal, whether lies.*

An appeal lies to the High Court from an order refusing to re-hear an appeal dismissed for default, even though such appeal has been preferred to the Special Judge under section 109A, sub-section 2, of the Bengal Tenancy Act, in a suit under section 106 of the Act. **C** MANMOTHA NATH DEY *v.* GADADHAR MANNA **751**

——— *Valuation, objection as to—Appellate Court, duty of—Civil Procedure Code (Act V of 1908), O. VII, r. 11 (b)—Undervaluation, dismissal for, legality of.*

An Appellate Court should not entertain an objection based on undervaluation to the jurisdiction of the Trial Court, unless, for reasons to be recorded by it in writing, it is satisfied that the undervaluation has prejudicially affected the disposal of the suit on its merits, and the mere change of *forum* consequent on the undervaluation cannot of itself be treated as prejudicially affecting it.

In any event the proper course is not to dismiss a suit for undervaluation but to return the plaint to be re-presented in a Court of competent jurisdiction where the proper valuation necessitates a change of *forum*. **M** NARAYANI AMMAL *v.* SECRETARY OF STATE **167**

———, whether lies against decree passed on compromise entered by Vakil without reference to his client **429**

——— (SECOND)—*Abatement of suit, no issue framed as to.*

The question of abatement of a suit, which was raised in the written statement of the defendants who were substituted in the place of a deceased defendant but as to which no express issue was framed, cannot be allowed to be raised in second appeal. **C** AKIYANNESSA *v.* ABDUL GANI SADAGAR, **1**

——— *Acquiescence, question of.*

The question of acquiescence is a matter of legal inference to be drawn from the facts proved in the case and can be taken up in second appeal. **P** CHUHAR *v.* JAS KAUR, 69 P. R. 1917; 103 P. W. R. 1917 **927**

——— *Custom or usage, existence of, whether question of fact or law—Evidence.*

A decision that an alleged custom is not established by the evidence on the record is a decision on a question of fact, with which the High Court cannot interfere in second appeal.

But although the question of the existence of an alleged custom is a question of fact, the decision is liable to attack in second appeal on the ground that irrelevant evidence has been received or that relevant evidence has been excluded, or that there is no evidence of the alleged custom, or that the finding as to the existence of the custom is based on legally insufficient evidence, or that the facts found do not constitute evidence of the alleged custom or that in the determination of the question in controversy legal principles or tests have been erroneously applied, *e. g.*, that the Court has not correctly appreciated the essential attributes of a custom or has overlooked the distinction between a custom and a usage.

The question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage or whether a custom is reasonable and valid, is a question of law, which may be discussed in second appeal. But the mere question of the sufficiency of the evidence adduced to establish a custom is not a ground of second appeal. **C** KAILAS CHANDRA DUTTA *v.* PADMA KISHORE ROY, 25 C. L. J. 613; 21 C. W. N. 972 **959**

——— *Error of Judge in criticising evidence of witness on wrong footing.*

Where the Judge of the lower Appellate Court stated in his judgment that only one of three material witnesses was examined whereas, as a matter of fact, all the three were examined:

Held, that the error of the Judge in criticising the evidence of one of the witnesses on the footing that the other two had not been examined went to nullify his decision based upon the evidence of that witness. **C** BARODA PROSAD ROY CHOWDHURY *v.* MANMATH NATH MITRA **456**

——— *Objection as to place of suing, when to be taken.*

No objection as to the place of suing can be taken for the first time in second appeal. **PAT** RAJ KUMAR SINGH *v.* RAJ KESWAR KOERI **161**

——— *Plea in law, whether can be taken for first time.*

A plea in law which goes to the root of the plaintiff's claim and arises on the facts found by the lower Appellate Court and is not affected by any facts outside those findings may be taken for the first time in second appeal. **N** SURAJMAL *v.* PANDHARI, 13 N. L. R. 98 **45**

———, *Revision.*

Where a second appeal is preferred but does not lie under the law, it can nevertheless be treated as an application for revision. **O** BHAGWATI PRASAD SINGH *v* GOVIND DAT, 4 O. L. J. 374 **125**

——— Substantial error or defect in procedure **163**

APPEAL (SECOND)—concld.

——— Wajib-ul-arz, *finding of fact based on interpretation of, interference with.*

A finding of fact based on a totally unwarranted reading of a passage in the *wajib-ul-arz* of a village is liable to be set aside in second appeal. **P** SANT SINGH *v.* FRANGU, 54 P. W. R. 1917 **755**

APPRECIATION OF EVIDENCE, *whether 'point of law.'*

Appreciation of the value of documentary evidence is not the same as a misconstruction or misinterpretation of a document, and does not involve a question of law. **P** BHAGWANT SINGH *v.* NARINJAN SINGH, 129 P. W. R. 1917 **781**

APPROVER, *material corroboration of statement of, necessity of—Corroboration, material and geaeral—Accused found in company of approver shortly after commission of crime—Presu nption.*

There is a difference between general and material corroboration of an approver. What is required is material corroboration, and by it is meant the evidence concerning participation of his companion in committing the crime. Being found in the company of the approver shortly after a dacoity is very strong indication of fellowship in the crime. **P** SAHAI SINGH *v.* EMPEROR, 21 P. W. R. 1917 CR.; 18 CR. L. J. 852 **820**

ARBITRATION AND AWARD—*Representative of party to reference, whether can enforce award.*

A proceeding for the purpose of setting aside an execution sale was compromised and the matter in dispute was referred to an arbitrator, who made an award by which he directed that the judgment-debtors, whose property was sold, should pay a certain sum in cash to the other party within twenty days of the date of the award to have the sale cancelled. In a suit for possession of the property by the plaintiffs, who acquired it from the judgment-debtors subsequent to the award:

Held, that in order to get the benefit of the award the plaintiffs must prove that the condition which the arbitrator stipulated had been complied with. **C** RAI CHANDRA MANDAL *v.* RAGHUNATH DAFADAR **245**

ARMS ACT (XI OF 1878), S. 19 (b)—*Gun found in room of joint family house accessible to many—Offence.*

Where the place in which an incriminating article is found is one to which several persons have equal rights of access, it cannot be said to be in the possession of any one of them.

A gun was found in an abandoned room of a joint family house belonging to three accused, who were all adults and who, as joint members of the family, managed the affairs of the joint family and exercised equal rights The house was not enclosed by any fence or wall and the room was accessible from outside:

Held, that the accused could not be convicted under section 19 (*b*) of the Arms Act. **C** SUDHANYA BAWALI *v.* EMPEROR, 21 C. W. N. 839; 18 CR. L J. 781 **157**

AWARD laying down scheme of management—Decree, whether can be altered by majority **738**

BENGAL CESS ACT (IX B. C. OF 1880), S. 20 (a)—*Land entered in Part I of Road Cess Return as* malik's *land—Rent, suit for, maintainability of.*

Where any holding, estate or tenure in respect of which a Return has been made is entered by the maker of the Return in Part I of the Road Cess Return, he is precluded from suing for any rent whatsoever, in respect of any land, holding or tenure forming part of the estate to which the Return relates, unless it is proved that the holding or tenure the rent of which is sought to be recovered was created subsequent to the lodging of the Return. **PAT** JUGAL KISHORE SAHAI *v* HANUMAN MAHTON, 2 P. L. W. 38 **401**

——— S. 20 (b), *applicability of*—Bhaoli *land.*

Section 20 (*b*) of the Bengal Cess Act does not apply to *bhaoli batai* holdings. **PAT** UPENDRA LAL MISRA *v* MOTI THAKUR, 2 P. L. W. 35; 2 P. L. J. 617 **61**

BENGAL ESTATES PARTITION ACT (V B. C OF 1897), SS. 64, 65, *interpretation of—Orchard or land belonging to one proprietor, meaning of.*

Under the provisions of section 65 of the Bengal Estates Partition Act, a Deputy Collector may permit one proprietor to retain occupation of the land allotted to another upon agreeing to pay an annual rent, otherwise the section is self-contained. It does not read "orchard or land" belonging to one proprietor as is read in section 64 of the Act. **PAT** BARHAMDEO NARAIN *v.* BADRI NATH **14**

——— S. 113 (c)—*Appeal, when to be preferred—"Confirming or amending a partition," meaning of.*

An appeal will lie to the Board against an order making allotment, only when a partition has been re-cast and confirmed by the Commissioner. The expression "confirming or amending a partition" in section 113 (*c*) of the Act must be taken to mean a definite amendment which disposes of the case. The amendment and re-arrangements suggested by the Commissioner must be carried out before an appeal will lie. **B R B & O** KESHWAR SINGH, *In re*, 2 P. L. W. 114 **580**

BENGAL LAND REVENUE SALES ACT (XI B. C. OF 1859)—*Revenue sale of estate—Purchaser, right of, to revenue-free lands within the estate.*

The purchaser of an estate at a revenue sale takes the estate as created at the time of the Permanent Settlement subject to certain well known qualifications.

A purchaser of an estate at a revenue sale (under Act XI of 1859) cannot claim lands, which have been described in the Record of Rights as revenue-free lands and in respect of which no rent was ever claimed or realised by any previous proprietor of the estate, merely because those lands are situate within the geographical limits of the estate purchased by him unless he establishes that those lands were included in the estate at the time of the Permanent Settlement or, in other words, that the revenue was assessed on the basis of the assets of those lands. **C** ABDUL RAHMAN KAZI *v.* BAIKUNTA NATH ROY **757**

BENGAL LAND REVENUE SALES ACT—contd.

——— —Ss. 2, 3, *Revenue sale, dates in connection with —"Arrears of revenue", meaning of—Collector's power to purchase estate at highest bid, after making bid of Re.* 1.

Per *Curiam.*—An instalment of revenue payable on account of the January *kist*, if unpaid, does not become an arrear of revenue until the 1st of February next following.

There are three dates to be considered in connection with sales under Act XI of 1859. The *first* is the *kist* or instalment date fixed by the *kistibandi* of each estate. The *second* is the date fixed by the Board of Revenue for each district as the latest day in each quarter for payment of all arrears, and *lastly*, the date fixed for the sale. The question whether an instalment of payment remaining unpaid constitutes an arrear of revenue within the meaning of section 2 of the Act is a question of law and cannot, therefore, be decided by the statement of a witness that it was an arrear of revenue within the meaning of the Act. **C** AMRITA LALL ROY *v.* SECRETARY OF STATE **458**

——— Ss. 6, 7 **458**

——— Ss. 33, 58, 6, 7—*Revenue sale, dates in connection with —"Arrears of revenue", meaning of—Collector's power to purchase estate at highest bid, after making bid of Re.* 1—*Notices under ss.* 6 *and* 7, *whether can be issued by Sub-Deputy Collector for Collectors—"Ground declared and specified," meaning of—Non-service of notice under s.* 7, *whether invalidates sale—Finding of fact or law.*

Per *Chatterjea, J.* (*Newbould, J.*, dissenting).—Under section 58 of Act XI of 1859, the Collector having made a bid of Re. 1 cannot afterwards purchase the estate on behalf of the Government at the highest amount of the bid made by another bidder.

The purchase of an estate so made by the Collector is in contravention of the provisions of section 58 of the Act and cannot confer a legal right on the Government under the purchase. Therefore, the proprietor can recover the estate by a suit in the Civil Court brought for the purpose, even though in his grounds of appeal to the Commissioner such an objection to the sale was not specified.

The words "unless such ground has been declared and specified" in section 33 of Act XI of 1859 do not include the reasons for the ground. Therefore, where an objection to a revenue sale was taken in an appeal to the Commissioner, on the ground that the purchase by the Collector under section 58 of the Act was illegal, the same objection may be taken in the Civil Court though the reason given for it in the appeal may not be the same as that which is urged in the suit

Where an estate being put up to auction under Act XI of 1859, the peon of the Collector made a formal bid of Re. 1 on behalf of the Government in the presence of the Collector, who did not forbid it:

Held, that as the Collector allowed his peon to make the bid of Re. 1 it must be taken to be his bid, and whether it was a matter of form or not, the legal consequence must ensue, so that the Collector could not purchase that estate on behalf of the Government under section 58 of the Act at the highest bid made by another bidder.

BENGAL LAND REVENUE SALES ACT—concld.

Quære.—Whether notices of sale under Act XI of 1859 issued and signed by the Sub-Deputy Collector "*for the Collector*" invalidate the sale?

Quære.—Whether non-service of notice under section 7 of the Act is not a material irregularity in the conduct of the sale so as to invalidate the sale?

Per *Newbould, J.*—Where an estate is put up to auction under Act XI of 1859, the commencement of the bidding according to the usual practice with a bid of Re. 1 for Government does not prevent the Collector from taking advantage of the provisions of section 58 to purchase the estate on behalf of the Government at the highest bid made by another bidder.

There is a sufficient compliance with the provisions of the Act if the Collector or other authorised officer settles or directs that notices of sale under sections 6 and 7 of the Act should be issued and the notices are signed on his behalf by the subordinate officer to whom the duty of signing them has been delegated. Where such notices were signed by a Sub-Deputy Collector "*for the Collector*", a legal presumption arises that the issue of the notices was directed by the Collector. **C** AMRITA LAL ROY *v.* SECRETARY OF STATE **458**

——— S. 37—"*Protected interest*"—*Tank existing prior to lease.*

A tank existing prior to the defendant's lease is not a "protected interest" within the 4th exception to section 37 of Act XI of 1859. **C** AKIYANESSA *v.* ABDUL GANI SADAGAR **1**

———S. 58 **458**

BENGAL MUNICIPAL ACT (III B. C. OF 1884), Ss. 237, 238, 240—"*Erect or re-erect a building*", *meaning of—Pulling down and again putting up balcony, whether constitutes re-erection.*

The words 'erect or re-erect" in section 240 of the Bengal Municipal Act do not necessarily mean build or re-build an entire house from its foundation. The question whether there has been an erection or re-erection depends upon the circumstances of each case. It is a question of degree.

Pulling down and then putting up the whole of a balcony is not a re-erection within the meaning of section 240 of the Bengal Municipality Act. **PAT** CHAIRMAN OF GAYA MUNICIPALITY *v.* SHAM LAL GUPTA 2 P. L. W. 180; (1917) PAT. 338 **713**

———S. 240 **713**

BENGAL SURVEY ACT (V B.) C. OF 1875), S 62, *applicability of—Suit for declaration of title and confirmation of possession.*

If a plaintiff, suing for declaration of title and confirmation of possession or, in the alternative, for recovery of possession of land which has been the subject of survey proceedings, has been in possession all along and has never been dispossessed, then the suit is one for declaration of title and confirmation of possession and section 62 of the Survey Act is a bar to the suit, provided the proceedings of the Assistant Superintendent of Survey were otherwise regular. But if there has been dispossession of the plaintiff since the decision of the Assistant Superintend-

ent of Survey, then the suit is one for declaration of title and for recovery of possession to which the Survey Act has no application. **PAT** JANAKDULARI KOER *v.* SHEOJI MAHARAJ **86**

BENGAL TENANCY ACT (VIII B. C. OF 1885), S. 23—Raiyat, *right of, to cut and appropriate timber.*

A tenant *prima facie* has the right to fell the timber growing on the land so as to put the holding, on which the tenant has a right of occupancy, to the best use as an agricultural holding. If the landlord alleges a custom depriving the tenant of that right he must prove that custom.

The timber of trees felled by the tenant in exercise of his right belongs to the landlord, apart from any special custom entitling the tenant to appropriate the same. The burden of proving such special custom is on the tenant.

The right of an occupancy *raiyat* to fell trees growing on the holding is not affected by, and is a totally different right from, the right to appropriate the timber when so felled.

Where on the failure of an occupancy *raiyat* to prove a special custom entitling him to appropriate the timber growing on the holding, the lower Court granted a perpetual injunction to the landlord restraining the tenant from cutting down and appropriating the trees growing on the holding:

Held, that the injunction granted was much too wide and that the landlord's right would be amply protected if a simple declaration were made that the tenant was not entitled to appropriate any tree felled by him and growing on any portion of the land held by him as tenant of the plaintiff landlord. **C** MEYOA LALL GHOSE *v.* GOBINDA SUNDER SINHA CHOWDHURY **679**

——— Ss. 40 (5), 188—*Appeal by only some of the landlords, whether maintainable—Civil Procedure Code (Act V of 1908), O. XLI, r. 4.*

Though an application for commutation of rent under section 40 of the Bengal Tenancy Act must be made under section 188 of the Act, by all the landlords together, or by an agent on their behalf, yet there is no such restriction in the case of an appeal in which the procedure followed is that which is laid down in Order XLI, rule 4, Civil Procedure Code, 1908 **B R B & O** *In re* BHIRAJ MAHTO, 1 P. L. W. 578 **787**

——— S. 48, *applicability of, to under-*raiyat *holding at produce rent—Lease, construction of—Tenant undertaking to deliver paddy and on default its price, liability of.*

Where under a contract of tenancy an under-*raiyat* undertook to deliver to the landlord a certain quantity of paddy as rent for each year and on default, to pay to the landlord Rs. 20 as the price of the paddy with damages and costs:

Held, that as the under-*raiyat* did not hold at a money-rent but at produce rent, section 48 of the Bengal Tenancy Act had no application to the case.

The expression "holding at a money rent" in section 48 of the Bengal Tenancy Act refers not only to the landlord, but also to the under-*raiyat* so that that section applies when both the *raiyat* and the under-*raiyat* hold their respective tenancies at a money-rent. **C** KAMARADDI *v.* MONMOHINI DASYA **373**

——— Ss. 49 (b), 85, SUB-SECS (2), (3)—*Under-*ryoti *lease for more than nine years created prior to Act, whether becomes invalid after expiry of nine years from passing of Act.*

A sub-lease for a term exceeding nine years, granted by a *ryot* prior to the passing of the Bengal Tenancy Act, does not become void after the expiry of nine years from the passing of the Act, but remains valid and operative as against the *ryot*, who, therefore, has no right, before the term of the sub-lease has expired, to eject the under-*ryot* under the provisions of section 49 (*b*), Bengal Tenancy Act. **C** MIA RAJA PATWARI *v.* RAM KUMAR DE **846**

——— S. 50 (2), *presumption under, whether applies to holding where abatement has been allowed for lands gone out of cultivation.*

Section 50 (2) of the Bengal Tenancy Act applies to a holding held at a certain rate in which abatement has been allowed in respect of portions of the holding which have gone out of cultivation, if the abatement bears to the whole rent the same proportion that the land given up does to the whole area. **C** GENU SHEIKH *v.* TARAMANI **259**

——— S. 50, CL. (2), *presumption under, whether arises where there has been alteration in holding—Rent receipts, tenant, whether bound to produce.*

The presumption under section 50 (2) of the Bengal Tenancy Act may arise even though there has been an alteration in the area of the holding.

Where there has been an increase in the area of the holding, but it is found from the landlord's papers that the tenant has held the holding at the same rate for twenty years immediately preceding the landlord's suit for enhancement of rent, the rent cannot be increased except for the excess area unless the presumption arising under section 50 (2) is rebutted.

If the plaintiff-landlord's own papers prove that the tenant-defendant was holding the land at the same rent for more than twenty years before the institution of the suit for enhancement of rent, it is not necessary for the tenant to produce his rent receipts to prove the same in order to avail himself of the presumption under section 50 (2) of the Bengal Tenancy Act. **C** MADHU SUDAN *v.* JAMIRUDDIN **767**

——— Ss 50, 105, 109—*Fair and equitable rent, settlement of—Appeal from decision of Revenue Officer—Appeal, second, whether lies to High Court.*

An application under section 105 of the Bengal Tenancy Act was made by the appellant to the Assistant Settlement Officer to settle a fair and equitable rent in respect of the land held by the respondents, who contended that they were fixed rate tenants of the land. The Assistant Settlement Officer held that the respondents had failed to prove that they were fixed rate tenants and settled Rs 5-10-0 as a fair and equitable rent. The respondents did not appeal to the Special Judge. The appellant appealed contending that a higher rent should have been fixed, and the Special Judge raised it from Rs. 5-10-0 to Rs. 8. In second appeal the respondents urged successfully that they were fixed rate tenants. The appellants appealed under clause 10 of the Letters Patent:

BENGAL TENANCY ACT—contd.

Held, that the respondents had no right to bring before the High Court in appeal the question whether they were fixed rate tenants or not, as they had not appealed to the Special Judge and, therefore, the only question which the High Court should have considered was the question whether a fair and equitable rent had been fixed.

That class of cases which directs that in construing section 50 of the Bengal Tenancy Act small variations of rent are not to be taken into account does not touch a case where the variation is as much as six annas on an alleged rental of Rs. 2-8-0 per *bigha*. **PAT** RAJA SINGH *v.* KISHUN BEHARI LALL, (1917) PAT. 261 **499**

——— S. 60—*Landlord and tenant—Co-sharer landlord, right of, to maintain separate suit for share of rent—Registration of co-sharer's name under Land Registration Act (VI B. C. of* 1876).

A co-sharer landlord who has been duly registered under the provisions of the Land Registration Act, is entitled to maintain a separate suit for his share of the rent, as under the provisions of section 60 of the Bengal Tenancy Act the tenant is prohibited from setting up the title of a third party to receive the rent sued for. **C** BHUPENDRA NARAIN DUTT *v.* MANMOTHA NATH MITTER **859**

——— S. 60—*Landlord and tenant—Tenant whether can plead that entire rent is not due to landlord registered as* 16*-annas proprietor under Land Registration Act.*

Under the provisions of section 60 of the Bengal Tenancy Act, it is not open to a tenant to plead in defence to a suit for rent by a landlord, who has been registered, under the Land Registration Act, as the 16-annas proprietor of the land, that the entire rent claimed is not payable to the plaintiff, but part of it is due to a third person as a co-sharer of the plaintiff. **C** SHYAMA CHARAN *v.* MUSTAFIZAR RAHAMAN **769**

——— S. 60, *object of.*

Section 60 of the Bengal Tenancy Act must be strictly interpreted, for if it is not so interpreted, the object for which it was enacted will not be attained; that object being to coerce proprietors to register their names under the Land Registration Act. The object is of great importance for the efficient administration of land revenue. **PAT** HARDAYAL MAHTON *v.* WAZIR MAHTON **97**

——— S. 61—*Under-lessee of tenant, whether authorised to deposit rent.*

In an ordinary suit for arrears of rent for particular years, the rights of the parties must be governed by the terms of the registered document creating the lease, until those terms are varied by another registered document or by a judicial decision.

Under-tenants who have been directed in their under-lease to keep down and pay the rent payable by their lessor to his superior landlord are persons authorised to make deposit of that rent under section 61 of the Bengal Tenancy Act. **C** SHIB PRASAD ROY *v.* SAMARENDRA NATH BOSE **431**

——— S. 85, sub-ss. (2), (3) **846**

——— S. 88—*Consent in writing, what is—Evidence—"Rent roll," meaning of*—Jama wasil baki, *whether rent-roll.*

BENGAL TENANCY ACT—contd.

An express consent in writing within the meaning of section 88 of the Bengal Tenancy Act does not mean a consent which is to be implied from certain documents.

Therefore the consent, if any, which arises by implication from the rent-receipts granted by a landlord in respect of a part of the tenure or holding, with a knowledge that the tenancy has been sub-divided by the tenants, or from *jama wasil bakis* or from road-cess returns filed by a co-sharer of the landlord, cannot be a consent in writing within the meaning of section 88 of the Bengal Tenancy Act.

Such documents cannot be taken as principal evidence to prove a consent in writing which does not, in fact, exist; they can only be used as evidence of such consent, when it is proved that there was in fact an express consent in writing which for some reasons cannot be produced.

A *jama wasil baki* (an annual statement of the rents payable and received from a particular estate) is not a rent-roll within the meaning of the proviso to section 88 of the Bengal Tenancy Act. The rent-roll mentioned therein is a *jamabandi*—a permanent document kept in the estate office or *sherista* of a landlord which contains a list of the tenants and the rents payable by them and which is kept up and amended from time to time. **C** RAJANI SUNDARI DASSI *v.* HARA SUNDARI DASSI **501**

——— S. 103—*Record of Rights, entry in—Declaration, suit for—Limitation.*

Where there is a definite challenge to the plaintiff's rights by an entry made in the Record of Rights and the fact is patent that the plaintiff must have been aware of that challenge to his rights, a suit for a declaration that the entry is wrong, if brought upon that challenge, must be brought in accordance with the six years' rule of limitation. If, however, in spite of the challenge the plaintiff retains possession of the property, he is not required to institute any suit upon that challenge but may institute a suit at any time within six years of any new challenge which has the effect of prejudicing his rights. **PAT** RAMJI RAM *v.* SADHU SARAN LAL, 2 P. L. J. 493 **11**

——— S. 106, *suit under—Possession—Title, question of, whether can be gone into.*

In a suit under section 106 of the Bengal Tenancy Act where the dispute is between rival proprietors, the question of possession is the only matter that should be gone into. As regards other parties' claim the Court is not limited to the question of possession. **C** SURENDRA KRISHNA ROY CHOUDHURY *v.* PEARY MOHAN ROY **693**

——— S 109.

Per *Mullick, J.*—Under section 109 of the Bengal Tenancy Act there is no second appeal to the High Court against an assessment of fair and equitable rent. **PAT** RAJA SINGH *v.* KISHUN BEHARI LALL, (1917) PAT. 261 **499**

——— S. 109 A (2) **751**

——— S. 148 (*h*), *scope of—Assignee of decree for arrears of rent, right of, to execute decree.*

Clause (*h*) of section 148, Bengal Tenancy Act, forbids the assignee of a decree for arrears of rent to make any application to execute the decree,

even as a simple decree for money under the Civil Procedure Code. **C** SUDHANYA KUMAR PODDAR *v.* GOURANGA CHANDRA **542**

——— S. 148 A, *suit under, by co-*shebait, *maintainability of—Co-*shebaits, *whether co-sharers in* debutter *property.*

Co-*shebaits* are not co-sharers, but co-worshippers, and a family arrangement arrived at between them cannot entitle them to treat the *debutter* property as their personal property and to sue personally for their share of the rent payable to the idol. Therefore a co *shebait* cannot maintain a suit under section 148A, Bengal Tenancy Act, for the recovery of a share of the rent of the *debutter* property on the ground that by an amicable arrangement arrived at between him and his co-*shebaits*, he is interested in the *debutter* property to the extent of that share, and the other *shebaits*, who have been joined as *pro forma* defendants in the suit, in the remainder.

Joint *shebaits* are for many purposes joint trustees. **C** NORENDRA NATH KUMAR *v.* ATUL CHANDRA BANDOPADHYA **837**

——— S. 153A—Ex parte *decree for rent—Application to set aside, decree, maintainability of.*

An application for setting aside an *ex parte* rent-decree is not entertainable unless it contains a statement of the injury sustained by the applicant by reason of the decree. **C** NARESH NARYAN ROY *v.* MIDNAPORE ZEMINDARY CO., TD **800**

——— CHAP. XIV.

The history of judicial opinion on the question of the effect of the cessation, partial or entire, of the interest of a landlord on his right to enforce realization of arrears of rent by sale of the tenancy under the special procedure of Chapter XIV of the Bengal Tenancy Act reviewed. **C** SYEDUNNESSA KHATUN *v.* AMIRUDDI, 21 C. W N. 847; 25 C. L. J. 629 **353**

——— Ss. 161, 167—*Assignment of portion of rent payable to landlord tenure-holder, whether incumbrance.*

The holders of a tenure, who had granted a *miras* (under-tenure) of the entire tenure at a permanent rent of Rs. 45, sold by a conveyance to the *mirasdar* (under-tenure-holder, their right to receive rent to the extent of Rs. 33 out of the Rs. 45 reserved as the *miras* rent, describing it in the conveyance as their *malikana masahara.* The tenure was sold in execution of a rent decree and the purchaser brought a suit for rent against the *mirasdar* claiming the full yearly rent of Rs 45 originally reserved as the *miras* rent:

Held, that what was assigned to the *mirasdar* by the conveyance was a portion of the rent payable to the holders of the tenure for the *miras* and not a portion of the tenure itself, and as such the assignment was an incumbrance within the meaning of section 161, Bengal Tenancy Act, which it was necessary for the auction-purchaser to have annulled by a notice under section 167 of the Act before he could avoid it. **C** BIRENDRA KISHORE *v.* AHAMUD ALI **687**

——— S. 167 **687**

——— S. 169—*Sale-proceeds, disposal of—Application made two months after confirmation of sale, maintainability of—Interest, rate of, to be allowed to decree-holder—Costs, whether can be recovered out of surplus sale-proceeds.*

An application under section 169 of the Bengal Tenancy Act made more than two months after the date of confirmation of sale is maintainable.

Where the judgment-debtor disputes the landlord's right to receive interest as part of the sum due on account of rent out of the surplus sale-proceeds under section 169 (*c*), Bengal Tenancy Act, the Court will determine the dispute and the determination shall have the force of a decree. Interest may be added to the sum due as rent at the statutory rate of 12½ per cent. per annum.

The costs of an application under section 169 (*c*) of the Bengal Tenancy Act cannot be added to the sum to be deducted from the surplus sale-proceeds. **PAT** RAMESHWAR SINGH *v.* MUHAMMAD WAIZ, 2 P. L. W. 97; (1917) PAT. 270 **734**

Ss. 170, 171—*Occupancy holding—Mortgagee, right of, to question collusive decree obtained by landlord against tenant for enhancement of rent.*

A mortgagee of an occupancy holding, who has after contest been allowed to deposit arrears of rent under sections 170 and 171 of the Bengal Tenancy Act, has a sufficient interest in the holding entitling him to maintain a suit for a declaration that a collusive decree obtained by the landlord against the tenant for enhancement of rent is not binding on him. **PAT** BARHMA DEO LAL *v.* SHEO PRASAD LAL, 1 P. L. W. 674; (1917) PAT. 222; 2 P L. J. 561 **237**

——— Ss. 171, *erroneous order under—Contract Act (IX of* 1872), *ss.* 69, 70—Putni, *sale of, in execution of rent decree—Deposit of decretal amount by* dar-putnidar Putnidar, *liability of—Injunction, suit for—Decree, conditional.*

The landlord of a *putni* tenure brought a suit for arrears of rent against some only of the *putnidars* and obtained a decree. Defendant, a *dar-putnidar* of the judgment-debtors, deposited the decretal amount in Court to save the tenure from being sold, and was ordered to be put in possession as mortgagee under section 171 of the Bengal Tenancy Act. Plaintiff, a *putnidar* who was not a party to the landlord's suit for rent, brought a suit for a declaration and an injunction that his right in the tenure was not affected by the order under section 171 of the Bengal Tenancy Act, and the Court gave him a decree conditional on his paying to the *dar-putnidar* his proportionate share of the rent:

Held, (1) that the payment made by the defendant fell as against the plaintiff within sections 69 and 70 of the Contract Act;

(2) that the condition attached to the decree in favour of the plaintiff was not improper. **C** RAJANI KANTA MONDAL *v.* LAL MUHAMMAD, 21 C. W. N. 628 **242**

——— S. 182, *applicability of*—Ryot, *widow of, holding homestead for residence—Transfer, whether permissible.*

A *ryot* died while in possession of an agricultural *jote.* His widow paid rent to the *zemindar* for a period of two years, and built herself a homestead which she used as her own dwelling:

Held, that the widow must be taken to have been *ryot* as regards the homestead, so that section 182 of the Bengal Tenancy Act applied to it, with the

BENGAL TENANCY ACT—concld.

result that except with the landlord's consent she had no right to transfer it in the absence of any custom entitling her to do so. **C** ISWAR CHANDRA DEY *v.* MURARI LAL DUTT, 26 C. L. J. 88 **472**

——— S. 188 **787**

——— — SCH. III, Art. 2 **711**

BENGAL VILLAGE CHOWKIDARI ACT (VI B. C. OF 1870), Ss. 50, 51—*Object and scope of s.* 51—Chowkidari chakran *lands*, zemindar's *title to*—*Settlement before resumption proceedings, validity of. Chowkidari chakran* lands form part of the revenue paying estate within whose ambit they are situate, and the *zemindar* has a qualified title thereto. Therefore when such lands being vacated by the *chowkidar* pass into the possession of the *zemindar*, before they are resumed and transferred by the Collector to the *zemindar* under the provisions of the Chowkidari Act, the latter does not become a trespasser and a settlement made by him of those lands prior to the resumption proceedings cannot be held to be invalid as against a person who obtains a permanent under-tenure in respect thereof from the *zemindar*, after the resumption proceedings.

The new estate which vests in the *zemindar* in respect of the *chowkidari chakran* lands transferred to him under the Chowkidari Act is in continuation and confirmation of his pre-existing interest in those lands.

The object of section 51 of the Chowkidari Act is to maintain the validity of contracts made by the *zemindar* in respect of *chowkidari chakran* lands and it is immaterial whether such contracts do or do not also include other lands which are in no way affected by the resumption proceedings.

The application of the section cannot be limited to cases where there has been a contract by the *zemindar* in respect of lands other than *chowkidari chakran* lands. **C** SHIB CHANDRA *v.* SURENDRA CHANDRA **759**

——— Ss. 50, 51—*Suit by* putnidar *for possessian of* chowkidari chakran *lands—Limitation applicable —Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 142, 144.

Article 144 of the Limitation Act applies to the suit of a *putnidar* brought against the *zemindar* for the recovery of possession of *chowkidari chakran* lands transferred to the latter under the Chowkidari Act, and to ascertain when the *zemindar's* possession became adverse, the Court must find when the lands were settled by the *zemindar* with tenants and when those tenants took possession of the lands and whether such possession was to the knowledge of the *putnidar*. **C** MANINDRA CHANDRA NANDI *v.* RANGALAL **728**

BOMBAY ACT XI OF 1846, S. 3—*Rule* 44 *of rules made under s.* 3, *whether* ultra vires—*Mewas Agent's Court, conviction by—High Court's power—Jurisdiction—Appeal—Revision.*

Rule 44 of the rules under section 3 of Act XI of 1846 is not *ultra vires* and under it the High Court of Bombay has power –it being immaterial whether the power is called appellate or revisional—to take cognizance of any case on the petition of a convicted party and, if it thinks fit, send for the proceedings and pass a fresh decision.

Therefore, the High Court has jurisdiction to entertain an appeal from a convicted person who has

BOMBAY ACT—concld.

been sentenced by a Court of the Mewas Agent to a term not exceeding five years' imprisonment. **B** NAZAR MAHOMED *v.* EMPEROR, 19 BOM. L. R. 537; 18 CR. L. J. 817; 41 B. 657 **641**

BOMBAY ACT (III OF 1865), S. 1 **869**

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM. ACT III OF 1901), S. 3 (7)—*Building—Enclosure—Wall—Wire fence, whether building—Interpretation of Statute*—Ejusdem generis.

A wire fence being neither a 'wall' nor an 'enclosure is not a building within the meaning of section 3 (7) of the Bombay District Municipalities Act, 1901.

The word "enclosure" used in the definition of the word "building n section 3 (7) of the Bombay District Municipalities Act, must be interpreted as *ejusdem generis* with the preceding words 'hut' and 'shed,' that is to say, must be taken to refer to some fabric or structure or thing built in the more popular acceptation of the word. **B** EMPEROR *v.* RANCHODLAL AMRATLAL, 19 BOM. L. R. 521; 41 B. 563; 18 CR L. J. 832 **656**

BOMBAY PREVENTION OF GAMBLING ACT (IV BOM. OF 1887), Ss. 4 TO 7—*Gambling in house occupied temporarily by picnic party—Presumption under s.* 7, *whether rebuttable.*

The presumption arising under section 7 of the Bombay Prevention of Gambling Act is rebuttable.

On the occasion of the annual fair at Shuklatirtha some of the accused went there and occupied a house. In pursuance of a warrant under section 6 of the Bombay Prevention of Gambling Act, a search was made, when the accused were found playing cards and some money also was found which was the result of small stakes while playing cards. The Magistrate who tried the case, relying upon section 7 of the Act, presumed that the house where the play was going on was a common gaming house within the meaning of the Act and convicted the accused under sections 4 and 5 of the Act:

Held, that the fact that the accused occupied the house temporarily, when they were out on a picnic party and were playing there for small stakes, was sufficient to rebut the presumption arising under section 7 of the Act that it was a common gaming house. **B** CHIMANLAL MANEKLAL *v.* EMPEROR, 19 BOM. L R. 693; 18 CR. L. J. 885 **997**

BUDDHIST LAW—Adoption, *kittima* and *apatittha*, form of **749**

——— BURMESE—Maintenance—Dissolution of marriage—Desertion by wife **143**

——— *Property acquired during marriage—Interest of wife, whether attachable.*

Property acquired during marriage by the husband becomes the joint property of the husband and wife unless their earnings are kept separate and distinct, and their respective interests in such property are attachable in execution of a decree against one of them. **L B** MAUNG PAN HLA *v* MAUNG TUN NYEIN **410**

BURDEN OF PROOF—Mortgage bond, suit on—Recital, denial of truth of **44**

BURMA GAMBLING ACT (I OF 1899), S. 4—"*Ket*", *whether game of mere human skill.*

The Burmese game "ket" is not a game of mere

human skill within the meaning of section 4 of the Burma Gambling Act. **L B** PO ON *v.* EMPEROR, 8 L. B. R. 529; 18 CR. L. J. 756 **132**

CALCUTTA MUNICIPAL ACT (III B. C. OF 1899), S. 559, sub-s. (18), Bye-laws framed under, breach of—Calcutta Police Act (IV B. C. of 1866), s. 66, sub-s (4) (*a*), offence under **129**

CALCUTTA POLICE ACT (IV B. C. OF 1866), s. 66, sub-s. (4) (*a*), *offence under—Calcutta Municipal Act (III B. C. of* 1899*), s.* 559 *sub-s.* (18), *Bye-laws framed under, breach of.*

The petitioner, a building contractor who had undertaken the erection of a masonry or brick building and who, under a license of the Calcutta Corporation under bye-law 2 of the bye-laws framed under the provisions of section 559, sub-section (18) of the Calcutta Municipal Act, was authorised to make an enclosure on a portion of the public street for the purpose of depositing mortar, bricks, etc, thereon, on condition of his fencing off the portion to be occupied with a temporary fence, unloaded and deposited during the course of his building operations bricks on a foot-path—part of a public street—without fencing it off by a temporary fence, and thereby caused obstruction in the foot-path for about six hours:

Held, that the petitioner had not only committed a breach of the bye-law under which his license was granted, but had also committed an offence under the provisions of section 66, sub-section (4) (*a*), of the Calcutta Police Act.

Quære.—Whether sub section (4) (*a*), introduced into section 66 of the Calcutta Police Act by the Amending Act III B. C. of 1910, overrides or repeals the provisions regarding the regulation of obstructions to be found in the Calcutta Municipal Act. **C** CHARLES HENRY BROOKE *v.* EMPEROR, 18 CR. L. J. 753; 26 C. L. J. 510. **129**

CARRIERS ACT (III OF 1865), S. 10—*Notice, requirements and necessity of.*

To maintain a suit for damages for short delivery against a common carrier, a notice of claim under section 10 of the Carriers Act must be given to the defendant, even though the carrier came to know of the claim *aliunde* within six months' time and had no difficulty in tracing the goods

Where a clause in a Bill of Lading ran as follows:—"No claim of any kind whatsoever in respect of the contract shall be valid, unless notice in writing shall be given and delivered at the office of the Company at Calcutta within six months from the date of any default, loss or damage, in respect of which such claim arises:"

Held, that the clause did not in any way limit the requirements of section 10 of the Carriers Act and was entirely consistent with it. **C** RIVER STEAM NAVIGATION COMPANY, LTD. *v.* HAZARIMAL MULTAN MAL **919**

CATTLE TRESPASS ACT (I OF 1871), S. 10—*Seizure of cattle for coercing owner to pay rent for grazing, whether offence—Theft.*

Per *Teunon, J.*—A lessee of grazing land is entitled, under section 10 of the Cattle Trespass Act, to impound cattle whose owners, while obstinately refusing to come to any arrangement with the lessee or

to pay the customary or any fee, insist on grazing their cattle on the lessee's pasture. The fact that the lessee may hope that in order to prevent the impounding, the owners will make a payment, does not make the lessee's conduct unlawful nor converts the seizure of the cattle into an attempt at distraint.

Per *Huda, J.*—Such seizure by the lessee without any intention to take the cattle to a pound for the purpose of coercing the owners of the cattle to pay the arrears of rent for grazing is clearly illegal and amounts to an attempt of theft, which the owners are entitled to resist by use of force. **C** WAZUDDI *v.* RAHIMUDDI, 18 CR. L. J. 849 **817**

CAUSE OF ACTION **870**

———*Goods sent without order—Plaintiff asked to keep goods—Suit for charges—Jurisdiction.*

Defendant from Cawnpore sent a bale of cotton to plaintiff at Jhansi without any order or direction of the latter. The plaintiff refused to take delivery of the bale and the defendant wrote to him asking him to take delivery and to hold the goods on the defendant's behalf. The plaintiff sued the defendant for his charges, etc:

Held, that the cause of action arose at Jhansi and that the Jhansi Courts had, therefore, jurisdiction to entertain the suit. **A** GANESH PRASAD *v.* BANSIDHAR BARAUNIA, 15 A. L. J. 513 **904**

———, *meaning of.*

The expression "cause of action" means every fact necessary for the plaintiff to prove, if traversed in order to support his right to the judgment of the Court. **A** MUHAMMAD ZAKARIYA *v.* MUHAMMAD HAFIZ, 15 A. L. J. 557; 39 A. 506 **233**

C. P. TENANCY ACT (XI OF 1898), S. 70, *sub-cl.* (5)—*Unpartitioned village—Ordinary tenant—Deed executed by tenant for consideration in favour of one of three* lambardars—Sale—Surrender—*Registration prohibited—Effect of such registration, whether effected through fraud or ignorance—Trespass.*

An ordinary tenant in an unpartitioned village executed for consideration a registered document, described as a *surrender*, in favour of the plaintiff, who had one-third share in the village and was one of the three *lambardars* each of whom received one third of the rent from each tenant. The defendant was in possession with the consent of the remaining two *lambardars*. The plaintiff sued in ejectment:

Held, (1) that the document purporting to be a *surrender* must be deemed to be a deed of *sale* inasmuch as the plaintiff, though one of the several co-owners, did not represent and act as agent on behalf of the entire proprietary body;

(2) that the plaintiff could not rely upon the *sale*-deed in support of his claim for possession, inasmuch as the registration of the *sale*-deed was forbidden by section 70, sub-clause (5), of the Central Provinces Tenancy Act;

(3) that although the document purported to be a *surrender*, the parties to it could not evade the mandatory provisions of the law by giving the transaction the appearance of one not prohibited by such provisions, whether their conduct was influenced by fraud or ignorance;

(4) that as the defendant was in possession as a trespasser to the extent of the plaintiff's share,

the latter was entitled to a decree for joint possession to the extent of that share. **N** BALWANTRAO *v.* RAMRAO **954**

——— Ss. 70, 71—*Sale of occupancy holding by tenant, validity of*—Nazarana *paid to landlord, suit for refund of.*

Plaintiff entered into an agreement for the purchase of some occupancy holdings from *S.* and *J.* A sale-deed was executed but was not registered. The defendant, who was the *malguzar* of the village in which the land was situate, filed an application under sections 47 and 71 of the Central Provinces Tenancy Act, but the proceedings were withdrawn on the plaintiff paying Rs. 175 to the defendant. *S.* and *J.* then brought a suit to recover possession of the holdings from the plaintiff and got a decree. The latter then brought a suit to recover the money paid by him to the defendant:

Held, that the money was paid to the defendant in consideration of his giving up his right to question the validity of the transfer, which right he was supposed to possess, and that the payment amounted to a compromise of a disputed claim which was binding on the parties and the plaintiff was not, therefore, entitled to a return of the money paid by him. **N** SHARDAPRASAD *v.* SHAIKH HUSAIN, 13 N. L. R. 114 **877**

CHARGE, previous convictions not specified in, effect of **987**

CHOTA NAGPUR TENANCY ACT (VI B. C. OF 1908), S. 11—*Transfer of tenure, registration of, necessity of—Failure to register, consequence of*—Res judicata *Rent suit.*

The assignment of a tenure under the Chota Nagpur Tenancy Act must be registered in accordance with section 11 of the Act. If the provisions of the section are not complied with the landlord is not entitled to recover from the tenant the rent due between the date of transfer and the date of registration.

Where in a rent suit the issue as to the right of the plaintiff to maintain his claim for rent is raised and decided, it operates as *res judicata* in a subsequent rent suit. **PAT** ZALIKHA BIBI *v.* KRISHNA DAYAL GIR, 2 P. L. W. 146 **778**

——— Ss. 51, 177—*Rent, suit for recovery of—Payment to third person, plea of—Procedure.*

In a suit for recovery of rent under the Chota Nagpur Tenancy Act where the plaintiff has made out a complete title to receive rent and the tenants set up the plea of no knowledge of the plaintiff's title and of payment of rent to a third person, such person should, under section 177 of the Act, be made a party to the suit and the question of the actual payment of rent to such third person in good faith should be enquired into and the suit decided according to the result of such enquiry

In rent suits it is desirable, where the plaintiff has received delivery of possession from the Civil Court and has had his possession recognized in the survey proceedings, that he should be permitted to realise his rent, leaving it to any third person, who disputes the plaintiff's title, to bring a civil suit **PAT** SUNDAR ROY *v.* HEMA MAHTO, (1917) PAT. 89; 2 P. L. ... 286

——— S. 177 **191**
191

CHOWKIDARI CHAKRAN LANDS *comprised within* putni, *resumption of*—Putnidar, *rights of*—*Payment of additional rent.*

A *putnidar* is entitled to recover possession of the *chowkidari chakran* lands situate within the ambit of the lands comprised in his *putni* lease, which on resumption by Government under the Bengal Chowkidari Act have been settled by the Collector with the *zemindar*, and to hold them as part and parcel of his *putni* under the *zemindar* on payment of the sum assessed as revenue upon those lands under the Chowkidari Act, and in addition a fair share of the profits of the land, unless it is shown that in assessing the *putni* rent at the time of the *putni* lease the profits of all the lands including the *chakran* lands were fully taken into account. **C** KHONDKAR MEHDI HOSSEIN *v.* UMESH CHANDRA **964**

——— Zemindar's *title—Auction-purchaser of* zemindari *at revenue sale, whether acquires* chowkidari chakran *lands transferred to* zemindar *under Chowkidari Act.*

Choukidari chakran lands form part of the original revenue paying estate and when they are resumed and transferred to the *zemindar*, the latter does not acquire thereby a new estate but the estate taken by him under the order of transfer is in confirmation and by way of continuance of his pre-existing estate.

Nevertheless a purchaser of the parent estate at a revenue sale under Act XI of 1859 acquires no title to the *chowkidari chakran* lands that have been resumed and transferred to the defaulting *zemindar* under the Chowkidari Act, where the Collector, treating the enfranchised *chowkidari chakran* lands as constituting by themselves a separate estate subject to the payment of a separate assessment made under the Chowkidari Act, puts up to sale the original parent estate, exclusive of those lands, for realisation of the arrears of revenue due therefrom. **C** BRAJENDRA LAL DAS *v.* DEB NARAIN TEWARI **894**

CHRISTIAN MARRIAGE ACT (XV OF 1872), Ss. 4, 5 **664**

——— Ss. 68, 4, 5—*Marriage between Hindu and Christian solemnized by Hindu—Offence.*

A Hindu by religion, performing a marriage according to the Hindu mode between two persons either of whom is a Christian, commits an offence under section 68 of the Christian Marriage Act.

The Christian Marriage Act was intended to apply to the marriages of all Christians in India, including marriages where one of the parties is a Christian. **M** KOLANDAI VELU *v.* DEQUIDT, 33 M. L. J. 113; 6 L. W. 126; 22 M. L. T. 163; (1917) M. W. N. 589; 18 Cr. L. J. 840; 40 M. 1030 **664**

CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 0[illegible]—*Decree, suit to set aside—Summons suppressed.*

A suit lies to set aside a decree solely on the ground that the summons have been fraudulently suppressed. Section 108 of the Civil Procedure Code, 188[illegible], is no bar to such a suit **PAT** CHIRANJIB LAL CHOWBEY *v.* DOULTRA, 2 P. L. W. 20 **677**

——— S. 248—*Order on application for transmission of decree, whether order on application for execution—Notice—Execution of decree, order for, without notice, validity of.*

Where a notice is necessary to be issued under section 248, Civil Procedure Code, 1882, any order

for execution made without such notice is without jurisdiction and consequently a nullity.

Per *Sanderson, C. J.*—An order granting an application of a decree-holder for transmission of the decree to another Court for execution is not an order passed on a previous application for execution within the meaning of section 248, Civil Procedure Code of 1882.

Per *Mookerjee, J.*—A notice, given to the representatives of a judgment-debtor, of the decree-holder's application for transmission of the decree for execution to another Court cannot be treated as a notice given upon a previous application for execution within the meaning of section 248 of the Code of 1882. **C** MAHARAJ BAHADUR SINGH *v.* INDER CHAND BOTHRA, 26 C. L. J. 130 **853**

——— S. 257A—*Consideration paid towards forbearance to execute decree, effect of—Mortgage—Settled account forming part of consideration—Non-receipt of consideration, whether can be proved.*

A sum of money paid to a decree-holder for giving time to the judgment-debtor, under an arrangement not sanctioned by the Court under section 257A of the Civil Procedure Code, 882, must be deducted from the amount of the decree.

Where a person who takes a mortgage stands in a fiduciary relation to the mortgagor, it is competent to the mortgagor to prove failure of consideration, by proving circumstances which would entitle him to go behind the settled account comprised in the mortgage and showing that the amount was not really due.

It is open to a mortgagor to shew that there has been an actual failure of consideration in respect of a part and that the mortgage is only good for the balance.

An attaching creditor can question the correctness of the whole account on which a mortgage of the attached property is founded.

Where the transfer of interest in immoveable property is by way of security only, there is no principle which gives the consideration for the mortgage a position higher than that of an ordinary bond debt. Where an obligor can under certain circumstance go behind a settled account, he is equally entitled to plead that the consideration based on that account had never been received. **M** VENKATA PERUMAL RAJU *v.* UDDAGIRI PAPA NAIDU, 21 M. L. T. 351 **208**

CIVIL PROCEDURE CODE (ACT V OF 1908), *Rules of Code, whether govern sections.*

Per *Woodroffe, J.*—The body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. The body of the Code must, therefore, be read in conjunction with the rules, either as existing at the date of publication of the Code or as altered or added to subsequently. Therefore, the power of remand under section 107 is limited to the case described in Order XLI, rule 23. **C** ABDUL KARIM ABU AHMED KHAN *v.* ALLAHABAD BANK, LTD., 21 C. W. N. 877; 26 C. L. J. 49 44 C. 929 **598**

——— S. 2 (14)—*"Order", meaning of—Guardians and Wards Act (VIII of 1890), ss. 34 (e), 36—Order passed against guardian under s. 34 (e) of Act, whether executable.*

Under section 34 *(e)* of the Guardians and Wards Act, the District Court directed the guardian appointed by Court for the estate of a minor female to pay the sum of Rs. 1,600 to the guardian of the person of the minor step-daughter of the aforesaid minor for her marriage expenses. The money was not so paid. The ward attained majority and obtained possession of the property. The step-daughter's guardian applied for execution of the order passed by the District Court as a decree of Court:

Held, that the order was not one contemplated by section 2 (14) of the Code of Civil Procedure, and could not be executed under the provisions of that Code, the proper remedy being by a suit. **M** PARVATHAMMAL *v.* CHOKALINGA CHETTY, (1917) M. W. N. 602; 6 L. W. 526 **341**

——— S. 9 **937**

——— S. 11.

A decree for possession of properties in favour of plaintiffs, who had acquired title as aforesaid under the adopted son and who alleged dispossession by the widow after such acquisition of title, will not be *res judicata* in a subsequent suit by the reversioners on the widow's death, inasmuch as no question arose or can be said to have been decided in the former suit as to the right of the reversioners to sue after the widow's death. **M** SOMASUNDARAM CHETTIAR *v.* VAITHILINGA MUDALIAR, 6 L. W. 253; 40 M. 846 **546**

——— S. 11, O. XLI, RR. 4, 33—*Decision in appeal, when extends to non-appealing parties and appellant against whom appeal had abated.*

The decision of a Court of Appeal in favour of appellants extends to the parties who did not exercise the right of appeal when the grounds of the decision are common to all of them.

When an appeal which had abated as against some of the appellants by reason of their representatives not having been brought on the record is allowed, the decree of the Trial Court must be set aside as regards the whole of the claim and not merely in respect of the interests of those appellants whose appeals have not abated when the grounds of appeal are common to all the appellants. **M** SOMASUNDARAM CHETTIAR *v.* VAITHILINGA MUDALIAR, 6 L. W. 253; 40 M. 846 **546**

——— Ss. 11, 47—*Decree based on compromise, construction of—Suit for possession of land already decreed, whether competent—Decree-holder, remedy of* **2**

——— S. 11—Res judicata, *constructive—Suit decreed without decision of material issue—Practice of keeping undecided material issue, propriety of.*

In a suit between the plaintiffs and the defendants the question of the transferability of an occupancy holding, which was directly and substantially in issue, was not decided by the Court, which decreed the plaintiffs' suit but left the question open between the parties. In a subsequent suit between the same parties in which the same question was in issue:

Held, that though the course adopted by the Court was not proper, yet its decision in the previous suit could not operate as *res judicata* on the question of the transferability of the holding. **C** PRIYA SANKAR *v.* JITENDRA NATH BHADURI **19**

CIVIL PROCEDURE CODE—1908—contd.

——— S. 11—Res judicata—Ex parte *decree—Decision on issue not necessary to be determined—Co-defendants.*

Per *Mullick, J.*—An *ex parte* decree can operate as *res judicata*, but a decision on an issue which is not necessary to be determined cannot so operate.

In order that a decision may operate as *res judicata* between any co-defendants, it is necessary that there should be a conflict distinctly and expressly raised between them and the decision of that conflict as between them should be necessary for the disposal of the suit **PAT** NAND LAL PAL *v.* NARESH CHANDRA DEB, 2 P. L. W. 108. **468**

— S. 11—Res judicata, *question of, how determined—Decision on point not necessary for decision of suit, whether* res judicata.

In order to determine the question of *res judicata* it is necessary to ascertain what matters were in dispute between the parties, and this should be done not merely by looking at the decree but also by examining the pleadings and the judgment.

One *J. R.* with his sons owned several business concerns in Delhi, Calcutta and Cawnpore. On his death in 1903 a partition took place between his sons *J. N.* and *S. R.* and the business was divided half and half. Later on disputes arose between the descendants of *J. N.* and one *H. B.*, his great-grandson, brought a suit for his share in the property. This suit was instituted at Cawnpore on 7th August 1909. Various pleas were raised by the defendants, the principal one being that the family was not joint, there having been a complete disruption since *Sambat* 1960=1903 A. D. when the partition between *J. N.* and *S R* took place. One *B. D.*, son of *J. N.*, was joined as a defendant to the suit and a written statement was filed on his behalf on the 30th November 1909. As, however, he had not signed the verification, an adjournment was made and time given up to 11th December 1909 and the written statement was re-filed on the 6th December: but *B. D.* had died on the 5th. The case proceeded on a question of jurisdiction and eventually the plaint was returned to the plaintiff for presentation to the proper Court, as it was held that the Cawnpore Court had no jurisdiction to try the suit. It was also found that the Delhi concerns had no connection with Cawnpore and that *B. D.* and his descendants alone were concerned with the Cawnpore business. The plaint was consequently presented at Delhi. It was contended that the judgment in the former suit operated as a bar to this suit:

Held, (1) that the question whether the Cawnpore shop was or was not a part of the joint property was directly and substantially in issue in the Cawnpore Court and was concluded by the decision of that Court;

(2) that the mere fact that the question of jurisdiction was also decided on other grounds as well did not prevent the decision in the former suit operating as *res judicata*.

During the pendency of this suit the defendant *B. L*, a son of *J. N.* by his second wife, applied for and obtained Probate of the Will executed by *B. D.* on 26th November 1909 and in these proceedings it was held that *B. D.* had executed the Will as a free agent and not under undue influence and had a disposing mind. It was urged that the plaintiff being a minor, his guardian *ad litem* was guilty of gross negligence in not appealing against this decision and that, therefore, it should not be treated as *res judicata* so far as the minor was concerned:

Held, that the question as to the disposing mind and the due execution of the Will by *B. D.* could not be re-agitated and must be regarded as having been finally settled. **P** BABU LAL *v.* HARI BAKHSH, 122 P. W. R. 1917 **479**

——— S. 11, O IX, R. 9 *Suit for recovery of possession on declaration that a decree and sale were fraudulent, maintainability of, after dismissal of previous suit for same declaration.*

A suit brought in the Munsif's Court for a declaration that a rent-decree and an execution sale thereunder of a holding were fraudulent was dismissed for default. Subsequently the plaintiff, being deprived of the holding under the execution sale, instituted another suit in the Court of the Subordinate Judge for recovery of possession of the holding on the same declaration as prayed for in the previous suit:

Held, that the subsequent suit was not barred under Order IX, rule 9, as it was not based on the same cause of action as the earlier suit, nor was it barred as *res judicata*, as the previous suit was dismissed for default, and also as the Munsif, who dismissed that suit, was not competent to try the subsequent suit, instituted in the Court of the Subordinate Judge. **C** GIRIBALA DASI *v.* NITYA LAL SINHA **905**

——— S. 11, Expl. V.

Where a Court abstains from granting a relief on the ground that in its opinion no such relief is claimed, such abstention does not in a subsequent suit operate as *res judicata* under Explanation V, section 11, Civil Procedure Code.

Where in a suit for recovery of possession after dispossession of the plaintiff, his possession within limitation is questioned, it is for him to prove such possession. **O** RATIPAL *v.* BIPIN CHANDRA CHATTERJI, 4 O. L. J. 354 **80**

——— S. 20 **161, 904, 937**

——— S. 20—*Cause of action—Jurisdiction—Banker and depositor—Suit to recover deposit.*

The ordinary rule is that a debtor must seek his creditor to pay him, and people do not generally make express stipulations on the subject when making a deposit, because the question of suing for the deposit is far from their minds.

In an ordinary case, especially a case against a Bank or some trader who holds himself out as a person to receive deposits, it does not necessarily follow that a re-paynment of the deposit is to be made at the place of business of the Bank. In the majority of such cases the intention of the parties is that the money should be paid to the depositor wherever he happens to be when he demands re-payment. **A** SRI NARAIN *v.* JAGANHATH, 15 A. L. J. 653 **890**

——— S. 20 (c)—*Cause of action—Jurisdiction—Decree obtained by fraud, suit to se taside.*

Defendant fraudulently obtained a decree in the

CIVIL PROCEDURE CODE—1908—contd.

Court of the Second Munsif of Sirajgang in Lower Bengal, and having got the decree transferred for execution to Agra, put it into execution and caused the plaintiff to be arrested The latter thereupon brought a suit at Agra for a declaration that the decree obtained by the defendant was a nullity and for damages on account of loss of reputation and for physical and mental pain:

Held, that the Agra Courts had jurisdiction to entertain the suit, inasmuch as a material portion of the plaintiff's cause of action had accrued to him at Agra. **A** KHUSHALI RAM *v.* GOKUL CHAND, 15 A. L. J. 638 **352**

—— S. 20 (c)—*Place of suing—Suit to recover money due on Life Insurance Policy—Death of insured, place of.*

A suit to recover money due on a Life Insurance Policy can be instituted in the place where the insured died; for death in such cases is part of the cause of action within the meaning of section 20 of the Code of Civil Procedure. **M** VISHVENDRA THIRTHA *v.* NATIONAL INSURANCE CO. LTD. **392**

—— S. 21 **161**

—— S. 44 - *Transmission of decree for execution to Native State, legality of—Jurisdiction—Practice—* Ex parte *order for transmission—Right of party aggrieved—Limitation Act (IX of 1908), Sch. I, Art. 182.*

Section 44, Civil Procedure Code, does not sanction the transmission of a decree of a Court in British India to a Court of a Native State.

Long practice cannot be relied on to justify such a transmission, for, where want of jurisdiction is established, long practice will not avail.

An *ex parte* order for transmission as aforesaid is liable to be vacated at the instance of the party aggrieved within the time prescribed under Article 182 of the Limitation Act. **M** CHIDAMBARAM CHETTY *v.* RAMANATHAN CHETTY, 32 M. L. J. 487; 5 L. W. 646 **41**

—— S. 47 **675**

—— S. 47—Appeal—High Court, power of, to rectify technical error **89**

—— Ss. 47, 11—*Suit for possession of land already decreed, whether competent—Decree-holder, remedy of*

A suit for the recovery of possession of land already decreed is not maintainable; the only remedy of the decree holder being the execution of the decree. **P** FAKIRA *v.* PIR BAKHSH, 34 P. W. R. 1917; 55 P. L. R. 1917 **2**

—— S. 63—*Attachment of property by superior Court—Subsequent attachment and sale by inferior Court—Sale, whether invalid.*

A subsequent attachment and sale by an inferior Court of immoveable property already attached in execution of a decree of a superior Court is not necessarily illegal and made without jurisdiction. **M** A. K. T. K. M. NARAYANAN NAMBUDRIPAD *v.* TAWKER J. MEGAJI SEIT, (1917) M. W. N. 205; 33 M. L. J. 217; 22 M. L. T. 119; 6 L. W. 404 **612**

—— S. 73; O. XXI, R. 52—*Rateable distribution—Time for making application—Anticipatory attachment, validity of—Priority of attachment, effect of—Attaching creditors, relative rights of.*

Rule 52 of Order XXI, Civil Procedure Code, applies only where the property to be attached is in the custody of a public officer. It does not allow of an anticipatory attachment of money expected to reach the hands of a public officer. Therefore, the attachment by a notice under this rule of a fund before it has reached the hands of a public officer is not valid even where during the continuance of the attachment the fund comes into the custody of that officer.

Per *Sanderson, C. J.*— An attachment under Order XXI, rule 52, Civil Procedure Code, of a fund merely prevents alienation of the fund subject to the further order of the Court and does not give title to the creditor who effects the attachment.

Per *Mookerjee, J.*—To make sub-section (1) of section 73, Civil Procedure Code, applicable it must be shown that the applications for execution were made before the receipt of assets. Where assets are realised by the sale of immoveable property the point of time for consideration, before which applications for execution should be made, is the date of the sale of the property.

An attachment does not create any title in the attaching creditor; it creates no charge or lien upon the attached property. It is effected by a Court for the benefit of the execution creditor by prevention of private alienations by the judgment-debtor of the attached property. Consequently where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment, but the Court is bound to apply the rules of justice, equity and good conscience in the determination of the relative rights of the creditors who wish to proceed against the fund in *custodia legis* for the satisfaction of their dues. If the fund is insufficient to meet in full the claims of the creditors, it should be rateably distributed amongst them. **C** THAKURDAS MOTI LAL *v.* JOSEPH ISKENDER, 21 C. W. N. 887; 25 C. L. J. 595 **516**

—— S .92 **745**

—— S. 100 (1) (a), (b).

Under section 100 (1) (*a*), (*b*), Civil Procedure Code, the High Court is not entitled in second appeal to determine whether the evidence of the existence of an alleged usage is or is not credible, though it is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law.

Though the question whether a given state of facts establishes a binding custom or usage is a question of law, the question whether such a state of facts has been proved by evidence is a question of fact. **C** KAILAS CHANDRA DUTTA *v.* PADMA KISHORE ROY, 25 C. L. J. 613; 21 C. W. N. 972 **959**

—— S. 102—*Appeal, second—Mesne profits, suit for, coupled with prayer for declaration—Suit, form of.*

Plaintiffs brought a suit asking for a declaration of their title to, and confirmation of possession of, a plot of land and also for a sum of Rs. 49-8-0 by way of mesne profits; in the alternative they claimed that if it be adjudged by the Court that they had been dispossessed or were not in posses-

CIVIL PROCEDURE CODE—1908—contd.

sion, after the institution of the suit, a decree might be passed for *khas* possession. It appeared that the amount claimed as mesne profits was made up of the amount which was awarded against the plaintiffs in a previous Small Cause Court suit by the defendants on the ground that the plaintiffs had deprived the defendants of the crops grown on the land in suit in the previous year:

Held, (1) that a decree for mesne profits could be made in the suit inasmuch as there was an alternative claim for possession;

(2) that a second appeal lay against the decree of the lower Appellate Court disallowing mesne profits, inasmuch as the suit, being one for a declaration of title to land, was not cognizable by a Small Cause Court. **C** SHEIKH YAKUB *v.* TAZIMUDDI MULLICK, 26 C. L. J. 105 **842**

——— S. 102—*Appeal, second, right of Suit cognizable by Small Cause Court—Declaration, prayer for, addition of, whether alters nature of suit.*

The mere addition of a prayer for a relief by way of declaration does not alter the character of a suit which is of a nature cognizable by a Small Cause Court, so as to give a party a right of second appeal which is prohibited by the terms of section 102, Civil Procedure Code.

Where all the reliefs which the plaintiff claims in a suit can be obtained without asking for a declaration, the mere addition of a prayer for a declaration does not prevent the suit from being a suit cognizable by a Small Cause Court. **C** NOGENDRA NATH ROY *v.* ASHUTOSH ROY **627**

——— S. 104, O. XXI, R. 92—*Appeal, second, whether lies from appellate order reversing order of first Court under O. XXI, r. 92.*

Under the present Code of Civil Procedure no second appeal lies from an appellate order reversing an order of the first Court setting aside an execution sale under Order XXI, rule 92. **C** RAKHAL CHANDRA *v.* MANARANJAN DAS **753**

——— S. 104 2), O. XXI, R. 92, *order passed under —Appeal, second, whether lies*

An order passed under Order XXI, rule 92, Civil Procedure Code, is not open to second appeal. **O** TUNG NATH *v.* KANDHAIYA LAL, 4 O. L. J. 372 **121**

——— S. 105 **942**

——— Ss 107, 151, O. XLI, R. 23—*Remand, power to order—Inherent jurisdiction of Court, when to be invoked—Rules of Code, whether govern sections.*

The powers of an Appellate Court as regards remand are not limited to the specific case mentioned in Order XLI, rule 23, Civil Procedure Code But a Court, in the exercise of its inherent jurisdiction to do what is right and necessary, may order a remand in cases other than those covered by Order XLI, if justice so requires it.

Whether justice does require a Court to invoke its inherent jurisdiction for the purpose of ordering a remand must be determined by that Court with reference to the particular facts of the case and the rule of law that the Court cannot invoke its inherent jurisdiction where there is a provision in the Code, whether by way of remand or otherwise, which, if applied, will meet the justice of the case.

CIVIL PROCEDURE CODE—1908—contd.

Per *Woodroffe, J.*—The body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. The body of the Code must, therefore, be read in conjunction with the rules, either as existing at the date of publication of the Code or as altered or added to subsequently. Therefore, the power of remand under section 107 is limited to the case described in Order XLI, rule 23.

Per *Mookerjee, J.*—Order XLI, rule 23, cannot be regarded as a limitation on the power of remand recognised in section 107 in the sense that the power to remand can be exercised only in the contingency mentioned in Order XLI, rule 23.

Nothing in section 107, Civil Procedure Code, restricts in any manner the application of the principle of inherent power recognised by section 151.

The exercise of inherent power can only be invoked where the Court is satisfied that the specific provisions of the Code are not sufficient to meet the necessities of the case

Per *Teunon, J.*—Where there has been in the first Court a fair and honestly conducted trial, a case should under section 107, Civil Procedure Code, be remanded, in other words, a *de novo* trial should be directed only where Order XLI, rule 23, is applicable that is to say, where the Trial Court has disposed of the suit upon a preliminary point. But in exceptional cases where it may be said that in effect there has been no proper trial at the first Court, it is open to the Appellate Court in the exercise of its inherent jurisdiction, for which section 15 of the Code now makes express provision, to direct a remand or a re-trial. **C** ABDUL KARIM ABU AHMED KHAN *v.* ALLAHABAD BANK, LTD., 21 C. W. N. 877; 26 C. L. J. 49; 44 C. 929 **598**

——— S. 110—*Decision incidental to final conclusion whether directly "involved".*

Where a decree of the Chief Court affirms the decision of the Court below and the decision of both Courts is based on facts held to be established, no certificate for leave to appeal to His Majesty in Council can be granted, even though the decision incidentally involves a decision on the question of the interpretation to be put on certain documents, as this cannot be regarded as a "substantial" point of law "directly involved" in the case. **P** BHAGWANT SINGH *v.* NARINJAN SINGH, 129 P. W. R. 1917 **781**

S. 115—*Assumption of jurisdiction by subordinate Court—Revision—High Court, interference by.*

Where a subordinate Tribunal has usurped jurisdiction it is incumbent upon the High Court to interfere. **C** RAM PROSAD PRAMANIK *v.* SRICHARAN MANDAL, 21 C. W. N. 1109 **276**

——— S. 115—*High Courts Act, 1861 (24 & 25 Vict c. 104), s. 15—Revision.*

Per *Curiam*—Where an order granting or refusing sanction for prosecution under section 95 or section 476, Criminal Procedure Code, made by a Civil Court is sought to be set aside by an application to the High Court, the High Court can exercise the powers vested in it by section 115 of the Civil Procedure Code or section 15 of the High Courts Act, and the Criminal Bench as such has no jurisdiction to deal with the matter on revision.

Per *Chaudhuri, J.*—The revisional powers of the High Court under section 115, Civil Procedure Code, or its power of superintendence under clause 15 of the High Courts Act have not been cut down by section 195, Criminal Procedure Code. **C** BUDHU LALL *v.* CHOTU GOPE, 21 C. W. N. 654; 25 C. L. J. 40'; 18 CR. L. J. 793 **313**

——— S. 115—*High Court's interference with decision erroneous in law.*

A Subordinate Court decreed the suit of a consignee against a Steam Navigation Company for damages on account of short delivery, erroneously holding that a notice of claim given to the sub-agent of the Company was a good notice in the circumstances of the case:

Held, that the decision being merely erroneous in law, it did not warrant the High Court's interference under section 115, Civil Procedure Code. **C** RIVER STEAM NAVIGATION COMPANY, LTD. *v.* HAZARIMAL MULTAN MAL **919**

——— Ss. 115, 105—*Interlocutory order in appealable case—Revision, whether lies—High Court, power of interference of.*

The Chief Court has no power to interfere in revision under section 115 of the Civil Procedure Code with an interlocutory order passed by a lower Court in an appealable case; but under section 105 of the Code, the order can be made a ground of objection in the subsequent appeal against the decree.

Case-law on the subject reviewed. **L B** MA KYI *v.* MAUNG PAN U **942**

——— S. 115, O. XXIII, R. 1—*Order allowing withdrawal of suit in Appellate Court, legality of—Revision—High Court, power of interference of.*

A suit in which a number of issues were raised and tried by the Munsif at considerable length was dismissed on the ground that the plaintiff had no title and that his claim was barred by limitation. On appeal, on an application made by the plaintiff-appellant for withdrawing the suit and the appeal with liberty to bring a fresh suit on the same cause of action, stating therein that "through the mistake of the writer who drew the plaint some important items were left out", the Appellate Court permitted the plaintiff to withdraw the suit and the appeal with liberty to bring a fresh suit:

Held, that there were no formal defects or sufficient cause within Order XXIII, rule 1, Code of Civil Procedure, for allowing the plaintiff to withdraw both his appeal and the original suit and that, therefore, the order could be set aside by the High Court in revision under section 115, Civil Procedure Code.

The case was remanded to the Appellate Court to be taken up for re-hearing from the point at which it stood when the order allowing withdrawal of the suit was made. **C** SHANU SHEIKH *v.* DHANI SARKAR **934**

——— S. 115—*Revision—District Judge ordering payment of allowance to guardian of person of minor.*

A District Judge made an order directing the guardian of the property of a minor to pay to the guardian of his person a certain allowance, on condition of the latter removing with the infant to a certain house that had been provided for the residence of the minor. This condition was, however, superseded by some other orders but a subsequent application for the allowance was refused by the District Judge on the ground that the guardian of the minor's person had not complied with the condition:

Held, (*Fletcher, J.*, hesitating), that the order of the District Judge refusing the application should be set aside by the High Court in revision under section 115, Civil Procedure Code. **C** SARPAT SINGH *v.* BUDH SINGH DUDHEREA **240**

——— S. 115—*Revision—Error in law, whether ground for interference.*

In order to justify interference under section 115 of the Civil Procedure Code on the ground of an erroneous view of the law taken by the lower Appellate Court, the error must involve, either a want or refusal of jurisdiction, or some illegality or material irregularity of procedure. **N** GANESH PRASAD *v.* REWA RAI, 13 N. L. R 116 **883**

——— S. 115—*Revocation of sanction by District Judge in appeal—Revision—High Court, power of interference of.*

The High Court can interfere under its revisional jurisdiction, conferred by section 115 of the Code of Civil Procedure, with an appellate order of a District Judge passed under section 195 (6) of the Criminal Procedure Code. **PAT** RANG BAHADUR SINGH *v.* SHEONANDAN SINGH, 18 CR. L. J. 873 **985**

——— S. 115, O. XXIII, R. 1—*Withdrawal of suit long after institution, permission for—Insufficiency of evidence—Jurisdiction—Material irregularity—High Court—Revision, powers of.*

An order permitting a suit in proper form to be withdrawn under Order XXIII, rule 1, Civil Procedure Code, long after its institution on the ground of insufficiency of evidence is illegal and irregular, though passed with jurisdiction.

The High Court can interfere with such an order in revision under section 115, Civil Procedure Code. **M** CHINTA RANGAYYA *v.* CHINTA BUTCHAMMA, 6 L. W. 1; (1917) M. W. N. 719 **281**

——— S. 132, *sub-s.* 1—Pardanashin *lady, appearing in Court to institute criminal complaint, whether loses exemption from personal appearance in Civil Court.*

A *pardanashin* lady, who according to the customs and manners of the country ought not to be compelled to appear in public, does not cease to be exempt from personal appearance in Court under sub-section (1) of section 132, Civil Procedure Code, in consequence of her appearing on a previous occasion in a Criminal Court for the purpose of instituting a complaint. **C** BALAKESHWARI DABI *v.* JANANANDA BANERJEE, 26 C. L. J. 319 **610**

——— S. 144 **238**

——— S. 144—*Court, inherent power of, to make restitution for wrong done by its erroneous order.*

A Court has an inherent power to make restitution and a party who is entitled to it should not be referred to a regular suit.

J. N. got a decree for possession of a certain property by partition in 1903. The Chief Court, by

CIVIL PROCEDURE CODE, 1908—contd.

its decree of the 17th February 1906, made the decree conditional on payment of Rs. 153-13-0. Prior to that *J. N.* had obtained possession in execution proceedings. On the 14th February 1907, the executing Court held that the decree had become void owing to the non-payment of the sum and ordered restoration of possession to the judgment-debtor together with mesne profits for the period during which the decree-holder had been in possession. An appeal to the Chief Court was dismissed on the 19th July 1907, but on the 10th January 1908, an application for review was accepted, and it was ordered that the decree had not become void and that possession should be restored to the decree-holder. The latter was again put in possession and applied for mesne profits for the period during which he had been wrongfully kept out of possession:

Held, that though the case did not strictly come within section 144 of the Civil Procedure Code, yet it was eminently a case where the Court should make restitution for the wrong done to the decree-holder by reason of its erroneous orders. **P** JAGAN NATH *v.* FATTEH CHAND, 61 P. R. 1917; 98 P. W. R. 1917 **910**

——— S. 151 **598**

——— S. 151—*Transfer of Property Act IV of* 1882) *s.* 90, *decree under—Amendment of decree not in accordance with judgment—Inherent power of Court.*

If on the face of it a decree made under section 90 of the Transfer of Property Act is not in accordance with the previous judgment, then the Court will be justified under the inherent powers given to it by section 151 of the Civil Procedure Code in making the decree in accordance with the judgment. **PAT** RAMESHWAR SINGH *v.* JOTINDRA CHANDRA SINHA, 2 P. L. W. 205 **206**

——— S. 151, O IX, R. 9—*Execution—Orders, whether fall within* O. IX, R. 9—*Dismissal for default of petition of objection to sale in execution—Remedies open to petitioner—Review, inherent power of Court for.*

A fresh application for execution is competent where a previous application is dismissed for default, as Order IX, rule 9, Civil Procedure Code, does not apply in such a case.

Ex parte orders or decrees and orders of dismissal for default, made in the course of execution proceedings, lie outside the scope of the remedies provided by Order IX, Civil Procedure Code. But where in relation to such proceedings no special remedy is provided by the Code, the Courts have, under the general law, aided perhaps by section 151, Civil Procedure Code, an inherent power to review *ex parte* orders and orders for dismissal for default.

Where on an application for execution of a decree by the sale of an occupancy holding, the judgment-debtor preferred an objection on the ground that the holding was not transferable, but for his non-appearance on the day fixed for its hearing, the petition of objection was dismissed for default:

Held, (1 that until it was set aside, the order of dismissal for default must be held to be binding upon the judgment-debtor, at any rate for the purpose of the application for execution with reference to which the objection was preferred, and

CIVIL PROCEDURE CODE, 1908—contd.

the judgment-debtor was not entitled to ignore it and file a fresh petition of objection;

(2) that the order of dismissal could not be set aside on an application purporting to be made under Order IX, rule 9, Code of Civil Procedure, as Order IX, rule 9, was inapplicable, but that the Court had inherent power on a proper application made by the judgment-debtor to review the order and enquire whether the judgment-debtor had or had not a reasonable cause for non-appearance on the date appointed for the hearing of his petition of objection.

Under the circumstances of the case the judgment-debtor's application under Order IX, rule 9, was directed by the High Court to be treated as an application for review by the lower Court in the exercise of its inherent power to review the order of dismissal for default. **C** BHARAT CHANDRA NATH *v.* YASIN SARKAR, 21 C. W. N. 769 **586**

——— O. I, RR. 1, 3.

Order I, rule 3, is not limited to joinder of parties but also applies to joinder of causes of action.

The determination of the question whether or not the suit as framed is open to objection on the ground of misjoinder of parties and causes of action depends upon the allegations made in the plaint. **C** RAMENDRA NATH RAY *v.* BROJENDRA NATH DAS, 21 C. W. N. 794 **944**

——— O. I, R. 8 **745**

——— O. I, R. 9, O. II, R. 5, O. VI ,R 17—*Suit against executors as such and personally, whether maintainable—Non-joinder or misjoinder of parties, dismissal of suit for—Amendment of plaint.*

A suit for recovery of an estate, on declaration of plaintiff's title thereto as a *shebait* or in the alternative (if the property is found not to be *debutter*) as owner by right of inheritance to his deceased adoptive father, against the defendants in their personal capacity, was dismissed on the ground that as the defendants were in possession in their capacity as executors under the Will of a testator, they could not be sued in their personal capacity:

Held, (1) that inasmuch as the testator obtained possession of the estate and held it until his death and under his Will it vested on his death, in his executors, and inasmuch as the plaintiff averred that the executorship of the defendants ceased after his adoption, the Trial Court ought to have allowed the plaintiff an opportunity to amend the plaint by suing the defendants both as executors and in their personal capacity, instead of dismissing the suit on the ground of misjoinder or non-joinder of parties;

(2) that as the alternative claims of the plaintiff arose out of the same transaction, the plaintiff could maintain the suit as a *shebait* or in the alternative in his own right as owner. **C** NRIPENDRANATH ROY *v.* BIRENDRANATH ROY, 21 C. W. N. 939 **615**

——— O. I, R. 10 **705**

——— O. I, R. 10, *read with s* 107.

H. brought a suit for rent against a tenant claiming to be the sole landlord. *J.* also brought a suit against the same tenant in respect of the same land for the entire rent. *H.* was a party defendant to the suit of *J.* Both suits were tried together as analogous and it was found by the Trial Court that *H.* was entitled to a ten-annas share and *J.* was

entitled to the remaining six-annas share of the rent. No appeal was preferred in the suit of *J.* But *H.* preferred an appeal against the decree in his suit and on appeal the Appellate Court held that *H.* alone had a right to the entire rent and *J.* had no right to any portion of the rent. On second appeal by the tenant:

Held, that the decree in *J.*'s suit did not operate as *res judicata* upon the question of *H.*'s right to the rent but that under the provisions of Order I, rule 10, read with section 107, Civil Procedure Code, *J.*, who though not a party in form to the suit brought by *H* in substance contested the suit, should be made a party to the appeal in *H.*'s suit and the appeal be heard and determined in his presence. **C** JAFAR ALI *v.* HAR GOBINDA SARMA **65**

——— O I, R. 10—*Major wrongly described as minor —Suit by next friend—Amendment of plaint—Procedure.*

Order I, rule 10, of the Civil Procedure Code is wide enough to cover a case where a major is wrongly assumed to be a minor and a suit is brought on his behalf by his next friend. The proper procedure to adopt in a case of this nature is to return the plaint so that it may be presented after making the necessary amendments. **M** SHANMUGA CHETTY *v.* NARAYANA AIYAR, 40 M. 743 **510**

——— O. I, R. 13—*Non-joinder of parties—Objection, when to be taken—Enforcement of joint right to mortgage debt by father—Adult sons jointly interested not made parties to suit—Objection as to non-joinder taken after settlement of issues.*

Under Order I, rule 13, of the Civil Procedure Code, an objection as to non-joinder of parties should be taken before the settlement of issues. That rule applies even in cases where the plaintiff claims a joint right along with others but does not make the atter parties to such suit.

A debt was due on a mortgage to a joint family consisting of a father and son. There was a partition among the members of the family and the mortgage debt was not included in the partition, as it was then considered as barred by limitation. Subsequently after the new Limitation Act came into force the father alone brought a suit on the mortgage. After the settlement of issues objection was taken by the defendants that the sons were necessary parties to the suit, and that the suit was, therefore, bad for non-joinder:

Held, that the objection was taken too late. **M** KASIYANA KOUNDAN *v.* THIMA NAICKEN **527**

O. II, R. 2 **233**

——— O II, R. 2.

Where the causes of action for a prior and subsequent suit in respect of the same property are different, the provisions of Order II, rule 2, Civil Procedure Code, do not stand in the way of the entertainment of the subsequent suit. **O** RATIPAL *v.* BIPIN CHANDRA CHATTERJI, 4 O. L. J. 354 **80**

——— O. II, R. 2—*Mortgage—Mortgagor in possession as tenant—Rent, default in payment of—Suit for arrears—Subsequent suit for arrears and principal debt, maintainability of.*

A mortgage-deed of May 1897 provided that the mortgagors would retain possession of the mortgaged property as tenants by executing a separate deed of lease and would pay rent monthly, six monthly or annually. On failure to pay rent the mortgagee was at liberty to recover the principal sum secured and the rent, or to recover the rent and eject the mortgagors. The rent was not duly paid, and in 1902 and in 1904 the mortgagee sued and obtained decrees for sums of rent then due. On default being again made in the payment of rent, the mortgagee sued the mortgagors for the principal mortgage-debt and arrears of rent:

Held, that the causes of action in this and the previous suits were not the same, inasmuch as in the absence of evidence to the contrary the previous suits must be taken to have been based on the lease alone. **P** BUDHA SHAH *v.* SULEMAN, 71 P. W. R. 1917 **576**

——— O. II, R. 2, O. XXIII, R. 1—*Withdrawal of suit, whether operates as bar to subsequent suit—Permission to withdraw, effect of.*

Where plaintiffs first sued for their shares in the moveable property of a deceased collateral and then sued separately for their shares in his immoveable property and the Court allowed them to withdraw their suits for their shares in the moveable property with permission to bring fresh suits under rule 1, Order XXIII of the Civil Procedure Code:

Held, that the suits for the immoveable property were not barred by rule 2, Order II, of the Civil Procedure Code, inasmuch as the effect of the permission given under rule 1, Order XXIII, of the Code was to leave matters in the position in which they would have stood if no such suits had been instituted. **P** GHULAM MUHAMMAD KHAN *v* NUR KHAN, 65 P. R. 1917; 105 P. W. R. 1917 **897**

——— O. II, R. 5—*'Estate,' meaning of.*

The word "estate" in Order II, rule 5, means not only the "estate" rightly and properly held by executors, but also the "estate" in its physical sense, so that a claim against the executor as such can be joined with a claim against him personally, when both the claims arise in reference to the same estate. **C** NRIPENDRANATH ROY *v.* BIRENDRANATH ROY, 21 C. W. N. 939 **615**

——— O. III, R. 1, O. IX, R. 12—*Power of Court to direct party to appear in person—Failure to appear, effect of* Ex parte *proceedings.*

Under Order III, rule 1 of the Code of Civil Procedure a Court has power to direct a party to appear in person, and on his failure so to appear he may be declared *ex parte* under Order IX, rule 12, of the Code though his Vakil may be present in Court. **M** VAIGUNTATHAMMAL *v.* VALLIAMMAI AMMAL, 6 L. W. 337; (1917) M. W. N. 743 **719**

——— O. III, R. 4—*Pleader acting on* vakalatnama *not containing his name—Execution petition presented by such Pleader, validity of—Amendment of* vakalatnama.

On the last day of the period of limitation an application for execution of a decree was filed by a Pleader on the authority of a *vakalatnama* executed by the decree-holder and accepted by the Pleader, though the latter's name did not appear in the body of the *vakalatnama* Notice having been issued upon the judgment-debtors, they appeared and obtained time

CIVIL PROCEDURE CODE, 1908—contd.

to file objections, and eventually they objected to the execution on the ground that the Pleader who filed the application having no authority to act, the application for execution was invalid:

Held, that in the absence of any evidence that the Pleader was not in fact engaged by the decree-holder and of objection by the judgment-debtors that the Pleader had never in fact been authorised to make the application, it should be presumed that the decree-holder engaged the Pleader to make the application, so that the omission of his name from the body of the *vakalatnama* was merely a clerical error, which might be rectified by the decree-holder being allowed to amend the *vakalatnama* by insertion of the Pleader's name along with the Pleaders therein named. **C** MUHFOOZUL HUQ *v.* MAZHORUL HUQ **685**

——— O. III, R. 4 (2)—*Pleader, appointment of, termination of.*

Under Order III, rule 4 (2 , Civil Procedure Code, after a Pleader has once been appointed by a party his employment cannot be determined except (1) by a writing signed by the client or the Pleader and filed in Court with the leave of the Court, or (2 by the termination of the proceedings in the suit. This rule should be strictly observed. **PAT** *In the matter of* TWO PLEADERS, 1 P. L. W. 483; 2 P. L. J. 259; (1917) PAT. 217; 18 CR. L. J. 808 **328**

——— O. V, R. 17.

On the refusal of a defendant to accept summons, attempted to be served upon him at a place where he does not ordinarily reside, the summons must be served in the house in which he ordinarily lives. **C** BRAJA NATH PAL *v.* SURENDRA KRISHNA ROY **181**

——— O VI, R. 16—*Pleadings, amendment of—Court, power of, to order amendment, scope of—Alternative claims on ground of ownership and prescriptive right, maintainability of—Reliefs, alternative.*

Order VI, rule 16, of the Civil Procedure Code, authorises a Court at any stage of the proceedings to direct that any matter in any pleading which may tend to prejudice, embarrass or delay the fair trial of the suit be amended or struck out. But the Court is not to dictate to the parties how they should frame their cases.

All it has to see is that the parties do not offend against the rules of pleading, which have been laid down by the law, and introduce what is unnecessary or tends to prejudice, embarrass, or delay the fair trial of the suit. The object of permitting alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation to dispose of the same controversy or the subject-matter of the same relief, though the ground upon which the relief is claimed may be different.

Where a plaintiff prayed for a declaration that he was entitled to irrigate his land from a certain tank, basing his claim on his alleged joint ownership of the tank and also on a right of easement enjoyed by him through his tenants for a period of more than 20 years, and the lower Court threw out the suit on the ground that the pleas set forth were inconsistent:

Held, that the suit did not offend against the rules of pleading and that alternative claims on the ground

CIVIL PROCEDURE CODE, 1908—contd.

of ownership and prescriptive right were entertainable. **O** MUHAMMAD ABUL HASAN KHAN *v.* MUHAMMAD ALI MUHAMMAD KHAN, 20 O. C. 192; 4 O. L. J. 499 **903**

——— O. VI, R. 17 **605, 615**

——— O. VI, R. 17—*Pleadings, amendment of—Alternative claim made for first time in appeal, whether permissible.*

Kittima and *apatittha* are two distinct forms of adoption to which totally different considerations apply. Therefore, where a claim is based on *kittima* adoption, it cannot be amended in appeal by advancing an alternative claim based on *apatittha*, inasmuch as the effect of the amendment would be to change the suit into one of a substantially different character. **L B** MAUNG THA SO *v.* MAUNG LU PE **749**

——— O. VII, R. 10.

The provision contained in Order VII, rule 10, of the Civil Procedure Code applies only to the paper on which a suit is instituted and not to an application made in the course of a suit. **PAT** MOHAMMAD ABDUL GHAFOOR *v.* MAHTAB, 2 P. L. J. 394 **1**

——— O. VII, R 10—Proper Court, presentation to, return of plaint for—Civil Court, jurisdiction of. **125**

——— O. VII, R. 10—*Provincial Small Causes Courts Act (IX of 1887), s. 25—Jurisdiction of Small Cause Court Judge to dismiss suit on merits after holding it to be non-cognizable.*

A Judge of a Small Cause Court cannot proceed to try and dismiss a suit on the merits, which he, on the objection of the defendant, holds not to be cognizable by a Small Cause Court, for under Order VII, rule 10, Civil Procedure Code, it is incumbent upon him to return the plaint at any stage of the suit for presentation to the proper Court.

A suit which was in essence a suit for rescission of a contract and consequential relief was brought in a Small Cause Court. The defendant objected to the jurisdiction of the Court and also objected to the claim on the merits. The Judge found that the suit was not cognizable by the Court but nevertheless proceeded to try the case on the merits and ultimately dismissed it.

On the application of the plaintiff for setting asid the judgment, the High Court set it aside and directed the plaint to be returned to the plaintiff in order that he might present it to the proper Court for trial of his claim. **C** PADU MOHAMMAD *v.* CHUTRA NATH **293**

——— O. VII, R. 11 (*b*) **107**

——— O. VII, R. 11 (b).

Where a consequential relief is sought in addition to a declaratory decree, the plaintiff is bound to fix upon the consequential relief a reasonable value. If he puts upon the consequential relief a ridiculous value, then the Court must step in and fix a reasonable value for him. **PAT** SHAMA PERSHAD SAHI *v.* SHEOPARSAN SINGH, 2 P. L. W. 173 **95**

——— O. IX, R. 9 **580, 905, 918**

——— O. IX, R. 12 **719**

CIVIL PROCEDURE CODE, 1908—contd.

——— O. IX, R. 13—Summons, service of, place of —Mortgage suit 181

— O. XX, R. 12—*Possession, decree for, in favour of co-plaintiff—Reversal of decree—Mesne profits, suit for—Liability of plaintiff who was not decree-holder.*

A Hindu died leaving two widows *A* and *B*. *A* made a *waqf* of half the property in favour of a certain temple. Subsequent to *A's* death, *B* adopted one *J*, alleging that she had permission from her husband to do so. *B* and *J.* then sued for possession of the *waqf* property questioning the validity of the *waqf*. The suit was contested by the *mutawalli N*, who was in possession. The Subordinate Judge decreed the claim of *A.* for possession of the *waqf* property, but held that the adoption of *J.* was not proved. *N.* appealed and the case was referred to arbitration and the arbitrator gave an award. The decree which followed the award was that *J.* was the adopted son of *A* and that the *waqf* was a valid *waqf*. *N.* the *mutawalli* on obtaining possession of the *waqf* property sued both *A.* and *J.* for the recovery of *mesne profits* for the period of dispossession:

Held, that *J.* could not be made liable for the period prior to the date of the decree on the award inasmuch as he was not a decree-holder prior to that date, but that as the decree on the award made him a joint decree-holder with *A* his liability began from that date. A NAND RAM *v.* JIWA RAM 23

— O. XX, R. 12 (2), O. VII, R. 10—*Mesne profits—Decree—Application for enquiry into mesne profits—Jurisdiction—Order directing application to be returned for presentation to proper Court—Appeal, whether lies.*

Where the question of a Court's jurisdiction is concerned, it is the plaint alone which should be considered.

The enquiry as to mesne profits is a part of the proceedings in the suit consequent upon a preliminary decree and is terminated by a final decree after the mesne profits are ascertained. The Court which passes a decree for mesne profits has jurisdiction to enquire into the amount of the mesne profits although the amount claimed in the application for enquiry, or that found by the enquiry may exceed the pecuniary limits of the jurisdiction of the Trying Court which had jurisdiction to try the suit as originally laid.

An application for the ascertainment of mesne profits is an application for an order in the suit and is not an application for execution of a decree, and an order returning such an application for presentation to the proper Court is not an order returning a plaint and is not appealable. PAT MOHAMMAD ABDUL GHAFOOR *v.* MAHTAB, 2 P. L. J. 394 231

——— — O. XXI, R. 34 77

——— — O. XXI, R. 36, O. XLI, R. 5—*Execution, stay of, by Appellate Court*—Ad interim *order, date of operation of Subsequent proceedings—Jurisdiction—Failure to comply with provisions of O. XXI, r. 35, effect of—Practice.*

An *ad interim* order issued by an Appellate Court for stay of execution of a decree under appeal takes effect from the time it is pronounced, and not from the time it is officially communicated to the lower Court; and the proceedings subsequent to and contrary to such order are liable to be set aside as having been taken without jurisdiction. So where possession of immoveable property is delivered after pronouncement of the order, the property should be returned to the appellant on his giving the necessary security for restoring it to the decree-holder in the event of the latter succeeding in appeal

Where the provisions of rule 36 of Order XXI, Civil Procedure Code, have not been complied with and the property is in possession of the tenants, the possession is not legally transferred

The practice of the Chief Court is not to stay execution for mere costs. P KARAN CHAND *v.* JAWANDI, 53 P. W. R. 1917 752

——— — O. XXI, R 42, applicability of 89

——— — O. XXI, R. 54 516

——— O. XXI, R 58 (1), *Proviso, applicability of, where Court has no jurisdiction to attach.*

The proviso to rule 58 (1), Order XXI, Civil Procedure Code, applies even to those cases where the Court without jurisdiction becomes possessed, of the property attached in execution by the usurpation of authority. C SURENDRA NATH GOSWAMY *v.* RAJANI KANTA DAS 446

——— — O. XXI, R 63—*Order negativing claim, effect of.*

An order on a claim petition is conclusive as against a party against whom it is passed under Order XX, rule 63, of the Civil Procedure Code, unless it is set aside in a suit instituted within the time limited by law.

Certain properties were attached in execution of a decree. Defendant put in a claim petition and his claim was disallowed and his title to the property attached negatived. That order he never sought to set aside. In a subsequent suit by the plaintiff to eject the defendant on the basis of a subsequent trespass by the latter:

Held, that the order on the claim petition was conclusive under Order XXI, rule 63, of the Code of Civil Procedure, so far as the defendant was concerned and that the latter could not take advantage of the suit filed by the plaintiff to re-agitate the question of his title. The fact that both the plaint and the written statement in the subsequent suit were within one year from the date of the order did not affect the question. M PEELA YARAKAYYA *v.* KANUMURI VENKATA KRISHNAMRAJU, 6 L. W. 281; 22 M. L. T. 232; (1917) M. W. N. 721 684

——— O. XXI, R. 69—*Execution—Sale postponed sine die—Fresh proclamation, necessity of—Irregularity—Substantial injury.*

Where in execution proceedings the Court adjourns the sale *sine die* and thereafter no fresh sale proclamation fixing a new and definite date for holding the sale is issued, it is a material irregularity within the meaning of Order XXI, rule 69, in publishing and conducting the sale and the sale is liable to be set aside if substantial injury resulting from the material irregularity is proved. PAT KIRPAL SINGH *v.* KEDARNATH BOSE 68

——— — O. XXI, R 90 33

——— O. XXI, R. 92, s. 104 (2), order passed under —Appeal, second, whether lies 121

——— — O. XXI, R. 92 753

CIVIL PROCEDURE CODE, 1908—contd.

——— O. XXI, RR. 92, 93—*Execution—Sale—Judgment-debtor having no saleable interest—Purchaser, suit by, for refund of purchase-money, maintainability of.*

A purchaser in execution of a decree can by a regular suit obtain a refund of the purchase-money paid by him on the ground that the judgment-debtor had no saleable interest in the property at the time it was put up to sale. The remedy of such a purchaser is not limited to making an application for the purpose under the terms of the Civil Procedure Code.

The suit is maintainable even though the plaintiff does not ask to set aside the auction-sale. **C** PRASANNA KUMAR BHATTACHARJEE *v.* IBRAHIM MIRZA **924**

——— O. XXI, R. 100 **640**

——— O. XXI, RR. 100, 101, 103—*Order under r. 100—Appeal, whether lies.*

Under rule 103 of Order XXI of the Civil Procedure Code no appeal lies from an order passed under rule 101 of that Order. **P** GULABI BIBI *v.* ASLAM KHAN, 57 P. R. 1917; 101 P. L. R. 1917; 91 P. W. R. 1917 **891**

——— O. XXII, R. 4—*Appeal—Death of sole respondent—Heirs, some, brought on record, effect of—Abatement of appeal.*

A suit for recovery of rent having been decreed, the defendants-tenants appealed. During the pendency of the appeal the respondent died and only some of his heirs were substituted, and others, who were minors, were given up with the result that the appeal as against them was dismissed:

Held, that the appeal, as against the substituted heirs, could not proceed, as on the death of the sole plaintiff-respondent, his rights as landlord devolved on his heirs as a whole, so that the decree which was passed in favour of the plaintiff could not be split up by allowing it to stand in favour of some of the heirs and setting it aside as against the others. **C** ALI MEA *v.* NANA GAZI **430**

——— O. XXII, R. 11 **730**

——— O. XXIII, R. 1 **281, 897, 934**

——— O. XXXIV, R. 1 **730**

——— O. XXXIV, RR. 2, 4—*Two suits for sale on same mortgage, whether permissible.*

Per *Piggott, J.*—The object of rules 2 and 4 of Order XXXIV of the Code of Civil Procedure is that in any suit for sale on a mortgage, an account should be taken once and for all, of the amount due, for principal and interest on the mortgage. Two successive suits for sale on one and the same mortgage should be an impossibility. **A** MUHAMMAD ZAKARIYA *v.* MUHAMMAD HAFIZ, 15 A. L. J. 557; 39 A. 506 **233**

——— O. XXXIV, R. 3 **268**

——— O. XXXIV, R. 5 (2), *application under—Limitation, commencement of—Mortgage—Decree for sale—Application for decree absolute—Appeal, effect of.*

Under the provisions of Order XXXIV, rule 5, Civil Procedure Code, the right to make an application begins as soon as the period limited in the decree is over and once time begins to run it must continue running, so that if an appeal is preferred against the decree, the limitation for making an application for a decree absolute is not thereby extended. **O** JAGDISH SINGH *v.* RAM ADHIN SINGH, 20 O. C. 205 **858**

O. XXXIV, R. 14 **533**

——— O. XXXIV, R. 14—*"Bring the property to sale," meaning of.*

The words "bring the property to sale" in Order XXXIV, rule 14, Civil Procedure Code, include not only all the steps preliminary to the sale, but the sale itself. **C** GOBINDA CHUNDRA PAL *v.* KAILASH CHANDRA PAL **73**

———O. XXXVIII, RR. 5, 6, O. XXI, R. 42, —*Decree directing accounts, non-compliance with—Application for security and attachment under O. XXXVIII, rr. 5, 6.*

On non-compliance by a trustee with an order for furnishing accounts under section 92 of the Civil Procedure Code, the decree-holders made an application purporting to be under the provisions of rules 5 and 6 of Order XXXVIII requesting the Court to call upon the trustee to furnish security or, in the alternative, to attach his immoveable property. The Court ordered the trustee to file security in a sum of Rs. 80,000 and in the meantime issued an order for conditional attachment of his property:

Held, (1) that the Court did not commit any error of substance by directing the trustee to furnish security before it ordered attachment as provided by rules 5 and 6 of Order XXXVIII of the Civil Procedure Code;

(2) that the mistake being a merely technical one the High Court, sitting as a Court of Appeal, had power to rectify it and could treat the order passed under Order XXXVIII as passed under rule 42 of Order XXI of the Civil Procedure Code;

(3) that an enquiry into the state of accounts under section 92 of the Civil Procedure Code with a view to ascertaining the liability of the trustee, if any, towards the trust fund was an enquiry into a matter *ejusdem generis* with an enquiry into the question of mesne profits and was thus covered by rule 42 of Order XXI of the Civil Procedure Code. **A** JAI NARAIN *v.* BANKEY LAL **89**

——— O. XXXIX, R. 2.

Courts in India have the power by virtue of Order XXXIX, rule 2, of the Civil Procedure Code to issue temporary injunctions in a mandatory form. **M** KANDASWAMI CHETTI *v.* SUBRAMANIA CHETTI, 6 L. W. 140; (1917) M. W. N. 501; 33 M. L. J. 448 **384**

——— O. XLI, R. 1—*Appeal, presentation of—Copies of decree and judgment, necessity of—Copy filed after expiry of period of limitation, effect of—Limitation.*

Under Order XLI, rule 1, of the Civil Procedure Code, a memorandum of appeal must be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded, and where the latter is filed after the expiry of the period of limitation, the appeal, in the absence of just cause shown for extending the time, must be dismissed as barred by time. **P** DHANPAT MAL *v.* MELA MAL, 67 P. R. 1917; 133 P. W. R. 1917 **918**

——— O. XLI, R. 4 **787**

CIVIL PROCEDURE CODE, 1908 - contd.

— O. XLI, Rr. 4, 33 546
——— O. XLI, R. 5 ; 52
——— O. XLI, Rr. 14, 17, 21—*Appeal, hearing of—Notice to respondent, service of—Appellant, duty of, to furnish address of respondent.*

An Appellate Court is not to presume that the respondent has knowledge of the date of hearing of the appeal, if notice has not been duly served upon him.

It is the duty of the appellant to give the proper and correct address of the respondent, but the latter is not bound to communicate his address either to the Court against whose decree or order the appeal has been preferred or to the Appellate Court; and by his omitting to do so or by leaving the Appellate Court in dark as to his whereabouts he in no way abuses the provisions of the Civil Procedure Code. **P** Jamna Das *v.* Bishan Das, 63 P. W. R. 1917 889
——— O. XLI, Rr. 17, 19 751
——— O. XLI, R. 23 598
——— O. XLI, R. 23—*Decision on preliminary point, what is.*

A suit is disposed of on a preliminary point within the meaning of Order XLI, rule 23, Civil Procedure Code, where by reason of the decision on one or more of the issues recorded in the case there has been no necessity for the consideration of the other issues, and such a preliminary decision is a decision of a preliminary point, whether the decision involves questions of law or questions of fact. **PAT** Rachu Gir *v.* Raghunath Gir, 2 P. L. W. 23; 2 P. L. J. 398 202
— O. XLI, Rr. 23, 25—*Suit for declaration of title and possession—Title not proved in Trial Court—Appellate Court holding title proved, whether can remand case—Remand, legality of.*

A suit for recovery of possession of land on declaration of plaintiff's title was dismissed by the Trial Court on the ground that the plaintiff's title to and possession of the land were not established. On appeal the Subordinate Judge, coming to the conclusion that the plaintiff had proved his title, remanded the case to the first Court for decision of five issues after recording such evidence as the parties might think fit to adduce:

Held, that the remand was not in accordance with the procedure laid down in the Code and was wholly unnecessary and that the Subordinate Judge ought to have considered the evidence himself in coming to a conclusion upon the question of possession and limitation raised in the issues sent down for decision. **C** Amrita Lal Mandal *v.* Bhutnath Mandal 705
——— O. XLIII, R. 1 (*t*) 751
——— O. XLIII, R. 1 (*w*) 886
——— O. XLV, R. 15— *Certified copy of the decree," interpretation of—Plain print copy with affidavit, whether sufficient.*

Rule 15 of Order XLV of the Code of Civil Procedure should not be construed as restricting the only possible evidence of an Order in Council to the certified copy, but as directory words with the object of ensuring that proper information on the subject of an Order in Council should be supplied to the Courts in India.

Where, therefore, along with an application for execution of the decree of the Privy Council a plain print copy of the decree was filed and in support thereof an affidavit was filed, to show that it was the decree passed by the Privy Council:

Held, that it must be deemed to be the true copy of His Majesty's Order in Council within the meaning of rule 15 of Order XLV of the Code of Civil Procedure. **M** Janaki Ammal *v.* Narayanaswami Aiyar, (1917) M. W. N. 587; 33 M. L. J. 300 629
——— O. XLVI, Rr. 6, 7 929
——— O. XLVII, R. 1—*Review, application for, whether can be heard after appeal is preferred against decree—Appeal.*

A Court has power, and in fact is bound, to proceed with an application for review of its judgment, notwithstanding the fact that an appeal has been subsequently filed in the case by the applicant for review.

But that power of the Court exists so long as the appeal from its decree is not heard, because once the appeal is heard, the decree in appeal is the final decree in the case and the application for review of judgment of the Court of first instance can no longer be proceeded with. On the other hand, if the application for review is successful, the appeal preferred by the applicant for review cannot proceed. **C** Pyari Mohan Kundu *v.* Kalu Khan, 44 C. 1011 407
— O. XLVII, R. 7, O. XLIII, R. 1 (*w*)—*Appeal from order granting review, maintainability of.*

Plaintiff sued defendants for specific performance of a contract to execute a lease of certain property and in the alternative for ejectment and damages. The dispute was referred to arbitration, and the arbitrator decided in favour of the plaintiff, but gave an option to the defendants to vacate the land after payment of the rent due at a certain rate. The Court passed a decree by which the plaintiff was given the right to eject the defendants in addition to the recovery of rent. Defendants applied for amendment of the decree, but their application was rejected. They then applied for review, and their application being granted, the plaintiff appealed:

Held, that the appeal could not be supported upon any of the pleas referred to in Order XLVII, rule 7, of the Civil Procedure Code.

Order XLIII, rule 1 (*w*), Civil Procedure Code, is merely inserted in order that the rule in question may contain a complete list of those orders from which an appeal lies. It must be read subject to the provisions of Order XLVII, rule 7, by which the right of appeal from an order granting an application for review is limited and defined. **A** Lachman Das *v.* Mutsaddi Lal, 15 A. L. 505 886
Sch II Cls. 1, 15—*Arbitration and award—Reference by some only of the parties, validity of—Award, setting aside of.*

Before a Court can have jurisdiction to make an order of reference under clause of Schedule II of the Civil Procedure Code, all the parties interested in the suit must agree, and if all the parties interested do not agree, then the Court has no jurisdiction to make the order of reference and the order of reference is invalid not only against those who have not agreed but also against those who have agreed.

Consequently, if there is no valid agreement to form the basis of a reference in the terms of clause 1 of the Second Schedule to the Code, there is no

CIVIL PROCEDURE CODE, 1908—concld.

valid award whereon a decree can be based in accordance with clause 16.

Clause 15 of the Second Schedule to the Civil Procedure Code assumes a valid reference to arbitration, and only contemplates cases where the propriety of an award on the basis of such a reference is in question. **C** DOOLY CHAND *v* MAMUJI MUSAJI, 21 C. W. N. 387; 25 C. L. J 339 **295**

—— —— SCH. II, CL. 3—*Arbitration—Reference, validity of*—Pro forma *defendants not parties to reference, effect of—Objections to award—Court ordering reference—Jurisdiction.*

Before a Court comes to the conclusion that a reference to arbitration is invalidated by reason of some of the defendants not joining the reference, the facts of each case should be carefully examined, as to whether under the circumstances of the particular case the reference to arbitration may not have involved a virtual, if not an express, abandonment by the plaintiff of his claim as against any defendant or defendants who had not joined in the order of reference.

A suit was brought against several defendants but the cause of action as set forth in the plaint was in substance against one defendant alone. The suit was referred to arbitration. Some of the defendants were exempted, but those of the defendants against whom the suit was proceeding *ex parte* neither joined nor were exempted. The plaintiff, it appeared, was prepared to treat such of the defendants as did not join in the reference as mere *pro forma* defendants:

Held, that under the circumstances of the case there was a valid order of reference and the contesting defendant could not challenge the award on the ground of the invalidity of the reference.

Semble.—Objections to an award on the ground of invalidity from any cause whatever should be decided by the Court which has made the order of reference to arbitration and by no other Court. **A** AJODHYA PRASAD *v.* BADARUL HUSAIN, 15 A. L. J. 427; 39 A. 489 **357**

——— CL. 22 **581**

——— *Appendix D, Nos.* 17, 20—*Decree, form of—Succession—Suit for possession of share of estate, nature of—Procedure.*

Although a suit for a share of inheritance is not brought in the form of an administration suit, the trial Court should treat it as an administration suit and after due trial of the matters involved pass a decree on the lines of the model decrees Nos. 17 and 20 in Appendix *D.* to the Civil Procedure Code **L B** MA SHWE THET *v.* MA HLA SHIN **579**

COMPANIES ACT (VI OF 1882), S. 75—*Failure to hold general meeting within six months of Memorandum of Association being registered—Offence.*

Where after the repeal of the Companies Act of 1882, the accused was convicted of not holding a general meeting within six months of the Memorandum of Association being registered, under section 75 of that Act:

Held, that the conviction was bad and must be set aside. **C** RAM RICHPAL *v.* EMPEROR, 18 CR L. J 896; 41 P. W. R. 1917 Cr. **1008**

COMPANIES ACT (VII OF 1913), S. 134 (4)—*Default of Director in filing balance-sheet—General meeting not held—Offence—Jurisdiction, territorial, to try offence under s.* 134.

In answer to a charge under section 134 (4) of the Indian Companies Act in respect of default made in filing with the Registrar the balance-sheet for a certain year, it is not open to a Director of a Joint Stock Company to plead that as no general meeting was called in that year and no balance sheet was laid before the Company at any such general meeting, it was impossible for him or his Company to comply with the requirements of section 134.

The Presidency Magistrates in Calcutta possess jurisdiction to try charges under section 134 of the Indian Companies Act even where the Company is situate outside Calcutta, as the office of the Registrar with whom the balance-sheet should be filed is in Calcutta **C** DEBENDRA NATH DAS GUPTA *v* REGISTRAR JOINT STOCK COMPANIES, BENGAL, 18 CR L J. 787; 22 C. W. N. 96 **07**

——— S. 187—*Company—Shares, sale of, through Managing Director Winding up—Director, default of, in selling shares - Call—Suit to recover money paid on call, maintainability of.*

A share holder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the Company, and it is inconsistent with his position as a share-holder, where he remains as such, to claim back any of that money. He must not directly or indirectly receive back any part of it.

Plaintiff owned a certain number of shares in the defendant Bank. In April 1913 he asked the Managing Director of the Bank to sell the shares and the latter undertook to do so. In May the Managing Director paid to the plaintiff a sum of money which would be approximately the equivalent of the net sale proceeds of the shares at Rs. 66 per share and falsely represented that the shares had been sold at that figure. The Bank went into liquidation in December and the plaintiff was placed upon list A of contributories in respect of the said shares on the ground that he remained a registered share-holder, and was compelled to pay the amounts of the calls made in the liquidation. He brought a suit to recover the amount paid by him from the Bank on the ground that the Managing Director in the course of his employment by the defendant Bank was guilty of neglect and misconduct towards the plaintiff in not selling the said shares:

Held, that the plaintiff had no cause of action against the Bank. **B** NAROTTAM MORARJI GOKALDAS *v.* INDIAN SPECIE BANK, 19 BOM. L. R. 615 **261**

COMPANY—*Income tax, payment of—Preference share-holders, whether entitled to dividend without payment of income tax.*

As between fixed preference and ordinary share-holders of a joint stock company, the former are not entitled to have their preference dividends paid free of income tax in a case where there are no express words to that effect in the contract regulating the rights of the parties.

Where the Articles of Association of a company provided that "the preference shares shall confer on the holders thereof the right, out of the net profits of the company, which it shall be determined to distribute in dividends, to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum

COMPANY—concld.

on the capital amount for the time being paid up thereon respectively.....:"

Held, that it must be taken that the sum which the company determined to distribute by way of dividend included the tax on so much of the profits as, after setting aside certain sums for reserve and so on, belonged to and was distributable amongst the share-holders by way of dividend and that, therefore, the preference share-holders were not entitled to the payment of their five per cent. dividend without deduction of income tax. **B** PURSHOTAMDAS HARKISONDAS *v.* CENTRAL INDIA SPINNING, WEAVING & MANFG. CO., LD., 19 BOM. L. R. 665 968

COMPROMISE *Settlement-deed—family disputes.*

A deed of settlement amounts to a compromise of family disputes where an antecedent title in the parties is assumed. **PAT** MUHAMMAD ABDUL NAYEEM *v.* JHONTI MAHTON 389

CONFESSION, *retracted, value of—Corroboration.*

It is unsafe to base the conviction of an accused for murder on his retracted confession unless it is corroborated by trustworthy evidence in all the material particulars detailed therein. **P** SHER KHAN *v.* EMPEROR, 2 P. W. R. 1917 CR; 75 P. L. R 1917 18 CR. L. J. 779 155

CONSTRUCTION OF DOCUMENT 693

CONTRACT prima facie *unconscionable—Undue influence—Burden of proof.*

Where a contract is on the face of it unconscionable it is the duty of the party seeking to enforce it to prove that the contract was not induced by undue influence. **PAT** BARA ESTATE, LTD. *v.* ANUP CHANDRA, 2 P. L. W. 71; (1917) PAT. 342 337

——, *terms of.*

Where a contract gives a party an express option to sue on one occasion or another, he cannot be compelled to sue when the contract authorises him to wait.

Where a contract provides expressly for waiver, no statutory authority for such waiver is needed.

Where a contract gives the power to elect, it is not within the province of law to say that such election shall not be made. **O** BABU RAM *v* ABDHOOT SINGH, 4 O. L. J 402 423

CONTRACT ACT (IX OF 1872), S. 2—*Consideration, what constitutes—Benefit to promisor, whether necessary*

In order to support a binding promise it is not necessary that the promisor should benefit by the consideration: it is sufficient if the promisee does some act from which a third person is benefited and which he would not have done but for the promise. **C** FANINDRA NARAIN ROY *v.* KACHHEMAN BIBI 673

—— S 23 347

—— —— S. 23—*Consideration, illegal—Agreement not to prosecute for non-compoundable offence—Prosecution, threat of, effect of.*

Where the consideration for an agreement is a promise not to prosecute for an offence which is not compoundable, the agreement is not enforceable by law; but this limitation of freedom of contract should only be enforced where it is quite clear that the consideration for the agreement was such an illegal promise Where on a mere threat to prosecute or an apprehension that prosecution would take place

CONTRACT ACT—contd,

an agreement has been come to, this threat or apprehension is not sufficient to vitiate the agreement. The distinction in such cases between the motive for coming to an agreement and the actual consideration for the agreement itself must be kept carefully in view and this care must particularly be exercised in a case where there is a civil liability already existing and which is discharged or remitted by the agreement. **PAT** SUKHDEO DASS *v.* MANGAL CHAND, 2 P. L. W. 140; 2 P. L. J. 630 812

—— Ss. 23, 65—*Marriage brokage contract—Money paid, recovery of, suit for—"Discovered to be void," meaning of.*

Payment of money to induce a prospective bridegroom to marry is payment made in pursuance of a marriage brokage contract, and whether such money can be recovered back or not depends upon whether there has been performance of a substantial part of the contract or not.

A entered into a contract with *B* and *C* to give his sister in marriage to *D* son of *B* and brother of *C*, all members of a joint undivided Hindu family, and to pay him Rs. 1,000 and actually paid him Rs. 400. *A* did not give his sister in marriage to *D* and sued to recover back the amount paid by him to *D*, under the agreement:

Held, (1) that the contract being in effect a marriage brokage contract and as such, opposed to public policy, was void;

(2) that a suit to recover the money paid under the agreement could lie only in the absence of the performance of a substantial part of the agreement. **M** SRINIVASA AIYAR *v.* SESHA IYER, 6 L. W. 42 783

—— Ss. 25, 65—Consideration, failure of—Suit for refund of payment 877

—— —— S. 25 (3)—*Promise to pay barred debt—Cause of action, accrual of—Interest, delay in instituting suit, whether ground for disallowing.*

Where a balance struck more than three years after the date of the last item in a *bahi* account is duly signed by the debtor with an additional statement that interest at a specified rate will be realisable along with (*gail*) the said balance, such an agreement amounts to a contract under section 25 (3) of the Contract Act and constitutes a fresh cause of action.

Mere delay in instituting a suit is not a sufficient ground for disallowing interest on a barred debt acknowledged under section 25 (3) of the Contract Act. **P** BHAGWAN SINGH *v.* MUNSHI RAM, 66 P. R. 1917; 13 P. W. R 1917 915

—— —— S. 30—*Lottery—Agreement to purchase ticket in lottery sanctioned by Government, validity of—Injunction in support of void contract, whether can be granted.*

The defendant Club organised a lottery with the sanction of Government. Plaintiff purchased, through the admitted agents of the Club, a ticket in the lottery bearing a particular number He paid the price of the ticket which was promised to be delivered to him. Subsequently, the ticket was by mistake sold and issued to the third defendant. The matter being brought to the notice of the Club, the latter decided to withdraw that ticket altogether and to substitute another ticket bearing a different number in its place. They returned the money paid by the plaintiff, and wrote to the third defendant saying

CONTRACT ACT—contd.

that if the substituted ticket was successful in the lottery the amount thereof would be paid to him. The third defendant approved of the arrangement. The plaintiff then sued the defendants, praying that the first and second defendants, representing the Club, may be restrained by an injunction from withdrawing the ticket bearing the number purchased by the plaintiff from the lottery, and that pending the decision of the suit they may be restrained from paying the amount of any prize drawn by that ticket or any ticket substituted in place thereof to the third defendant:

Held, (1) that the agreement entered into by the plaintiff with the Club was an agreement by way of wager and that consequently it was void both under the first part of section 30 of the Contract Act and of the first part of section 1 of Bombay Act III of 1865;

(2) that the effect of the Government having sanctioned the lottery was that no prosecution would lie in respect thereof, but that the sanction did not affect the Civil Law on the subject of lotteries, inasmuch as Government has no power to overrule an Act of the Legislature by correspondence;

(3) that no injunction could be granted in support of a void contract. **B** DORABJI JAMSHEDJI TATA *v.* EDWARD F. LANCE, 19 BOM. L. R. 697 **869**

—— — S. 38, *scope of.*

Section 38 of the Contract Act does not deal with the case of an offer accepted by one of several joint promisees but considers only the case of such an offer which has been rejected. **P** MATHRA DAS *v.* NIZAM DIN, 68 P. R. 1917; 107 P. L. R. 1917; 81 P. W. R. 1917 **921**

——— — Ss 43, 44 **421**

——— — Ss. 61, 43, 44—*Goods supplied to a number of persons—Payments made by some of them—Appropriation—Limitation—Pleadings, defective—Claim substantially true—Court, duty of*

In a suit to recover the price of goods sold and delivered to the defendants, the plaintiff set up an adjustment of account in his plaint. The lower Courts found the claim to be true, but dismissed the suit on the ground that the plaintiff had failed to prove the adjustment of account on which his suit was based:

Held, that the dismissal was wrong as notwithstanding the adjustment set up in the plaint what the plaintiff sued for, was the price of the goods that were supplied to the defendants.

Six defendants who were members of a joint family were supplied with goods by the plaintiff. After the separation of the 6th defendant, the plaintiff continued to supply the other five, who remained united and these latter made payments for the goods supplied from time to time without any specific appropriation:

Held, that the plaintiff was entitled to appropriate the payments in discharge of the debts in order of time whether they were or were not barred by the law in force for the time being as to the limitation of suits and whether the payments were made by all the defendants or by some of them without the concurrence of others. **C** KRISHNA KUMAR DE *v.* KALINATH GUHA RAY **421**

CONTRACT ACT—contd.

——— — S. 65 **877**

——— — S. 65.

Per *Bakewell, J.*—The words 'discovered to be void' in section 65 of the Contract Act are more apt to describe an agreement which was void *ab initio* but was not then known by the parties to be so, than an agreement of which the illegality must be taken to have been always known to the parties. **M** SRINIVASA AIYAR *v.* SESHA IYER, 6 L. W. 42 **783**

——— — Ss. 69, 70—Putni, *sale of, in execution of rent-decree—Deposit of decretal amount by* dar-putnidar—Putnidar, *liability of—Bengal Tenancy Act (VIII B. C. of 1885), s* 171, *erroneous order under—Injunction, suit for Decree, conditional.*

The landlord of a *putni* tenure brought a suit for arrears of rent against some only of the *putnidars* and obtained a decree. Defendant, a *dar-putnidar* of the judgment-debtors, deposited the decretal amount in Court to save the tenure from being sold, and was ordered to be put in possession as mortgagee under section 171 of the Bengal Tenancy Act. Plaintiff, a *putnidar* who was not a party to the landlord's suit for rent, brought a suit for a declaration and an injunction that his right in the tenure was not affected by the order under section 171 of the Bengal Tenancy Act, and the Court gave him a decree conditional on his paying to the *dar-putnidar* his proportionate share of the rent.

Held, (1) that the payment made by the defendant fell as against the plaintiff within sections 69 and 70 of the Contract Act;

(2) that the condition attached to the decree in favour of the plaintiff was not improper. **C** RAJANI KANTA MONDAL *v.* LAL MUHAMMAD, 21 C. W. N. 628 **242**

——— — S. 74 **897**

——— — S. 107—*Contract for sale of goods Buyer default by Re-sale.*

A contract for the sale of cotton was made on the 5th January and weighment was completed on the 9th. The contract was then ended by an express agreement that the payment of the price and delivery were to be postponed for two or three days, and that on payment of the price delivery was to be effected by substituting the defendant's boa'd for the plaintiff's. A few days afterwards the defendant committed a breach of the contract, and the plaintiff, after sending the defendant a notice on the 2nd April, re-sold the goods on the 22nd, and then sued the defendant for the difference in the price:

Held, that the plaintiff was entitled to recover from the defendant the difference between the contract price and the price which he realised by the re-sale. **B** NIMBA *v.* MOTIRAM, 19 BOM L. R. 635 **223**

——— — S. 151—*Common carrier, liability of, in respect of goods delivered for carriage—Consignee, right of, to have goods re-weighed before taking delivery—Unreasonable refusal to take delivery, consequences of—Demurrage charges.*

The liability of a Steamship Company in respect of goods delivered to it for carriage is that of an insurer; therefore, if there is any shortage in weight during transit, the Company would be liable therefor.

CONTRACT ACT—concld.

A consignee of goods delivered to a Steamship Company for carriage cannot compel the Company to re-weigh the goods before taking delivery. But the refusal of the Company to re-weigh does not in any way affect the right of the consignee who may weigh the goods himself and claim the price of the shortage in weight. The mere fact that he has accepted delivery and granted a clear receipt does not extinguish his right to compensation, if he proves that a portion of the goods were lost in transit or while in the custody of the Company.

Whena consignee unjustifiably refuses to take delivery of goods, he cannot claim the price thereof from the common carrier, but on the contrary becomes liable for demurrage charges for the period during which the goods remain in the custody of the common carrier.

But no demurrage can be charged for the period subsequent to a notice given to the consignee that the goods will be sold away at auction if he fails to remove them. **C** RAMJASH AGARWAL *v.* INDIAN GENERAL NAVIGATION AND RY. CO., LTD. 387

—— S. 201—*Principal and agent—Power-of-attorney granted by joint co-parceners—Death of some co-parceners, effect of—Termination of agency.*

Where the paramount object of a power-of-attorney executed by three out of four brothers, living jointly in a Mitakshara family, in favour of the fourth was to facilitate the raising of joint loans by the latter on mortgages of the joint estate for their joint benefit:

Held, that the death of some of the executants did not put an end to the power but that so long as the object of the power continued to be capable of realisation, it retained its vitality.

Per *Mookerjee, J.*—It cannot be held as an inflexible rule of law that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the agent, not merely as regards the deceased, but also as regards the surviving principal. In each case the true intention of the parties to the contract must be determined from the terms thereof and from the surrounding circumstances.

Where two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, a severance of the joint interest by the death of one of the joint principals may operate to terminate the agent's authority, unless it is a power coupled with an interest.

Where, however, the principals are joint and several and the power given to the agent is both joint and several, the death of one of the principals does not terminate his authority as regards the surviving principal. **C** SITAL PROSAD *In re*, 21 C. W. N. 620 288

CORPORATION.

Where a corporation consists of an indefinite number, a major part of the members present at a meeting is competent to bind the minority but where the body is definite, there must be a major part of the whole number.

This rule applies to India which recognises fluctuating communities as legal *personæ* owning property

CORPORATION—concld.

for instance, the caste and the village, and in matters relating to the management of caste property and the administration of its affairs, though not the disposal of it, the majority of the caste has authority to control the minority. **M** YEGNARAMA DIKSHITAR *v.* GOPALA PATTAR, (1917) M. W. N. 595 738

COURT FEES ACT (VII OF 1870), S. 7 (*IV*) (c —*Court-fee—Declaratory decree with consequential relief, suit for—Plaintiff, duty of, to fix reasonable value upon consequential relief—Court, interference by, where ridiculous value is fixed.*

Where a consequential relief is sought in addition to a declaratory decree, the plaintiff is bound to fix upon the consequential relief a reasonable value. If he puts upon the consequential relief a ridiculous value, then the Court must step in and fix a reasonable value for him. **PAT** SHAMA PERSHAD SAHI *v.* SHEOPARSAN SINGH, 2 P. L. W. 173 95

—— —— S. 7, *cl IV* (f)—*Administration and accounts, suit for—Court-fee payable.*

A suit for administration and accounts in respect of an estate is in essence a suit for accounts within the meaning of section 7, clause IV *(f)*, of the Court Fees Act, 1870. So the plaintiff in such a suit is competent to value the claim for accounts approximately and to pay Court-fee thereon but is not bound to pay *ad valorem* Court-fee on the value of the estate. **C** SURAJUBULA DASSI *v.* JAGESWAR RAI, 26 C. L. J. 265; 22 C. W. N. 115 693

——— S. 7, *cls. V* (b) *and* (c)—*Suit for possession of* inam *lands wrongly entered as* ryotwari—*Valuation—Court-fee.*

A suit for possession of *inam* lands wrongly classed by Government as *ryotwari* and in respect of which *pattas* were issued to tenants may be valued by the plaintiff as *ryotwari* lands held on *patta* at five times the revenue payable thereon under clause V (*b*) of section 7 of the Court Fees Act. The fact that, after the institution of the suit, the lands are classed as *inam* does not affect the question.

In 1885 plaintiff sued Government for recovery of land granted as *inam* but classed by them as *ryotwari*. On 24th February 1891 he obtained a decree for possession In 1897 he got symbolical delivery, but the tenants continued in possession thereafter paying assessment to Government. In 1909, *i. e.* within 12 years from the date of the symbolical delivery, he brought a suit for possession against the Government and the tenants. After the institution of the suit, the lands were registered as *inam*:

Held, (1) that the plaintiff was entitled to value the suit on the basis that the lands sued for were *ryotwari* lands;

(2) that the suit was in time. **M** NARAYANI AMMAL *v.* SECRETARY OF STATE 167

COVENANT, construction of—Covenant running with the land—Covenant for re-entry, whether personal 530

CRIMINAL PROCEDUR CODE (ACT V OF 1898), S. 4, *Ch. XVI—Complaint, what is—Transfer of complaint to Sub-Deputy Magistrate for enquiry and report—Irregularity.*

Petitioner made an application before a Sub-Divisional Officer impugning the correctness of a

report of a Police Officer in a certain criminal matter and prayed that his case against the accused may be proceeded with. On a subsequent date the case was made over to a Sub-Deputy Magistrate to take evidence and to report for prosecution or otherwise:

Held, that the application made to the Sub-Divisional Officer was a complaint within the meaning of section 4 of the Criminal Procedure Code, and that the procedure adopted by the Magistrate, not being in accordance with the provisions of Chapter XVI of the Criminal Procedure Code, was irregular. **PAT** LALJI SINGH *v.* PARDI SINGH, 18 CR L. J. 754 **130**

——— S. 35 **308**

——— S. 96—*Search—Warrant, issue of—Magistrate, duty of.*

The act of issuing a search warrant is a judicial act and before a Magistrate issues it, it is his duty to weigh the circumstances before making up his mind on the question.

A mere statement in an affidavit that, in the opinion of the deponent, a summons may not have the desired effect, is not sufficient to justify the issue of a search warrant. **M** IYAVOO CHETTY *v.* JEHANGHIR, (1917) M. W. N. 494; 6 L.W. 287; 18 CR L.J. 837 **661**

——— S. 107—*Facts forming subject of previous enquiry resulting in discharge, whether ground for fresh enquiry under s.* 107.

In initiating proceedings under section 107 of the Criminal Procedure Code, a Magistrate should not rely upon facts and information which formed the subject of a previous enquiry and in which the accused were discharged. There must be fresh materials available on which it can be said that a fresh apprehension has arisen of a breach of the peace being committed by the accused. The same facts cannot form the subject of repeated proceedings either under the Penal Code or under the Criminal Procedure Code. **M** NAGIREDDY KONDAREDDDY, *In re*, 18 CR. L. J. 878 **90**

——— Ss. 107, 118—*Security to keep peace—Proof—Willingness of accused to give security.*

The mere fact that an accused person says he is willing to give security to keep the peace is *not* the kind of proof required by section 118, Criminal Procedure Code, as condition precedent to the taking of security under section 107, and an order for furnishing security under the latter section cannot be made merely upon the strength of such statement. **P** PREM SINGH *v.* EMPEROR, 27 P. R. 1917 CR; 18 CR. L. J. 847; 36 P. W. R 1917 CR. **671**

——— Ss 109, 118—*Security for good behaviour—Person residing openly within jurisdiction of Magistrate.*

The petitioner was required to give security for good behaviour under the provisions of section 118 read with section 109, Criminal Procedure Code, on the following facts, *viz.*, that on a certain night the petitioner, who was by profession a *kaviraj*, was found at about midnight in a lane in a town in association with two others who had in their possession house-breaking implements, that on being discovered he fled, that when arrested he remained

silent and that the explanation subsequently offered to the Magistrate of his presence at the time and place in question was false:

Held (*Teunon J.*, hesitating), that the facts found did not bring the petitioner within either clause (*a*) or (*b*) of section 109, Criminal Procedure Code, as the petitioner's presence or residence within the Magistrate's jurisdiction was well known.

Per *Huda, J.*—Clause (*a*) of section 109 of the Criminal Procedure Code refers to a continuous act and does not, therefore, apply to a case where there is a momentary effort at concealment to avoid detection or arrest. **C** RESHU KABIRAJ *v.* EMPEROR, 18 CR. L. J. 825 **649**

——— S. 118 **649, 671**

——— Ss 133, 137—*Procedure—Evidence, recording of, whether necessary.*

In proceedings under section 137 of the Criminal Procedure Code a Magistrate should proceed as in a summons case.

A Magistrate noticed that accused had erected a *thara* in a village which took up part of an open space. On a report by the *Girdawar Kanungo* the Magistrate issued a conditional order under section 133 of the Criminal Procedure Code, calling upon the accused to show cause why the order should not be made absolute. The accused put in a written statement to the effect that no obstruction to the thoroughfare had been caused and produced a number of witnesses who gave evidence to the same effect. Nevertheless the Magistrate, who had not recorded any evidence for the prosecution, made the order absolute under section 137 (3) of the Criminal Procedure Code:

Held, that the procedure adopted by the Magistrate was irregular and the order passed by him was consequently illegal. **P** SITA RAM *v.* EMPEROR, 32 P. R. 1917 CR.; 18 CR. L. J. 886; 43 P. W. R. 1917 CR. **1000**

——— S. 137

In proceedings under section 137 of the Criminal Procedure Code a Magistrate should proceed as in a summons case. **P** SITA RAM *v.* EMPEROR, 32 P. R. 1917 CR.; 18 CR. L. J. 888; 43 P. W. R. 1917 CR. **1000**

——— S. 137—*Public nuisance—Procedure on appearance of person showing cause against order for removal of nuisance—Magistrate, duty of.*

In an enquiry under Chapter X of the Criminal Procedure Code, a Magistrate should, as provided for by section 137 of the Code of Criminal Procedure, proceed to take evidence in support of the order before the counter-petitioner is called on to produce his evidence to meet it. **M** DAKSHINAMOORTHI, *In re*, 18 CR. L. J. 848 **672**

——— S. 144, *order under—Magistrate, whether bound to state grounds for order—Jurisdiction.*

A Magistrate has jurisdiction and is fully justified in passing an emergent order under section 144, Criminal Procedure Code, without setting out in the order the grounds of his action, where on the facts reported by the Police and accepted by the Magistrate, there appears to be no doubt that a most serious riot is apprehended. **C** BHUPENDRA MOHAN PAL CHAUDHURI *v.* CHAIRMAN OF MADARIPUR MUNICIPALITY, 18 CR. L. J. 892 **1004**

CRIMINAL PROCEDURE CODE—contd.

—— S. 145, *object and scope of—Dispute as to management of property—Magistrate, jurisdiction of.*

The object of section 145 of the Criminal Procedure Code is limited strictly to the prevention of violent self-help even by a true owner. The provisions of the section belong to the criminal and not to the civil law and should not be resorted to unless there is in fact a real apprehension of occurrence of offences against public order.

Under section 145, Criminal Procedure Code, the question in each case will be, *first*, whether the dispute is a dispute concerning land or water or the boundaries thereof, within the meaning of the section, and *secondly*, whether the acts found to have been exercised are such as to justify a finding of possession. The mere fact that the word management is used to describe the acts of possession which each party claims to have exercised would not exclude the jurisdiction of the Magistrate. **PAT** GHASI RAM *v.* AMRIT MAL, 2 P. L. W. 94; 18 CR. L. J. 858; (1917) PAT. 350 **826**

—— — S. 145—*Proceedings, ground for—Cancellation of proceedings—Fresh proceedings, institution of, whether permissible.*

Proceedings under section 145 of the Criminal Procedure Code can be instituted only upon overt acts or preparation by the parties showing a present and an imminent danger of the breach of the peace, and not merely upon an imaginary event that might lead to a breach of the peace.

Where a proceeding under section 145 of the Criminal Procedure Code has been once cancelled a fresh proceeding can be instituted only when the Magistrate on further material, either on the report of the Police or any other information is satisfied that there is a likelihood of a breach of the peace. In that case the procedure prescribed by clause 1 of section 145 of the Criminal Procedure Code should be observed. **PAT** DEONANDAN SINGH *v.* RAMAJODHYA SINGH, 2 P. L. W. 25; 18 CR. L. J. 703 **139**

—— Ss. 145, 435—*Proceedings under s. 145—Revision—High Court, interference by—Government of India Act (5 and 6 Geo. V C. 61), s. 107—High Courts Act (24 and 25 Vict. C. 104), s. 15—Jurisdiction.*

Where a Magistrate duly empowered to act under Chapter XII of the Criminal Procedure Code takes proceedings which are in intention, in form and in fact proceedings under that Chapter, the High Court has no power to send for those proceedings either under the Code, or under section 15 of the High Courts Act or under section 107 of the Government of India Act.

Section 107 of the Government of India Act does not differ from or extend the jurisdiction conferred upon the High Court by section 15 of the Charter Act. **A** MATUKDHARI SINGH *v.* JAISARI, 15 A. L. J. 576; 18 CR. L. J 828 **652**

—— — S. 145—*Produce of immoveable property, whether subject-matter of dispute—Jurisdiction of Magistrate to deal with produce—Order, good in part and bad in part—Court, power of, to sever good part from bad.*

Sub-section 2 of section 145 of the Criminal Procedure must be read in conjunction with sub-section 1 which deals with land and water; and sub-section 2 purports to give a definition of what land and water are supposed to comprise.

A Magistrate has under section 145, Criminal Procedure Code, power to deal with moveable property which represents the produce of the land in dispute if the produce is attached to, or if the same is cut and lying on, the land in dispute under the section; but if the produce of the land has been removed and is wholly unconnected with and dissociated from the land in dispute, then the Magistrate is deprived of jurisdiction to deal with it under section 145, sub-section 2.

Orders as opposed to convictions are severable and the bad part of an order can be severed from the good. Where an order under section 145 of the Criminal Procedure Code is bad in part and good in part, the Court will sever the bad from the good, reject the bad and maintain the good. **P** SUNDER MALL *v.* JHARI LAL, 2 P. L. W. 54; 18 CR. L. J. 756: 2 P. L. J. 637 **132**

—— — S. 162, Ch. XIV—*Evidence Act (I of 1872), s. 155—Impeaching credit of witness—Procedure—Proof of statement to Police—Person, whether bound to state truth to Police.*

Under section 155 of the Evidence Act the credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

Section 162 of the Criminal Procedure Code allows the credit of a witness to be impeached in the manner provided by the Evidence Act, by the statement which he is alleged to have made to the Police in the course of an investigation under Chapter XIV of the same Code.

If a Magistrate finds that a witness is recorded as having made a statement different from that which he has made before him and he considers that in the circumstances of the case the discrepancy should be brought to light, he ought to ask the witness if he has made the statement attributed to him by the Police papers. If the witness admits that he has, he should be given an opportunity of explaining why the contradiction has occurred. If the witness denies that he has made any such statement, the statement must be proved, before it can be used for the purpose of impeaching the credit of the witness. It is not like the deposition of a witness made in the Committing Magistrate's Court, which can be taken off the file of that Court and brought on that of the Court of Session without any proof, because the deposition proves itself. Not so a statement attributed to a witness on the Police papers.

No person is bound to state the truth to the Police in the course of an investigation under Chapter XIV of the Criminal Procedure Code. Hence a statement to the Police is not evidence, as a statement made on oath before a competent authority is. **L B** NGA PYU *v.* EMPEROR, 18 CR. L. J. 844 **668**

—— — Ss 177, 192, 528—*Transfer of case by District Magistrate to Magistrate within whose jurisdiction parties do not reside, legality of—S. 177, applicability of.*

The Police reported to the District Magistrate of Nellore that they apprehended breach of the peace from certain parties and requested him to take pro-

CRIMINAL PROCEDURE CODE—contd.

ceedings under section 107 of the Code of Criminal Procedure. The District Magistrate, without recording any opinion as to the apprehended disturbance of the peace, transferred the case to the file of the Head Quarters Deputy Magistrate, Nellore, within whose jurisdiction neither of the parties resided. The Head Quarters Deputy Magistrate then issued a notice under section 107 of the Code of Criminal Procedure to the petitioners:

Held, (1) that the order of transfer was bad;

(2) that the District Magistrate could not be said to have taken cognizance under section 192 of the Criminal Procedure Code, of a case falling under section 107 of the Code within the meaning of the Code so as to enable him to transfer it to a Subordinate Magistrate.

The provisions of section 107 of the Criminal Procedure Code do not fall within the scope of section 528, so as to enable a District Magistrate to transfer proceedings under that section to a Magistrate who has no jurisdiction over the matter. Section 177 of the Criminal Procedure Code has no application to such proceedings and the use of the word "ordinarily" in that section excludes trial of cases specifically provided for in section 107 of the Criminal Procedure Code. **M** NAGIREDDY KONDAREDDY, *In re*, 18 CR. L. J. 878 **990**

——— Ss. 179, 181 (2) - *Criminal misappropriation —Jurisdiction.*

Section 179, Criminal Procedure Code, does not in terms apply to a trial for criminal misappropriation, as the offence does not depend on an act done and the consequences ensuing therefrom but only on the act which has been done.

Money paid by the complainant on account of an insurance policy was misappropriated within the jurisdiction of Court B, but loss to the complainant was caused in the jurisdiction of Court N:

Held, that Court N had no jurisdiction to try the offence. **C** SIMHACHALAM *v.* RATI KANTA LAHA, 21 C. W. N. 573; 25 C. L. J. 451; 18 CR. L. J. 762; 44 C. 912 **138**

——— S. 181 (2) **138**

——— S. 188—*Offence committed on high seas—Local Government, sanction of, necessity of—"Where there is no Political Agent", meaning of—"Place", meaning of.*

The first proviso to section 188 of the Criminal Procedure Code refers only to offences which are said to have been committed on any territory and not to offences committed on the high seas

Per *Batchelor, J.*—The words "where there is no Political Agent" in the first proviso to section 188 of the Criminal Procedure Code mean where there is no Political Agent for the territory in which the offence is alleged to have been committed.

Per *Shah, J.*—The word "place" in the first paragraph of section 188 of the Criminal Procedure Code includes high seas in its ambit. **B** EMPEROR *v.* MANUEL PHILIP, 19 BOM. L. R. 527; 18 CR. L. J 782 **158**

——— Ss. 190, *cl.* 1 (c), 200—*Magistrate, power of, to proceed on information –Complaint by private person—Investigation by Police—Magistrate, whether can proceed on Police report—Examination of complainant, necessity of—Irregularity.*

CRIMINAL PROCEDURE CODE—contd.

Where a private party informed a Magistrate that he suspected that forgery had been committed in the records of a case then pending in a Civil Court and asked for an investigation by the Criminal Investigation Department, and the Magistrate ordered such an investigation and on the report of the Criminal Investigation Department ordered the prosecution of the accused:

Held, that under section 190, clause 1 (*c*), Criminal Procedure Code, it was not open to the Magistrate to take cognisance upon the report of any Police Officer or on the complaint of the complainant without examining him on oath, and that the proceedings directing the prosecution of the petitioners were so irregular as to be likely in the event of their commitment to the Court of Session to result in the commitment being quashed.

The power of a Magistrate to proceed upon information is intended to be used in cases in which a Magistrate has good reason to believe that there has been a serious infringement of the law but is unable to take action in the ordinary manner for the reason that the party aggrieved is unwilling or unable to prosecute. **PAT** JHUNA LAL SAHU *v.* EMPEROR, 2 P. L. W. 15; 18 CR. L. J. 890 **1002**

——— - S. 192 **990**

——— Ss. 192, 526—*Government of India Notifications Nos. 515 I. B. and 516 I. B., dated 17th March 1913—Jurisdiction—Offence committed on Railway lands in Native State—Transfer of case by Chief Court and by District Magistrate.*

K. was charged with an offence under section 409 of the Indian Penal Code committed within the Railway lands situate in the Jhind State. On the application of the District Magistrate of Rohtak the Chief Court transferred the case to the District Magistrate of Hissar, with the direction that he should either dispose of the case himself or make it over for trial to some competent Magistrate in his District. The District Magistrate of Hissar accordingly made over the case to an Honorary Magistrate, 1st Class, Bhiwani, who tried *K.* and convicted and sentenced him. On appeal to the Court of the Political Agent, Phulkian States, objection being taken to the jurisdiction of the Honorary Magistrate of Bhiwani the Political Agent, Phulkian States, referred the case to the Chief Court:

Held, that the Chief Court had power under section 526 of the Criminal Procedure Code to transfer the case to any Court in the Province and section 192 empowered the District Magistrate of Hissar to transfer it for trial to any Magistrate subordinate to him, that sections 192 and 526 of the Criminal Procedure Code were in force in Railway lands situate in the Jhind State and that the powers conferred on District Magistrates by those sections had not been taken away by the Government of India Notification No. 515 I. B. or No. 516 I. B. and that, therefore, the Honorary Magistrate had jurisdiction to try the case. **P** KISHEN SINGH *v.* EMPEROR, 30 P. R 1917 CR; 18 CR L. J. 881; 44 P. W. R 1917 CR **993**

——— S 195 **134, 745 1007**

——— S. 195.

An offence committed during a Police inquiry and before any proceedings have been taken in Court

does not require sanction under section 195 of the Criminal Procedure Code. P AJAIB SINGH *v.* EMPEROR, 34 P. R. 1917 CR 18 CR. L. J. 893 1005

—— — S. 195—*Judicial proceeding—Application for leave to sue.*

Per *Chaudhuri, J.*—The Original Side of the High Court is in no sense a court subordinate to the Appellate Bench of the High Court which hears appeals therefrom, and an application by way of appeal to the former under section 195, Criminal Procedure Code, does not appear to be competent.

Per *Curiam*—An application for leave to sue is a stage in a judicial proceeding. C BUDHU LALL *v.* CHOTU GOPE, 21 C. W. N. 654; 25 C. L. J. 401; 18 CR. L. J. 793 313

—— — S. 195—*Provincial Small Cause Court, whether subordinate to District Judge.*

A Provincial Small Cause Court is under sub-clause (*c*) of clause (7) of section 195, Criminal Procedure Code, to be deemed subordinate, for the purposes of that section, to the Court of the District Judge and the latter has, therefore, jurisdiction to entertain an appeal or application under clause (6) of section 195 against an order of a Provincial Small Cause Court granting or refusing sanction for prosecution. C NIBARAN CHANDRA *v* AKSHOY KUMAR BANERJEE, 21 C W. N. 948; 26 C. L. J. 138, 18 CR. L. J. 791 311

—— — Ss. 195, 439—*Sanction to prosecute—Sessions Judge, interference by, under s. 195, whether competent—District Magistrate, whether subordinate to Sessions Judge—Accused, right of, to be heard—Revision.*

A Sessions Judge is not the authority to whom a District Magistrate, in the exercise of his powers under section 195 of the Criminal Procedure Code, is subordinate and consequently it is not open to the Sessions Judge, even if an application is made to him, to interfere under section 195 with an order of the District Magistrate in appeal granting sanction to prosecute the accused. The only remedy of the accused is by way of revision to the High Court under section 439 of the Criminal Procedure Code.

Section 195 of the Criminal Procedure Code contemplates that where an order is to be made to the prejudice of a party, that party is to be first heard by the Court. PAT UCHIT JHA *v.* BARHMO SINGH, 18 CR. L. J. 759 135

—— — S. 195 (6)—*Revocation of sanction by District Judge in appeal—Revision—High Court, power of interference of.*

The High Court can interfere under its revisional jurisdiction, conferred by section 115 of the Code of Civil Procedure, with an appellate order of a District Judge passed under section 195 (6) of the Criminal Procedure Code. PAT RANG BAHADUR SINGH *v.* SHEONANDAN SINGH, 18 CR. L. J. 873 985

—— — S. 200 1002

—— — Ss. 200, 202.

A Magistrate taking cognisance of a case, who proceeds under section 202 of the Criminal Procedure Code, must record the reasons showing why he is not satisfied as to the truth of the complaint of the offence of which he is taking cognisance.

A Magistrate proceeding under section 202, Criminal Procedure Code, is not entitled to enquire into the case himself and also to authorise a previous local investigation by a Police Officer.

A Magistrate who has taken cognisance of an offence under section 200 of the Criminal Procedure Code is until he is relieved, if relieved at all of the case, the person who ought to make final orders in the case. He cannot relieve himself of the responsibility by shifting the burden on to the District Magistrate.

A District Magistrate ought not to direct a Subordinate Magistrate in a case pending before that Magistrate to proceed to the spot and to make a report to him. If he considers that the Magistrate is for any reason not proceeding properly with the case, he should withdraw the case, proceed with it himself and take the responsibility upon his own shoulders. A MADHO GIR *v.* RASHID AHMAD, 15 A. L. J. 642; 18 CR. L. J. 765 141

—— — Ss. 221 (7), 535, 537.

Where an accused who was a previous convict was convicted of theft and sentenced to enhanced punishment under section 75 of the Penal Code, but the charge sheet did not specify the previous convictions as required by section 221 (7) of the Criminal Procedure Code:

Held, that the defect was cured by sections 535 and 537 of the Criminal Procedure Code, inasmuch as there had been no failure of justice nor had the accused been prejudiced in his defence. P BISAKHI *v.* EMPEROR, 29 P. R. 1917 CR; 18 CR. L. J. 875; 37 P. W. R. 1917 CR. 987

—— —— Ss. 233, 535—*Misjoinder of charges—Persons separately fabricating evidence to defraud complainant, whether can be tried jointly—Re-trial.*

Four persons were convicted in a joint trial under section 193, Indian Penal Code, two of them for having falsely executed one *kabuliyat* and the other two for having falsely executed another *kabuliyat* for the purpose of defrauding the complainant:

Held, that there was a misjoinder of charges, that is to say, there ought to have been at least two trials one in respect of each *kabuliyat*.

(The conviction and the sentences imposed were set aside, but no re-trial was ordered in view of the circumstances of the case.) C EMPEROR *v.* FAZAL SHEIKH, 21 C. W. W. 756; 18 CR. L. J 833 657

—— — S. 235 308

—— — S. 236—*Doubt as to offence committed—Conviction, alternative—Procedure.*

Where a Court is satisfied that the accused has committed one of two offences, either that of counterfeiting a currency note under section 489A of the Penal Code, or that of attempting to cheat under section 420 read with section 511, a conviction should be recorded in the alternative under those sections, and the question of sentence should be considered from the point of view of the maximum sentence provided for the lesser of the

two alternative offences. **A** HIRA NAND *v.* EMPEROR, 15 A. L. J. 587; 18 CR. L. J. 790 **310**

——— S. 238—*Rioting—Acquittal—Conviction for criminal trespass and hurt, legality of.*

An Appellate Magistrate cannot, when once he acquits persons charged with rioting and being members of an unlawful assembly of that offence, convict them of the minor offences of house trespass and hurt under sections 448 and 323 of the Indian Penal Code.

Eleven persons were charged with rioting and being members of an unlawful assembly before a second class Magistrate. They were convicted of offences under section 147 of the Indian Penal Code. On appeal the Appellate Magistrate acquitted seven of them and convicted the remaining four of offences under sections 448 and 323 of the Indian Penal Code:

Held, that the conviction was illegal and must be set aside. **M** MONGALU AORODHONO HATHI, *In re*, 18 CR. L. J. 760 **828**

——— S. 250—*Frivolous and vexatious accusation—Compensation, order for payment of.*

Where a charge in respect of which a complaint is made is a specific and serious one, it cannot be described as frivolous or vexatious, unless it is in fact false; and unless it is held to be false, an order for compensation under section 250 of the Criminal Procedure Code is not justified. **PAT** MANGRA KHARIA *v.* RAM DHARI SINGH, 2 P. L. W. 116; 18 CR. L. J. 837 **661**

——— Ss 258, 436—*Penal Code (Act XLV of 1860), ss. 465, 467—Jurisdiction of Sessions Judge to order committal or further enquiry for offence under s 467, I P. C., where accused was acquitted of offence under s. 465—Discharge, meaning of.*

Per *Richardson, J.*—Where a person accused of forging a document is charged with an offence under section 465 of the Indian Penal Code, and is acquitted by a First Class Magistrate under section 258, Criminal Procedure Code, the Sessions Judge has no power to direct his committal or to order a further inquiry under section 436, Criminal Procedure Code, on the ground that the offence alleged falls under section 467, Indian Penal Code, as it relates to a document which is a valuable security.

The acquittal of such a person on a charge under section 465, Indian Penal Code, cannot be construed as an order of discharge in respect of the alleged offence under section 467.

An order of discharge under the provisions of the Criminal Procedure Code should precede the framing of a charge, though there might be cases in which an accused can be discharged otherwise than under the specific provisions relating to discharge in the Criminal Procedure Code.

Per *Teunon, J.*—The Magistrate's order acquitting such an accused of an offence under section 465, Indian Penal Code, is tantamount to an order discharging the accused of the graver offence in respect of the same document punishable under section 467, Indian Penal Code. **C** ABDUL HAKIM KHAN *v.* BUZRUK ALI KHAN, 26 C. L. J. 210; 18 CR. L. J. 834; 22 C. W. N 117 **658**

— S. 344—*Riot and theft—Stay of proceedings—Civil suit in respect of same property already pending, effect of.*

Where accused are charged with theft and riot and the charges have reference to property which forms the subject-matter of a Civil suit already pending, it is desirable in the interests of the fair administration of justice that the Criminal proceeding should be stayed until the disposal of the Civil suit. **PAT** KHOBHARI RAI *v.* BHAGWAT RAI, 1 P. L. W. 793; 18 CR. L. J. 771 **147**

——— S. 352.

Section 352 of the Criminal Procedure Code does not vitiate the whole trial in a jail when there is nothing to show that admittance was refused to any one who desired it, or that the prisoners were unable to communicate with their friends or Counsel. No doubt it is difficult to get Counsel to appear in jail and for that reason, if for no other, such trials are usually undesirable **P** SAHAI SINGH *v.* EMPEROR, 21 P. W. R. 1917 CR.; 18 CR. L. J. 852 **820**

——— S. 423 **149**

——— S. 435 **652**

——— S. 436 **658**

——— S. 439—*Acquittal—Application by private person to set aside acquittal—High Court, interference by.*

Per *Teunon, J.*—No hard and fast rule should be laid down that applications made to the High Court by complainants for setting aside acquittals of persons who have been charged with the commission of offences are to be discouraged, as that would result in the High Court abdicating its functions and, in the present conditions of India, in denial of justice. Every such application should be considered on its own facts.

Per *Huda, J.*—The practice of the High Court has always been to discourage such applications when presented on behalf of private parties and this practice should not be departed from. **C** WAZUDDI *v.* RAHIMUDDI, 18 CR. L. J. 849 **817**

——— S. 439—*Concurrent revisional jurisdiction of High Court and Sessions Judge—Practice.*

If a remedy which is asked for in the High Court can also be obtained from the Sessions Judge, the High Court will decline to exercise jurisdiction unless there be special reasons to the contrary, and will relegate the party seeking relief to the lower Court.

Such is the established practice of the High Courts of Calcutta, Allahabad and Bombay, and should not ordinarily be departed from. **PAT** MUSAN RAI *v.* BIRICH ROY, 2 P. L. W. 115; 18 CR. L. J. 863 **831**

——— S. 439—*Revision—Irregularity—High Court, interference by.*

Where an applicant has not in any way been prejudiced by an irregularity, the High Court will not interfere in revision on the ground of that irregularity. **A** MADHO GIR *v.* RASHID AHMAD, 15 A. L. J. 642; 18 CR. L. J. 765 **141**

— S. 476—*Judicial proceeding—Enquiry by Court without jurisdiction, effect of—Perjury during enquiry, prosecution for, legality of.*

Dubitante.—A Court making an enquiry without jurisdiction is not competent to pass an order, under section 476, Criminal Procedure Code, for the prosecution of a witness for perjury committed during the course of such enquiry, even though the Court honestly

believed it had jurisdiction and the parties did not object to it, inasmuch as the proceedings in the enquiry are not 'judicial proceedings'

A proceeding before a Court of Justice acting in the administration of justice is a 'judicial proceeding'.

A Court taking evidence in a proceeding of which it is entitled to take cognizance under the Legal Practitioners Act, is a 'Court' within the meaning of section 476, Criminal Procedure Code, and the proceeding is a 'judicial proceeding'. M NALLASIVAN PILLAI *v.* RAMALINGAM PILLAI, 32 M. L. J. 402; (1917) M. W. N. 303; 6 L. W. 364; 18 CR. L. J. 785 **305**

——— Ss 476, 195—*Mutation application, dismissal of, by Deputy Collector—False claim—Succeeding Deputy Collector, whether competent to sanction prosecution for offence under Penal Code (Act XLV of 1860), s. 209—Jurisdiction.*

One *R.* applied to a Land Registration Deputy Collector for mutation of his name in the place of one *S.* whom he alleged to be dead, but an application purporting to be on behalf of *S* was also made to the Deputy Collector stating that she was alive. The mutation application of *R* was dismissed on 16th December 916, in the absence of both *R.* and *S.* On 16th March 1916, an application purporting to be on behalf of *S.* was made to the successor of the Deputy Collector by whom the mutation application was dismissed, praying for sanction to prosecute *R.* for an offence under section 209, Indian Penal Code, and he recorded an order under section 476, Criminal Procedure Code, directing the prosecution of *R*:

Held, (1) that the Deputy Collector had no jurisdiction to make the order as he had no judicial proceeding pending before him in the course of which the offence under section 209, Indian Penal Code, could be said to have been brought to his notice:

(2) that the proper course would have been to give sanction under section 195, Criminal Procedure Code. PAT RAM NIGAH SINGH *v.* EMPEROR, 1 P. L. W. 772; 18 CR. L. J. 895 **1007**

——— Ss. 476, 195—*Person not named in sanction, whether can be proceeded against.*

Section 195, Criminal Procedure Code, operates as a bar to the trial of certain *offences*, and the test of the necessity for the grant of sanction is the character of the offence and not of the *offender*; once the bar imposed by section 195, Criminal Procedure Code, to the trial of an *offence* has been removed, the Magistrate before whom the trial takes place is not barred from issuing process against and trying persons who have not been specifically named in such a sanction under section 195, Criminal Procedure Code, or in an order under section 476, Criminal Procedure Code, as the case may be. P AJAIB SINGH *v* EMPEROR, 34 P. R. 1917 CR.; 18 CR L. J. 893 **1005**

—— — S 476—*Sanction to prosecute—Affidavit, false, filed before* Munsarim—*Preliminary enquiry.*

An affidavit, written in English, was presented to the *Munsarim* of the Court. It purported to be signed by the deponent in Urdu. It was not proved that it was read or explained to the latter. The Judge held the statements contained in the affidavit to be false and exaggerated and gave sanction under section 476 of the Criminal Procedure Code for the prosecution of the deponent:

Held, (1) that the case was one in which a preliminary enquiry should have been made before an order was passed under section 476 of the Criminal Procedure Code;

(2) that inasmuch as the matters contained in the affidavit had not taken place before the Judge the affidavit should have been rejected on the spot A MATHURA PRASAD *v.* EMPEROR, 15 A. L. J. 5 7; 18 CR. L. J. 883 **995**

—— — S. 488—*Maintenance—Buddhist Law, Burmese—Dissolution of marriage—Desertion by wife.*

A wife who is driven away from her husband by his cruelty cannot be said to have "left the house not having affection for the husband" within the meaning of the *Dhammathats.*

A wife who refuses to rejoin her husband without sufficient reason or who is living apart from her husband by mutual consent is not entitled to maintenance; but a husband under Burmese Buddhist Law, who is bound to maintain his wife, cannot evade that liability by declaring that the marriage has been dissolved by reason of the wife's absence from him. L B THEIN ME *v.* PO GYWE, 9 L. B. R. 44: 18 CR L. J. 767 **143**

——— S. 488—*Maintenance for son—Past neglect, effect of—Magistrate, duty of.*

When an application is made under section 488, Criminal Procedure Code, by a child, it is the duty of the Magistrate to enquire, *first*, as to whether the child is unable to maintain itself, *secondly*, if the father is in a position to support his child, and *thirdly*, whether the father is neglecting to maintain his child. Past neglect of his duty to support his child may be a cogent factor in coming to a finding that at the time of the application the father is neglecting or refusing to support his offspring.

The object of maintenance proceedings, however, is not to punish a parent for his past neglect but to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and have a moral claim to support. If, therefore, a father offers to maintain his son on condition that he lives with him the Magistrate should refrain from passing an order against the father until he has had an opportunity at least of proving that the offer is made in good faith.

The fact that, in the past, he has neglected to support his son should not be considered as sufficient, by itself, to hold that the offer is not made in good faith. P SARDAR MUHAMMAD *v.* NUR MUHAMMAD, 22 P. R. 1917 CR; 16 P. W. R. 1917 CR; 18 CR. L. J. 811 **331**

——— S. 494—*Order permitting withdrawal of prosecution, whether judicial—Court, duty of, to record reasons for order.*

In withholding or according consent to the withdrawal of a prosecution under section 494, Criminal Procedure Code, the Court acts in a judicial capacity, and for its order, as for every order judicially made

CRIMINAL PROCEDURE CODE—concld.
it ought to give and record its reasons. C UMESH CHANDRA ROY *v.* SATIS CHANDRA ROY, 26 C. L. J. 208; 18 CR. L. J. 886; 22 C. W. N. 69 998
——— S. 526 993
——— S. 528 990
——— S. 535 657
——— Ss. 535, 537 987
CROWN, *right of entry of, on private property to regulate distribution of water—Injunction, grant of, legality of.*
Where Government is found to have no right to water supplied to tanks in a *mitta* by an artificial channel passing through the village, the revenue officers as agents of the Government are not entitled to go on the *mittadar's* land against his wish to regulate the supply or distribution of water to his *mitta* and other *Aiyan* villages or to execute repairs. Such a right can only be exercised without violating the proprietary rights of others and by the use of lawful means.
Government can be restrained by an injunction from committing trespass on the properties of private owners for controlling the distribution of water for purposes of irrigation. M SECRETARY OF STATE *v.* PALANIYAPPA PILLAI, (1917) M. W. N. 571; 6 L. W. 572; 22 M. L. T. 315 24
CUSTOM *of trade—Bombay Silver Market*—Kachchi *and* pakki adat—*Selling* shroff, *whether personally liable to principal of buying* adatia.
The custom of the Bombay Silver Market for forward contracts is that only shroffs are the ostensible buyers and sellers though shroffs may have and often do have outside principals for whom they are acting. The shroffs, when acting for principals, work sometimes for *kachchi adat* and sometimes for *pakki adat*. In the case of *kachchi adat* the *adatia* shroff guarantees the performance of the contract to the other shroff but does not guarantee its performance to his own principal. In the case of *pakki adat* the *adatia* shroff, who then acts for a higher rate of commission, is liable as a principal both to his own employer and to the other shroff.
There is no custom in the Silver Market whereby the selling shroffs are exempted from personal liability to the principal of the buying *adatia* for damages for breach of a contract entered into by them. B ABRAHAM E. J. ABRAHAM *v.* SARUPCHAND HAKAMCHAND 19 BOM. L. R. 608 256
——— or usage, existence of, whether question of fact or law—Evidence 959
——— ADOPTION—*Acquiescence, effect of—Estoppel.*
Where in consequence of the attitude taken up by the collateral heirs of the adoptive father the adopted son has been brought up as a member of the village community to which his adopted father belonged and has always been recognised as such, the collaterals are estopped from challenging the validity of the adoption. P GHUHAR *v.* JAS KAUR, 69 P. R. 19 7; 303 P. W. R. 1917 927
——— ALIENATION—Mukarraridari *rights—Tarkhans of* Mauza *Bhangi, Attock District—Necessity.*
Tarkhans of *Mauza* Bhangi, Attock District, are governed by the ordinary agricultural custom and among them a *mukarraridar* cannot sell his holding except for valid necessity even where the vendee is
CUSTOM—con'd.
the representative of the superior landlord who created the *mukarraridari* rights. P AHMAD *v.* SAMAND, 56 P. R. 1917: 13 P. W. R. 1917 814
——— ALIENATION *by widow of her husband's property—Reversioner's right, extent of—Transfer of right to stranger, whether permissible—Transferee of right* locus standi *of*—
A reversioner's right to contest an alienation or sale by a widow of her husband's property for want of necessity or otherwise is a personal one; and its transfer to a stranger, whether it is made in her lifetime or after her death, is both illegal and opposed to public policy as stimulating gambling in litigation. Consequently the transferee of such a right has no *locus standi* to maintain a suit for recovering the alienated property, on the ground that the alienation is an unauthorized one. P DIWAN CHAND *v.* IMAM DIN, 74 P. W. R. 1917 347
——— DILUVION—*Re-appearance of submerged land—Right of occupancy tenant—Rights granted before river action, nature of—Custom not ancient, effect of—Mutation proceedings, effect of—Limitation.*
In a suit for declaration of occupancy rights it was contended on behalf of the defendants-landlords *a* that the plaintiffs had lost all rights on account of the submersion of the land under the river according to the general custom of the district and (*b*) that the suit was barred as mutation had taken place in favour of the defendants on submersion which occurred twelve years before suit. It appeared from the *wajib-ul-arz* of 1880 relied upon by the defendants that the village had become subject to river action only in the previous year whereas the occupancy rights were of a date long anterior to 1880:
Held, (1) that the proprietors had failed to establish a custom whereby diluviated occupancy land on submersion at once became the property of the landlord and was liberated from the previously existing tenant right;
(2) that the custom propounded by the defendants was *prima facie* inequitable, as rights granted long before river action began could not be subjected to rules obtaining in neighbouring villages which were liable to river action when the tenancy originated;
(3) that the alleged custom having been propounded in the village for the first time in 1879 was not ancient and could not have the force of law;
(4) that mutation being a mere proceeding the suit was not barred, as the land though submerged was in the possession of the plaintiffs-tenants until the defendants took possession of it on its re-appearance above the water-level, which event took place only a short time before suit. P MUHAMMAD YAR *v.* PIRAN, 37 P. R. 1917; 124 P. W. R. 1917 394
——— HINDU LAW—*Muhammadans, adoption by, of Hindu manners and customs*—Nawayats *of South Canara—Joint family trade—Presumption—Evidence—Law applicable.*
Where a Muhammadan trading family so far conformed to Hindu customs that they lived as members of a joint family, purchased properties indiscriminately in the names of the members and showed themselves averse to division and conducted themselves as a Hindu family for many years:

CUSTOM—concld.

Held, that a suit for partition would lie and the shares would be allocated according to the principles of Hindu Law.

Held, further, that the fact that the parties belonged to the class of *Nawayats* who, many years ago, married Konkani women and largely conformed to Hindu manners and usages, may be taken into account with the rest of the evidence for the purpose of explaining the footing on which they lived and traded for so many years. **M** HUSSAIN SAHIB *v.* HASSAN SAIB, 5 L. W. 835 **184**

——— HINDU LAW—*Succession—Dancing girls—Females, rights of.*

Succession to the estate of a dancing girl is based more upon usage obtaining in the caste than upon any text of Hindu Law, and according to that usage females take in preference to males.

Where, therefore, the succession is to the estate of a dancing girl, a maternal grand-uncle's daughter would be preferred to the maternal grand-uncle's daughter's son **M** SUBBARATNA MUDALI *v.* BALAKRISHNASWAMI NAIDU, 22 M. L. T. 91; 6 L. W. 184; 33 M. L J. 207; (1917) M. W. N. 569 **408**

——— JOINT HOLDING—Widow, right of, to demand partition **473**

———SUCCESSION—*Agnates living in separate village and owning no land in village of deceased, right of.*

Prima facie agnates of a deceased person are entitled to a share in his estate, even though they live in another village and own no land in the village in which the land in dispute is situate. **P** NANDA *v.* HIRA, 47 P. R. 1917; 117 P. W R. 1917 **230**

——— ——— —— —*Awans of* Mauza *Chakrala, Mianwali District*—Sardari, *custom of—Collateral succession—Presumption—Burden of proof.*

A special custom of *sardari* exists in the family of Awans of *Mauzas* Chakrala and Thamewali, Mianwali District, and among them the rule of succession from father to son is governed by the *pagwand* rule, and in the case of collateral succession the whole blood and half blood succeed together.

The onus of proving any other custom, *e. g.*, *yakmadri*, lies on the party who alleges it. **P** GHULAM MUHAMMAD KHAN *v.* NUR KHAN, 65 P. R. 1917; 105 P. W. R. 1917 **897**

——— ——— ———Chundawand—Rindwanas *of Shahpur District.*

The custom of *chundawand* in the Shahpur District is exceedingly rare, and there is no trace of it amongst *Rindwanas* who form a sub-division of the *Mekan* tribe. **P** SULTAN *v.* GHULLA, 68 P. W. R. 1917 **783**

——— ——— ———*Sister v. collaterals—Mahwal Jats, Tahsil Alipur, Muzaffargarh District.*

Among Mahwal Jats of Tahsil Alipur, District Muzaffargarh, a sister does not exclude collaterals, whether she be married in the family or not. **P** HAYAT *v.* RUSTAM, 48 P. R. 1917; 118 P. W. R. 1917 **239**

DECREE *based on compromise, construction of—Declaration—Possession.*

A decree based on a compromise in a declaratory suit to the effect that the plaintiff is to get possession of certain land is a decree for possession. The mere fact that the word "*dakhilyabi*" does not occur in the decree is not enough to alter it from a decree for possession into a declaratory decree. **P** FAKIRA *v.* PIR BAKHSH, 34 P. W. R. 1917; 55 P. L. R. 1917 **2**

———, cancellation of, effect of **872**

———, *construction of—Interest, right of creditor to appropriate payment towards—Contract Act (IX of 1872), s. 60, applicability of, to decrees.*

An instalment decree made in a suit upon a hand-note ran as follows: "It is ordered that the defendants do pay to the plaintiff the sum of Rs. 2,888-8-0 with interest thereon at the rate of 12 per cent. per annum * *. The amount decreed * * to be paid in yearly instalments of Rs. 600 payable on July 15th each year' * * * *.":

Held, that under the decree interest was payable yearly and for the purpose of the decree the year must be taken to end on the 14th July, and that the plaintiff was, therefore, at liberty, in the absence of any express or implied appropriation by the judgment-debtor, to appropriate, out of each payment as it was made, a sum sufficient to satisfy the interest due at the date of the payment towards the satisfaction of the interest and to credit the balance only towards the principal. **C** BISWANATH BHATTACHARJEE *v.* SAMESWAR SARMA, 21 C. W. N. 1055 **348**

——— , ex parte, *set aside by suit, effect of—Original suit, revival of.*

When an *ex parte* decree is set aside by a suit, its effect is to relegate the parties to the position they previously occupied, with the result that the suit which terminated in the *ex parte* decree is revived and must be tried by the Court, if the plaintiff desires to proceed with it. **C** DHARANIDHAR ADITYA *v.* HEMANGA CHANDRA JANA, 21 C. W. N. 1087 **956**

DEFAMATION—*European called "native."*

Calling an European or Anglo-Indian a "native" is not defamatory, though it may by grossly abusive. **L B** CHRISTENSEN *v.* CASTOR **696**

Journalistic communication termed "rubbish."

To describe a journalist's communication as rubbish is defamatory, because the imputation conveyed by the word affects prejudicially his capacity as a journalist. **L B** CHRISTENSEN *v.* CASTOR **696**

———*Suit against several persons making defamatory statements, maintainability of—*

Where a number of persons make defamatory allegations against the plaintiff, a suit against all of them to recover damages for defamation will not lie, unless it is proved that the defendants made those allegations acting together, as each publication of the libel or slander is a distinct tort and a separate suit would lie against every person uttering and publishing the slander. **C** DIGAMBAR DAS *v.* BISWESWAR CHOWDHURY **12**

DELAY IN FILING SUIT—*Acquiescence.*

The mere fact that a suit by the reversioners challenging a gift is not brought till ten or eleven years after the death of the donor does not show that the plaintiffs acquiesced in the gift and the plaintiffs are not thereby estopped from bringing the suit. **P** BHAG MAL *v.* BHAGWAN DAS, 125 P. W. R. 1917 **636**

DIVORCE ACT (IV OF 1869), SS. 12, 13, 14—*Condonation, what amounts to—Collusion—Desertion on part of husband—Wilful neglect or misconduct.*

Condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances and is a question of fact, not of law. It is a blotting out

of the offence imputed, so as to restore the offending party to the position which he or she occupied before the offence was committed; consequently mere forgiveness is not condonation, in order to amount to condonation it must completely restore the offending party, and must be followed by cohabitation.

Where after the wife's confession of adultery, the husband allows her to occupy her bed (which is a separate bed) in the same room and to live in the house as usual for some days, the conduct of the husband cannot be regarded as condonation of the adultery.

A collusion within the meaning of section 13 of the Indian Divorce Act is held to exist where the initiation of the proceedings for dissolution of marriage is procured, or its conduct provided for, by agreement or bargain between the spouses or their agents.

A mere refusal by the husband, without reasonable cause, of the matrimonial bed does not constitute desertion on his part or such wilful neglect or misconduct as conduces to adultery, and is not an adequate ground for dissolution of marriage. **C** DE STE CROIX *v.* DE STE CROIX, 21 C. W. N. 717 **447**

EASEMENT—*Natural right to discharge water on to lower lands—Obstruction, whether constitutes continuing cause of action.*

Owners and occupiers of higher lands have the right to discharge surface water of their lands on to the contiguous lower lands not only in the dry season but in all seasons of the year.

This right is not curtailed by any natural changes such as the silting up of an adjoining river, in consequence of which the burden of the lower ground is enhanced.

An obstruction to the discharge of surface water constitutes a recurring cause of action, so that no question of limitation can arise in regard to a suit for the removal of the obstruction. **C** KASESWAR MUKERJEE *v.* ANNODA PROSAD PATRA **863**

——— *by prescription, whether can be acquired by tenant—Landlord and tenant—Right to raise water for irrigation—User for 50 years—Presumption of lost grant.*

An easement by prescription under the Limitation Act cannot arise between landlord and tenant.

Where the plaintiff's predecessor-in-title has openly and notoriously used the water from the tank of the defendant as of right and without any objection by the latter for 50 years, the Court is justified in presuming the existence of a lost grant. **PAT** KRISHAN CHANDRA MANDAL *v.* RAM SAHAY KATARI, 2 P. L. W. 46 **577**

——— *Water rights, extent and scope of—Suit to restrain use of watercourse, where no damage caused, maintainability of—Suit by transferee from Hindu widow.*

Everybody has a right to do anything on his own land with regard to the diversion, storage or the uses of water in any way he chooses, provided that when he ceases dealing with it on his own land or when he has made such use of it as he is minded to make, he is not to allow or cause that water to go upon his neighbour's land so as to affect that neighbour's land in some other way than the way in which it had been affected before.

A person has no right to obstruct the water of a natural stream, except to the extent to which he has had prescriptive use thereof.

A plaintiff, whose natural rights in regard to watercourses are in danger of being infringed or further encroached upon by a new enjoyment on the part of the defendant, capable of being converted by user for the prescriptive period into a new right in the latter, has a good cause of action, apart from any question as to the amount of damage which he may have suffered or be likely to suffer.

A plaintiff whose title to land is based upon a grant by a Hindu widow, which may or may not be valid against the reversioners, can during the lifetime of the widow maintain a suit for a permanent injunction restraining the defendant from diverting the course of the natural flow of surface water so as to affect his land. **C** ERALIJOOL TEA CO., LTD. *v.* NAGENDRO NATH **47**

EJECTMENT, *suit for—Cause of action.*

The institution of a suit for ejectment of the tenant cannot be regarded as the requisite act showing the intention of the landlord to determine the lease within the meaning of section 111 (*g*).

On non-payment of rent by the lessee the landlord brought a suit for his ejectment on the ground that under the terms of the lease the tenancy was forfeited in consequence of the non-payment:

Held, that a suit for ejectment was not maintainable for want of a cause of action, as it was not even alleged in the plaint that before the institution of the suit the plaintiff had, on the failure of the tenant to pay rent, done any act showing his intention to determine the lease. **C** NAURANG SINGH *v.* JANARDON KISHORE LAL SINGH DEO **952**

——— *suit—Redemption, whether can be allowed.*

Where in a simple suit for ejectment the plaintiff set out in the relief clause that, if it were found by the Court that there were any encumbrances on the property in suit, an order might be made permitting him to have redemption:

Held, that the plaintiff could not have redemption in such suit. **O** JANG BAHADUR SINGH *v* CHANDREJ SINGH, 4 O. L. J. 365 **171**

ENHANCED PUNISHMENT **987**

ESTOPPEL **675, 775**

——— *See* EVIDENCE ACT (I OF 1872), SECTION 115.

——— *Actions and conduct of parties.*

Actions and conduct of parties might give rise to estoppel, when such actions and conduct have produced alteration of circumstances so great that without great loss and inconvenience the parties cannot be put back in their original position. **M** HUSSAIN SAHIB *v.* HASSAN SAIB, 5 L. W. 835 **184**

——— *Admission, value of.*

A mere admission of the right of one party by the other in a previous case between them does not amount to an estoppel, but it affords a strong piece of evidence against the person making the admission. **P** SULTAN *v.* GHULLA, 68 P. W. R. 1917 **283**

——— *Trespasser building upon another's land, effect of—Suit for demolition—Building with knowledge of defective title.*

If a stranger builds knowingly upon another man's land, there is no principle of equity which prevents

ESTOPPEL - concld.

the owner from insisting on having back his land with all the additional value which the occupier has imprudently added to it. PAT STOCKING, B. v. TATA IRON AND STEEL CO, (1917) PAT. 273; 2 P. L. W. 133; 2 P. L. J. 600 175

EVIDENCE—*Admission of irrelevant evidence, whether vitiates judgment.*

The mere fact that inadmissible evidence was admitted by a Court does not vitiate its judgment, if the Court arrived at its conclusions on the merits independently of the evidence improperly admitted. C. AMBAR ALI v. LUTFE ALI, 25 C. L. J. 619; 21 C. W. N. 996 116

——— —*Criminal Procedure Code (Act V of 1898), s. 145, proceedings under and order therein, whether relevant.*

The facts of a previous proceeding under section 145, Criminal Procedure Code, and the order passed therein are relevant in a suit between the same parties for recovery of possession of the land on declaration of title, but the reasons for the order are not relevant. C BARODA PROSAD ROY CHOWDHURY v. MANMATH NATH MITRA 456

EVIDENCE ACT (I OF 1872), S. 13—Chittas, *private admissibility of.*

Semble.—Private *chittas*, however old, are not admissible in evidence under section 13 of the Evidence Act. C NAFAR JOARDAR v PRATIMA SUNDARI DASSYA 726

——— — Ss. 30, 114 (b)—*Confession of co-accused, whether constitutes sufficient basis for conviction—Retracted confession, value of.*

The confession of a co-accused is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case. But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by the other confessions, whether these have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not.

The weight to be given to a retracted confession depends on the circumstances under which it is made, and on the intrinsic credibility of the confession. U B NGA SAN NYEIN v. EMPEROR, 3 U. B. R. (1917) 8; 18 CR L. J. 774 150

——— — S. 32 (3).

A statement by the vendors in a deed of sale, that the land conveyed is limited by certain boundaries, is an admission that their proprietary interest does not extend over any land outside the boundaries mentioned, and as such is admissible against strangers to the transaction under section 32 (3) of the Indian Evidence Act. C AMBAR ALI v. LUTFE ALI, 25 C. L. J. 619; 21 C. W. N. 996 116

——— S. 35—*Register of births and deaths kept by village official, entries in, admissibility of—Entry, whether evidence of actual date of death.*

A village *karnam* or Reddi keeping a register of deaths acts as a public servant in the discharge of his official duty within the meaning of section 35 of the Evidence Act. It is not necessary that a

EVIDENCE ACT—contd.

public servant should be compellable by legislative enactment to discharge such a duty.

Where death registers are kept under the directions of the Board of Revenue acting as agents of the Government, the entries therein are admissible in evidence under section 35 of the Evidence Act.

An entry in such a register is proof of the actual date of death. M DEVARA PALLI RAMALINGA REDDI v. SRIGIRIRAJU KOTAYYA, 22 M. L. T. 17; 33 M. L. J. 60; (1917) M. W. N. 558; 5 L. W. 246 286

——— S. 45—*Trade mark, imitation of—Expert, opinions of, as to likelihood of deception by imitation trade mark, admissibility of.*

Opinions of experts, as to whether goods of a particular firm bearing particular trade marks alleged to be imitation would be likely to deceive the ultimate purchasers to buy imitation goods in place of genuine ones, are inadmissible under section 45 of the Evidence Act, as they do not relate to any question of science or art. It is for the Court to decide whether the marks complained of are likely to deceive the public. S MACDONALD & CO. v. HOLLAND AND MOSS, 10 S. L. R. 175 539

——— S. 55—*Character, evidence as to, relevancy of.*

In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant, but evidence may be given only of general character and not of particular act by which character is shown. L B CHRISTENSEN v CASTOR 696

——— S. 89—*Mortgage deed—Attesting witnesses dead—Mortgagor, failure of, to produce mortgage-deed—Execution, proof of.*

The attesting witnesses of a mortgage-deed, required by law to be attested, were dead. It was, however, proved that the mortgagor had executed the deed, and that it had been returned to him at the time of the sale of the mortgaged property to the mortgagee The mortgagor was called upon to produce the deed before Court, but he failed to do so:

Held, that under the above circumstances the execution of the mortgage-deed was, in view of section 89 of the Evidence Act, satisfactorily established, irrespective of the provisions of section 68 *et seq.* of the same Act. O JANG BAHADUR SINGH v. CHANDREJ SINGH, 4 O. L. J. 365 171

——— Ss. 90, 114, 115—*Unsigned accounts, presumption as to—Improvements, claim for, by alleged occupancy tenant.*

Section 90 of the Evidence Act does not enable a Court to presume that unsigned accounts of a temple which do not purport to be in the handwriting of any particular person or persons were written by the authorised accountants of the temple. Nor can section 114 be invoked in aid of such a presumption. M NAINA PILLAI v. RAMANATHAN CHETTIAR, 33 M. L. J. 84 788

——— S. 91—*Transfer of Property Act (IV of 1882), s. 54—Sale of immoveable property of less than Rs. 100 in value—Unregistered instrument of sale, admissibility of, in evidence.*

For the sale of an immoveable property of less than Rs. 100 in value an unregistered instrument, unaccompanied by delive of possession, is of no avail and confers no title.

EVIDENCE ACT—contd.

Where an immoveable property of less than Rs. 100 in value is sold by delivery of possession and an instrument of sale is also executed but not registered, the instrument is admissible as evidence of the nature of the transaction as under section 91 of the Indian Evidence Act such an instrument, although it does not confer any title and is merely evidentiary, is the only admissible evidence of the nature and terms of the transaction **C** JUMAN *v.* MOHAMMAD NABINEOAZ, 21 C. W. N. 1149 **779**

——— S. 92—*Written correspondence varying rent payable under registered lease, whether admissible in evidence—Rent suit—Right of party to rectify registered lease, whether can be gone into.*

The plaintiff held a permanent lease from the Government, which he sublet to the defendants by a registered document. In both the lease and the under-lease there was an undertaking on the part of the tenants to reclaim the land. The reclamation not having aken place in accordance with the terms of the lease, Government served notice upon the plaintiff to quit and threatened to re-enter. On this correspondence ensued between the plaintiff and the under-lessees, defendants, with the result that the defendants agreed that if the plaintiff would obtain a fresh lease in place of the original lease, which the Government claimed to have forfeited, the rent payable by the defendants under the under-lease should be enhanced by a corresponding amount to that which the plaintiffs would become liable to pay to Government; and in pursuance of that agreement the plaintiff received from the Government a fresh lease on more onerous terms than those on which the land was held originally by him. In a suit by the plaintiff to recover rent, not as provided for by the registered under-lease, but at the rate as varied by the correspondence that took place between the parties:

Held, (1) that the plaintiff could not recover more rent than what was agreed to be paid under the registered under-lease, as the terms of that document could not be contradicted or varied by subsequent correspondence which was not registered, even though by that correspondence a binding agreement may have been made between the parties for altering the rent payable under the registered sub-lease;

(2) that any case that the plaintiff might have for alterning or rectifying the terms of the original registered under-lease in a properly constituted suit, on the ground that the correspondence had given rise to a binding agreement which ought to be enforced in a Court of Equity, could not be gone into in the suit as it was an ordinary suit for rent. **C** SHIBA PRASAD ROY *v.* SAMARENDRA NATH BOSE **431**

——— S. 94 **556**

——— Ss. 114, 115 **788**

——— S. 114, ill. (*b*) **820**

——— Ss. 114 (b), 30—*Confession of co-accused, whether constitutes sufficient basis for conviction—Retracted confession, value of.*

The confession of a co-accused is not the same thing as the testimony of an accomplice and stands on a different footing. It may be taken into consideration as lending support to other evidence in the case But if there is no other evidence, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by the other confessions, whether these have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not

The weight to be given to a retracted confession depends on the circumstances under which it is made, and on the intrinsic credibility of the confession.

The object of examining an accused person is to afford him an opportunity of explaining away evidence against him. Each point appearing in evidence should be put to the accused and he should be invited to offer his explanation or comment on it. Anything in the nature of cross-examination should be avoided. **U B** NGA SAN NYEIN *v* EMPEROR, 3 U. B R (1917) 3; 18 CR. L. J. 774 **150**

——— Ss 115, 116.

Section 115 of the Evidence Act does not estop any person from denying the legal effect of a transaction to which he is a party, but only the truth of a "thing" which he intentionally caused the other party to believe. The "thing" does not refer to the legal validity of an agreement to relinquish a *spes successionis* when it actuates, nor to an intention which has to come into existence in the future, *e g*, when a succession opens. The intentional misleading under the section refers to the present existence of a right or fact and not to a future metaphysical possibility. **M** ASA BEEVI *v.* KARUPPAN CHETTY **361**

——— S. 115—*Estoppel—Minor, representation by, that he is major, effect of—"Person," whether includes minor*

The meaning of "a person" in section 115 of the Evidence Act cannot be contracted so as to exclude from its connotation all persons declared under the Contract Act incompetent to contract.

Where a person, not being clearly a minor in appearance, represents to another, and so intentionally causes that other to believe, that he is a major and on the faith of that belief causes that other to part with his money, he is estopped from subsequently pleading minority and proving it.

Per *Heaton, J.*—In general the word 'person' when used in the Evidence Act is used in its ordinary sense, and it is used in that ordinary sense in the case of section 115 of the Act also There is nothing in that section which suggests that there should be any limitation put upon the word "person." **B** DADASAHEB DASRATHRAO *v.* BAI NAHANI, 19 BOM L. R. 561; 41 B. 480 **180**

——— S. 155—*Impeaching credit of witness—Criminal Procedure Code (Act V of 1898), Ch. XIV, s. 162—Procedure—Proof of statement to Police—Person, whether bound to state truth to Police.*

Under section 155 of the Evidence Act the credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

Section 162 of the Criminal Procedure Code allows the credit of a witness to be impeached in the manner provided by the Evidence Act by the statement which

EVIDENCE ACT concld.

he is alleged to have made to the Police in the course of an investigation under Chapter XIV of the same Code.

If a Magistrate finds that a witness is recorded as having made a statement different from that which he has made before him and he considers that in the circumstances of the case the discrepancy should be brought to light, he ought to ask the witness if he has made the statement attributed to him by the Police papers If the witness admits that he has, he should be given an opportunity of explaining why the contradiction has occurred If the witness denies that he has made any such statament, the statement must be proved, before it can be used for the purpose of impeaching the credit of the witness. It is not like the deposition of a witness made in the Committing Magistrate's Court, which can be taken off the file of that Court and brought on that of the Court of Session without any proof, because the deposition proves itself. Not so a statement attributed to a witness on the Police papers.

No person is bound to state the truth to the Police in the course of an investigation under Chapter XIV of the Criminal Procedure Code. Hence a statement to the Police is not evidence, as a statement made on oath before a competent authority is **L B** NGA PYU *v.* EMPEROR, 18 CR. L. J. 844 668

EXCISE ACT (XII OF 1896), S. 52—*Licensee—Master and servant—Servant permitting drunkenness in shop during master's absence—Master, whether liable.*

A liquor licensee is responsible under section 50 of the Excise Act for the default of his servants in permitting drunkenness in his shop without his knowledge **L B** NGA SHIN GYI *v* EMPEROR, 18 CR. L J. 865 977

EXECUTING COURT, jurisdiction of, to decide question of mesne profits on restoration of possession 910

EXECUTION—*Judgment-debtor in possession of land under contract of sale—Land, whether can be sold in execution—Judgment-debtor, position of.*

The plaintiff got into possession of a piece of land on payment of the entire consideration for its purchase under a contract of sale. Before the conveyance was registered, however, the land was sold and was purchased by the defendant in execution of a money decree against the plaintiff:

Held, that the plaintiff at the date of the auction-purchase by the defendant had acquired a right to the land which passed to the defendant under the sale in execution, so that the plaintiff could not contend that he had no interest in the property which could be purchased by the defendant at the execution sale, and that he was not entitled to recover the property from the defendant on getting a registered conveyance from its former owner after the defendant's purchase. **C** JNAN CHANDAR DAS *v.* RAJANI KANTA PAL 850

——— *Limitation, question of, not pressed at earlier stage of same proceeding—Estoppel—Question of limitation decided in previous execution proceeding, whether can be raised in subsequent proceeding.*

An order of a Court directing execution of a barred decree to proceed after due notice to the judgment-debtor precludes the judgment-debtor

EXECUTION—concld.

from repeating his objection in a subsequent execution of the same decree. **PAT** BESHESWAR DAYAL *v.* RUP KISHORE LAL, 3 P. L. W. 13 675

——— *Purchaser from decree-holder, position of—Sale subsequently set aside with notice to decree-holder—Refund of price.*

The purchaser of a property from a decree-holder, which the latter purchased at a sale in execution of his decree, cannot treat as a nullity subsequent proceedings of the execution Court in which the execution sale is set aside with notice to the decree-holder but in the absence of and without notice to the purchaser, as such proceedings, being good proceedings against the decree-holder, are good also as regards the purchaser who claims through the decree-holder.

But such purchaser is entitled to a refund of the price paid by him with interest from his vendor. **C** SATI NATH *v.* RATANMANI NASKAR 200

——— *Sale—Misdescription—Wrong* khasra *plot No, whether vitiates sale.*

Khasra numbers are subordinate descriptions of a holding for the purposes of its identification.

Where an entire holding is sold in execution of a rent-decree obtained in respect of the holding, a wrong description of the holding by giving wrong plot numbers does not vitiate the sale. **PAT** RAJENDRA PRASAD SAHU *v* GANGAN KOER, 2 P. L. W. 81; 2 P. L. J. 623 282

——— *Sale—Purchaser, rights of.*

Where property is sold in execution of a decree: ordinarily all right, title and interest therein which the judgment-debtor had in possession, reversion, remainder, or in expectancy would pass to the purchaser, unless the Court limits the operation of the conveyance. **C** KUMUD KRISHNA MANDAL *v.* JOGENDRA NATH, 21 C. W. N. 854; 26 C. L. J. 250 511

EXECUTION OF DOCUMENT—*Fraud—Undue influence—Burden of proof.*

Where the execution of a document is admitted, the burden of proving that it was executed under fraud or undue influence is on the party setting up such plea. **PAT** RACHU GIR *v.* RAGHUNATH GIR, 2 P L W. 23; 2 P. L. J 398 202

EXECUTOR, *decree obtained by—Sale—Purchase by executor—Beneficial ownership in decree, determination of—Family arrangement, effect of.*

K. died leaving four sons and a widow. He left a Will appointing his widow as his executrix. The latter in execution of a rent-decree purchased the property in arrears. Prior to the decree one of the sons having died unmarried, his share had devolved upon the executrix as his mother and a family arrangement had been executed between the members of the family before the auction-purchase of the property, by which the executrix released all her interest in the estate of her deceased son in favour of another son. The plaintiff acquired the entire interest of that son and the other co-sharers in the property:

Held, (1) that under the terms of the family arrangement the executrix had no interest in the property that she purchased *qua* executrix in execution of the decree she obtained as executrix and that

EXECUTOR—concld.

the plaintiff was, therefore, entitled to the property;

(2) that though the decree was obtained by the executrix, the beneficial owners of the estate were the real owners of the decree. **C** KRISHNA PROMODA DASI *v.* KEDAR NATH **732**

———, *power of, to borrow money for carrying on business—Personal liability in respect of borrowings—Creditor's suit against estate and executors—Evidence of mismanagement on executors' part, admissibility of—Parties to suit.*

An executor who borrows money in the course of the administration for the purposes of the estate is personally responsible for the payment of such debts, though he is entitled to be indemnified out of the estate for such borrowing if he shows that it was reasonably and properly made.

In India a business left by a deceased owner is undoubtedly a heri able asset which passes to his heirs, and in the case of a Will, vests in his executor. In respect of the duties of the executor in carrying on that business, whether he does so for the purpose of winding it up or of making it over as a going concern to the person or persons entitled to inherit it and his duties in dealing with any other part of the testator's estate, there does not appear to be any difference between executors in India and in England. An executor may pledge any portion of his testator's estate in order to raise money for the purpose of administration, even when it is necessary to carry on a business left by the testator.

In a suit by the creditors against the executors of an estate for the recovery from the estate of money borrowed by them for the purpose of administration, evidence of mismanagement on the part of the executors should not be shut out, as the estate cannot be rendered liable without deciding the question of the propriety or impropriety of the executor's conduct in borrowing the monies.

Such a suit cannot be decreed against the estate but should be decreed against the executors in their personal capacity subject to the right of indemnity, if any, out of the estate, unless it is established that the borrowing was in all respects proper and for the benefit of the estate.

In such a suit the executors cannot fully represent the estate, as their personal interests as executors are diametrically opposed to those of the estate.

The executors under a Will borrowed large sums of money for the purpose of carrying on a business left by the testator, which ultimately failed. Some of the creditors brought an administration suit in the High Court, while others individually instituted suits against the executors for the recovery of the debts due to them from the estate, and these suits were decreed by the Court against the estate as represented by the executors:

Held, that the Court should have in the exercise of a wide discretion postponed the hearing of these suits and allowed the plaintiffs to prove their claims, along with the rest of the creditors of the estate, in the administration suit which was pending in the High Court, even though no specific order was made by the High Court asking the lower Court to postpone those suits **C** SUDHIR CHANDRA DAS *v.* KAMAL CHANDRA DUTTA, 21 C. W. N. 1043 **503**

EXECUTORS, rights and duties of **605**

EX PARTE DECREE—*Application to set aside decree by some defendants—Decree, entire, whether to be set aside.*

Where, on the application of some of the defendants for setting aside a mortgage decree passed *ex parte* against them, the decree is set aside, it should be set aside in its entirety. **C** BRAJA NATH. *v.* SURENDRA KRISHNA ROY **181**

FALSE COLLUSIVE DEFENCE.

An agreement to maintain a false defence in a civil suit is not an actionable wrong. **PAT** DARRHANGI THAKUR *v.* MAHABIR PRASAD **522**

FRAUD **161**

——— *of plaintiff pleaded by defendant participating in fraud—Proof.*

A defendant who wants to defeat the claim of a plaintiff on the ground of fraud, alleging that he himself participated in the fraud, must produce very strong evidence to establish the fraud, so as to enable him to extricate himself from the difficult situation in which he is placed. **C** AKIL CHANDRA SAHA *v.* GIRISH CHANDRA SAHA, 21 C. W. N. 861 **302**

———*Plaintiff co-vendee's name omitted from conveyance—Suit for possession of share against co-vendees—Limitation—Suit for rectification barred.*

A plaintiff who was a co-vendee of land along with the defendants but whose name was omitted from the conveyance by the fraud of the defendants, who were entrusted with the preparation and execution of the document, can by a suit recover possession of his share, even though the limitation period for rectification of the conveyance by insertion of his name, by a suit properly framed for the purpose, has elapsed. **C** ASITULLA *v.* SADATULLA **747**

GENERAL CLAUSES ACT (X OF 1897), S. 6 *(c)* **581**

GHATWAL in Manbhum, appointment of—Approval of Government, whether necessary.

In the District of Manbhum the *ghatwal* tenure is not heritable. The *ghatwal's* appointment depends upon the will and pleasure of the Government. **PAT** MIDNAPORE ZEMINDARI CO., LTD. *v.* PANDAY SARDAR, 2 P. L. W. 143; 2 P. L. J. 506 **114**

GIFT, *rescission of.*

Although in contracts for sale, mortgage, lease or exchange, there is pecuniary consideration, while in a gift there is no such consideration, yet the right of rescission in the case of a gift (on the part of the grantor) is circumscribed by the same sort of circumstances such as fraud, mistake, coercion, undue influence, misrepresentation or the like as would operate to invalidate a contract. **C** BEHARI LALL GHOSE *v.* SINDHUBALA DASSI **878**

GOVERNMENT OF INDIA ACT (5 & 6 GEO. V) C. 61), S. 107 **652**

——— NOTIFICATIONS Nos. 515 I. B. and 516 I. B. dated 17th March 1913 **993**

GUARDIANS AND WARDS ACT (VIII OF 1890), Ss. 7, 17, 19 (b)—*Natural guardian, legal rights of—Court, power of, to interfere with legal rights of natural guardian—Conversion of father to Islam—Right to continue guardian after conversion—Minors, welfare of.*

Both in equity and under the Guardians and Wards Act, a Court has power to interfere with the legal rights of guardianship of the parents. The

GUARDIANS AND WARDS ACT—contd.

welfare of the children should primarily be considered.

Where a Hindu mother applied for the appointment of a guardian of the person and property of her minor children owing to their father having embraced Islam:

Held, that the Court could not reject the application on merely legal grounds as showing no unfitness in the father under section 19 (*b*) of the Guardians and Wards Act to be the guardian of his children, but should ascertain what would be for the welfare of the minors, whether any of them were sufficiently advanced to make an intelligent preference for one mode of life or the other, to what rules of life had the children hitherto been subjected, what means were at the disposal of each parent to provide for them in future, and whether under the altered circumstances arising from his conversion the father would be able to provide a fit home for his children. If the father should not be able or prepared to provide such a home, he should be held not to be fit to be the guardian of his children within the meaning of section 19 (*b*) of the Guardians and Wards Act.

Per *Crouch, A. J. C.*—English decisions in which the conflict has been between the Protestant and Roman Catholic religions cannot be considered to have any authority in India when dealing with a conflict between Islam and Hinduism. The provisions of the Guardians and Wards Act are in no way limited by the English practice.

Change of religion by itself does not necessarily render a father unfit to be the guardian of his children.

Sections 17 and 19 of the Guardians and Wards Act must be read together.

Quære.—Whether the general rule that a child should follow the religion of his father could apply without qualification to a case where the religion has been newly adopted by the father and is not that in which the child was born or reared. **S** RADHIBAI *v.* DR. VASANMAL, 11 S. L. R. 17 **571**

——— S. 10 (1), (3)—*Application stating date of birth of minor—Proceeding for appointment of guardian—Evidence—Admissibility of proceedings to prove age of minor in subsequent suit.*

The proceedings for the appointment of a guardian of a minor and the cause title of such proceedings stating the age of the minor at the date of the proceedings are not admissible in evidence for the purpose of showing what the age of the minor was at that time. **C** BROJA KRISHNA GHOSE *v.* BENIMADHAB GHOSE **744**

——— S. 13—*Application to appoint guardian—Procedure.*

The procedure under section 13 of the Guardians and Wards Act is not intended to be summary, and a Court should not reject an application for the appointment of a guardian of a minor without any enquiry at all. **P** JIWAN *v.* ZEBO, 63 P. L. R. 1917; 134 P. W. R. 1917 **976**

——— Ss. 17, 19 (*b*) **571**

——— S. 30—*Transfer of minor's interest in decree by certificated guardian without leave of Court, whether can be questioned by judgment-debtor.*

GUARDIANS AND WARDS ACT—concld.

A judgment-debtor cannot question the validity of the transfer of a minor's interest in the decree, made by his certificated guardian without the leave of the District Judge, so as to prevent its execution by the transferee.

A judgment-debtor assignee of a mortgage decree can execute it by putting up the mortgaged property. **C** JAGABANDHU PAL *v.* HALADHAR PAL **269**

——— S. 31—*Mortgage by certificated guardian—Necessity—Order sanctioning mortgage—Creditor, duty of, to prove necessity.*

Where a District Judge satisfies himself as to the necessity for a loan by *ex parte* inquiries and sanctions a mortgage by the certificated guardian of a minor, the lender, if he acts *bona fide*, is not bound to go behind the order sanctioning the loan and is not bound to see to the application of the money, but is entitled to rely upon the order unless he is a party to a fraud for obtaining the sanction. **C** AKIL CHANDRA SAHA *v.* GIRISH CHANDRA SAHA, 21 C. W. N. 864 **302**

——— Ss. 34 (*e*), 36—*Civil Procedure Code (Act V of 1908), s. 2 (14)—"Order," meaning of—Order passed against guardian under s. 34 (e) of Act whether executable.*

Under section 34 *(e)* of the Guardians and Wards Act, the District Court directed the guardian appointed by Court for the estate of a minor female to pay the sum of Rs. 1,600 to the guardian of the person of the minor step-daughter of the aforesaid minor for her marriage expenses. The money was not so paid. The ward attained majority and obtained possession of the property. The step-daughter's guardian applied for execution of the order passed by the District Court as a decree of Court:

Held, that the order was not one contemplated by section 2 (14) of the Code of Civil Procedure, and could no be executed under the provisions of that Code, the proper remedy being by a suit. **M** PARVATHAMMAL *v.* CHOKALINGA CHETTY, (1917) M. W. N. 602; 6 L. W. 526 **341**

——— S. 41 (4)—*Order of discharge of guardian, not in express terms, effect of—Civil suit, whether barred.*

An order of discharge under section 41 (4) of the Guardians and Wards Act, in order to bar a civil suit by the minor against the guardian for rendition of accounts, must be in express terms, and not by implication. **P** AMAR NATH *v.* RAGHPAT RAI, 73 P. W. R. 1917; 108 P. L. R. 1917 **344**

GUARDIAN AND WARD—*Minor, whether* personally *liable for simple debt contracted by guardian—Guardian, whether can bind ward's estate.*

The guardian of a minor cannot bind his ward *personally* by a simple contract debt.

A guardian cannot bind his ward's estate except by a document purporting to bind it. **N** JHITIBAI *v.* TEJMAL, 13 N. L. R. 109 **35**

HIGH COURTS ACT, 1861 (24 AND 25 VICT. C. 104), S. 15 **313, 652**

HIGH COURT, Original Side of, history and power of **313**

HINDU LAW—ADOPTION—Death of adopted son —Second adoption during lifetime of first adopted son's widow—Suit for recovery of estate by first adopted son's reversioner **845**

——— ———Putrishta jag *ceremony, whether necessary.*

Where both the adoptive father and the adopted son are members of the same *gotra*, the *putrishta jag* ceremony is not necessary to validate the adoption. **PAT** SHEO LOTAN RAI *v.* BHIRGUN RAI, 1 P. L. W. 784; 2 P. L. J. 481 **375**

——— CUSTOM—*Impartible* zemindari — *Inalienability and succession by single heir, whether family custom or incident of tenure.*

In cases of grants of land under *zemindari* tenure under the Permanent Settlement, the conditions of the tenure prior to cession cannot be presumed to have continued and it rests on the claimant to show that the manner in which the estate has been treated by the British Government indicated that Government intended to preserve the prior incidents.

Impartibility leads logically to the existence of a power of alienability and not to a rule of inalienability. The custom of impartibility and of succession by a single owner are incidents attached not to the property of a family but to the law governing that particular family.

In cases of military tenures, as regards the question of inalienability without the Sovereign's sanction, the reason for the restricted ownership ceasing as soon as the military service is dispensed with, the ordinary law governing impartible estates involving the right of the holder of that estate to alienate at his pleasure becomes at once applicable, except where a custom of inalienability is proved to exist.

Where a supposed custom has followed the ordinary law as laid down by the Courts, though wrongly assumed to be the ordinary law, such custom, as it did not modify the law as generally understood and had not independently the force of law, cannot be recognised as a valid custom having the force of law. An erroneous view of law, though held for a considerable time, cannot form the basis of an independent custom when the error is discovered and set right. **M** VENKATA PERUMAL RAJU *v.* UDDAGIRI PAPA NAIDU, 21 M. L. T. 351 **208**

——— ———*Succession—Dancing girls—Females, rights of.*

Succession to the estate of a dancing girl is based more upon usage obtaining in the caste than upon any text of Hindu Law, and according to that usage females take in preference to males.

Where, therefore, the succession is to the estate of a dancing girl, a maternal grand-uncle's daughter would be preferred to the maternal grand-uncle's daughter's son. **M** SUBBARATNA MUDALI *v.* BALAKRISHNASWAMI NAIDU, 22 M. L. T. 91; 6 L. W. 184; 33 M. L. J. 207; (1917) M. W. N. 569 **408**

——— DEBTS—*Son's duty to pay just debts of his father—Immoral purposes—Burden of proof.*

A Hindu son is bound to discharge the debts contracted by his father, unless it is shown that they were contracted for illegal or immoral purposes; and where it is alleged by the son that a particular debt was contracted for such purpose, the burden lies on him to prove his allegation.

HINDU LAW—contd.

The burden is not discharged by showing that the father lived an extravagant or immoral life, there must be a direct connection between the debt and the father's alleged immorality.

Where in a suit for possession by a mortgagee it appeared that the deceased mortgagor lived a licentious life far beyond his means, indulging in drink, rioting and prostitution, and the plaintiff mortgagee lived in a portion of the same house which was occupied by the mortgagor and had full knowledge of the latter's mode of life and of the manner in which he was wasting his substance:

Held, that the mortgagor's son was under no obligation to discharge the debts incurred by the mortgagor for such purposes. **P** JASWANTI *v.* TEJ NARAIN, 120 P. W. R. 1917 **192**

——— ——— FAMILY SETTLEMENT—*Deceased's estate, bona fide dispute as to—Compromise between daughter and first cousin, whether binding on reversioners.*

Where a *bona fide* dispute between the daughter and the first cousin of a deceased Hindu regarding his estate resulted in a compromise:

Held, that the compromise was as much binding on the reversioners as on the persons who were parties to it, inasmuch as it was made in the interest of the estate which might otherwise have suffered the expense of a long litigation. **O** HAR DAYAL *v.* SHYAM NARAIN, 4 O. L. J. 376 **126**

——— GIFT—*Transfer of Property Act (IV of 1882), s. 123 Delivery of possession, whether necessary—Registration—Acceptance by donee, express or implied.*

Among Hindus gifts made subsequent to the Transfer of Property Act do not require delivery of possession if there is registration It is essential to a Hindu gift that there should be acceptance by the donee. But acceptance may be express or implied, acceptance being presumed unless dissent is signified. **PAT** MUHAMMAD ABDUL NAYEEM *v.* JHONTI MAHTON **389**

——— ——— *to woman—Presumption.*

There is no presumption under the Hindu Law that every gift of immoveable property made by Will to a Hindu woman is of a limited interest, except in the case of a gift by a husband to his wife. In all other cases a gift to a Hindu woman is taken to be of an absolute interest, unless there is something to show that the interest granted is not to be an absolute interest. **C** KUMUD KRISHNA MANDAL *v.* JOGENDRA NATH, 21 C. W. N. 854; 26 C. L. J 250 **511**

—GUARDIAN—*Ancestral trade, management of by guardian—Minor, liability of, for acts of guardian.*

Under Hindu Law where an ancestral trade descends upon a minor as the sole member of the family, and the ancestral trade is carried on under the superintendence of the minor's natural guardian for the benefit of the minor, the minor will be bound by all the acts of the guardian necessarily incidental to or flowing out of the carrying on of the trade. **N** JHITIBAI *v.* TEJMAL, 13 N. L. R 09 **35**

——— JOINT FAMILY—*Dayabhaga Possession of male members of family, whether possession of daughter of deceased member—Presumption—Adverse possession—Ouster, necessity of, proof of.*

HINDU LAW—contd.

In a Hindu family governed by Dayabhaga one of several brothers died leaving a widow and a daughter. The widow continued to be in possession of his share of the property till her death. After her death the male members of her husband's family remained in possession of the property and the daughter remained with her husband:

Held, that the possession of the male members of the propositus family must be presumed to be on behalf of his daughter. No adverse possession could be presumed until ouster was proved. **PAT** JAGU MANDAL *v.* MADHAB MANDAL 39

———JOINT FAMILY—Karta, *power of, to give consent for transfer of occupancy holding not transferable by custom.*

The consent given for the transfer of an occupancy holding not transferable by custom, by the *karta* of a joint Hindu family under which it is held, is binding on the other members of the family.

The powers of a *karta* of a joint Hindu family include the power to recognize the transfer of a tenancy not transferable without the landlord's consent. **C** GOLAPDI MEAH *v.* PURNA CHANDRA DUTTA, 21 C. W. N. 774 37

———*—trade carried on by manager—Debts, liability for—Presumption—Minor co-parceners, liability of—Guardian, right of, to continue caste trade, on death of manager.*

Where a Hindu family belongs to a caste whose caste calling is a particular kind of trade and the manager of the family carries on the trade as a family concern, it is competent for the next surviving eldest co-parcener on the manager's death to continue the trade on behalf of the family and minor co-parceners are bound by his acts and are liable for debts contracted by him as their guardian in the course of such trade.

Where the surviving members are all minors, it is competent for the mother to continue the trade on their behalf under the advice of her relations and to bind the minors for liabilities incurred by her in the course of the business.

The ordinary presumption in the case of a trading caste or family is that the entire family credit and all the joint family properties are embarked in the business, even as regards the minor members. The whole of the joint family properties, therefore, and not the trade assets alone are liable for the joint family trade debts which cannot, on principle, be distinguished from any other joint family debts. **M** MALAIPERUMAL CHETTIAR *v.* ARUNACHALLA CHETTIAR, 6 L. W. 417 224

———STRIDHAN, *non-Technical—Mayukha—Son, whether excludes son's son.*

Under the Mayukha a son who does not survive his mother cannot pass on by the doctrine of representation any right to his sons to succeed to the non-technical *stridhan* of his mother in competition with her surviving sons. **B** BAI RAMAN *v.* JAGJIVANDAS KASHIDAS, 19 BOM. L. R. 629; 41 B. 618 277

HINDU LAW—contd.

———SUCCESSION—Bandhu—*Sister's son and maternal uncle, right of succession of, in preference to mother's sister's son.*

Under the Hindu Law the nearest *bandhu* succeeds. A sister's son and a maternal uncle are, therefore, preferred to a mother's sister's son. **PAT** GAURI SHANKER JOSHI *v.* MANRAJ SHUKUL, 3 P. L. W. 198 705

———SUCCESSION—*Mitakshara—Sister's son and grandson, whether* bandhus.

According to the Mitakshara School of Hindu Law, a sister's son and grandson are *bandhus* and can succeed to the property of the deceased as his heirs. **P** BHAG MAL *v.* BHAGWAN DAS, 125 P. W. R. 1917 636

——— ———*Sudra* sanyasi—*Disinheritance.*

The texts of Hindu Law as to disinheritance applicable to a *yathi* or *sanyasi* do not apply to a Sudra ascetic, unless a usage to this effect is established. A Tambiran has rights to family property after becoming a Tambiran. **M** SOMASUNDARAM CHETTIAR *v.* VAITHILINGA MUDALIAR, 6 L. W. 253; 40 M. 846 546

——— ——— *Widow and daughter, rights of, in estate of deceased—Compromise, effect of.*

One *O.* was the owner of certain property including a house. He died leaving a widow and two daughters. On his death one *L.* claimed to be his devisee under a Will and took possession of his estate. *O.'s* widow sued *L.* for possession of the property but died while the suit was pending, and her two daughters were substituted for her. Thereafter the suit was compromised and the house was, under the compromise, obtained by *R.* one of the daughters. Plaintiff on account of a personal debt of the widow of *O.* obtained a decree against *R. qua* the legal representative of her mother, but the decree was confined to the assets of the widow in the hands of *R.* The decree-holder, in execution of the decree, sought to attach and sell the house which *R.* had obtained under the compromise with *L.*:

Held, (1) that the house did not form any part of the assets of the widow, but was *R.'s* inheritance from her father, inasmuch as though *R.* and her sister took up the duties of their mother as plaintiff in an heir-at-law suit against an invader, they did so as heirs of their father and not as heirs of their mother, and any property which they obtained by force of that suit constituted their inheritance from their father and was no part of the estate of their mother;

(2) that under the compromise each party took what he and she got by virtue of the independent title set up by him and her, and that to the extent of the property which *R* got, her title as her father's heir was admitted by the other parties by way of compromise. **N** GANESH PRASAD *v.* REWA BAI, 13 N. L. R. 116 883

———..WIDOW—*Acceleration—Maintenance—Reversioner, whether can deal with contingent interest.*

A reversionary Hindu heir has no right to deal with his expectant interest.

HINDU LAW—concld.

A Hindu widow must surrender her entire interest in her husband's property in order to effect a valid acceleration of the estate in favour of the next reversioner.

One *T.* died leaving two widows *P.* and *K.* *P.* and *K.* divided the property between themselves. *K.* during her lifetime surrendered her entire interest in the property in favour of her daughter's son to which the daughter consented. The daughter's son, on the other hand, agreed to give *K.* Rs. 1,200 per year for her maintenance and it was agreed that in lieu of her maintenance she should remain in possession of four villages belonging to her husband:

Held, that the surrender effected a valid acceleration. **PAT** DILTOR KOER *v.* HARKU SINGH, 1 P. L. W. 760; (1917) PAT. 225; 2 P. L. J. 578 **631**

——— ———, alienation by—Reversioners, rights of **775**

——— ——— ———*purchasing husband's estate in execution of decree against her, rights of—Burden of proof —Presumption.*

Where land, in which a Hindu widow had a 1/5th undivided share, was let out in permanent lease by her co-sharers and the widow without legal necessity, and subsequently on partition that land was allotted to the widow:

Held, that after the widow's death her husband's reversioner would be entitled to set aside the whole lease, but that the lessee would be entitled by a separate suit to enforce his right as against the other co-sharers of getting a lease of property of equal value out of the properties allotted to them. **C** NIRANJAN MUKERJEE *v.* SHIB PROSAD **370**

HINDU WILLS ACT (XXI OF 1870), *power of executor under.*

Under the Hindu Wills Act, an executor under Will has a statutory position and the estate of his testator vests in him. His position is not like that of a guardian of a minor or a *shebait* or a widow succeeding to her husband's estate, but he is the legal representative of the testator for all purposes and all the property of the testator vests in him as such. **C** SUDHIR CHANDRA DAS *v.* KAMAL CHANDRA DUTTA, 21 C. W. N. 1043 **503**

IDENTIFICATION OF ACCUSED, *evidence of, value of—Prosecution, duty of,*

The evidence of witnesses that they identified such and such accused first at the identification parades and then in Court, is valueless where the prosecution fails to prove conclusively that there was no possibility for the witnesses to have seen the features of the accused before he was placed in the parades. **P** SAHAI SINGH *v.* EMPEROR, 21 P. W. R. 1917 CR; 18 CR. L. J. 852 **820**

INCOME TAX ACT (II OF 1886), S. 11 **968**

——— SCH. II, PART II **968**

INCOME TAX AMENDMENT ACT (V of 1916) **968**

INJUNCTION, grant of—Crown, right of entry of, on private property to regulate distribution of water **24**

——— in support of void contract, whether can be granted **869**

———, suit for—Easement—Water rights, extent and scope of—Suit to restrain use of watercourse where no damage caused, maintainability of—Suit by transferee from Hindu widow **47**

INTEREST, delay in instituting suit, whether ground for disallowing **915**

———, *high rate of, whether penalty.*

There is nothing in law to prevent parties to a loan from contracting that a high rate of interest should be paid, if the money is not re-paid within a certain time. The rate of interest, deliberately arrived at by the parties to a contract, should not be reduced by a Court on the ground that being high it is a penal rate. **C** PADMA LOCHAN CHAKRAVARTTY *v.* RUSTOM KHAN **897**

———, *right of creditor to appropriate payment towards—Contract Act (IX of 1872), s. 60, applicability of, to decrees.*

In the absence of any appropriation by the debtor, it is open to the creditor to apply the payments made by the debtor in the first instance towards the interest and the balance only towards the principal.

There is no reason why this rule should not apply to a decree when there is an express provision for the payment of interest in the decree, whether the decree be an instalment decree or a decree of an ordinary kind.

If money is paid by a debtor when there is interest due to the creditor, unless the contract or decree provides to the contrary or the money is otherwise specially appropriated by the debtor, the creditor has a right to pay himself his interest.

When interest is payable under an express stipulation or provision, the interest becomes a debt accessory to the principal debt and section 60 of the Contract Act is applicable. **C** BISWANTH BHATTACHARJEE *v.* SAMESWAR SARMI, 21 C. W. N. 1055 **348**

JUDGMENT—*Finding, defective.*

The law requires that proof of limitation should be clearly established, and a finding that "on a consideration of all the circumstances of the case" the suit is barred by limitation, is defective and unsatisfactory. **PAT** RAM PERTAP LAL *v.* KESHO PRASAD SINGH, 2 P. L. W. 12 **385**

JURISDICTION—*Cause of action, accrual of—Civil Procedure Code (Act V of 1908), ss. 20, 21—Decree obtained in one Court—Suit to set aside decree in another Court.*

The defendants obtained a fraudulent *ex parte* decree in Bilaspur against the plaintiffs, who were the residents of Arrah District, by suppressing summons in the District of Arrah. They then got the decree transferred from Bilaspur to Arrah and applied for execution of it by issuing warrants of arrest against the plaintiffs. Notice under Order XXI, rule 22, of the Civil Procedure Code was issued and then the plaintiffs came to know of the decree against

JURISDICTION—concld.

them. They then instituted the suit in the Munsif's Court at Arrah to set aside the decree on the ground of fraud:

Held, that the Arrah Court had jurisdiction to entertain the suit. **PAT** RAJ KUMAR SINGH *v.* RAJ KESWAR KOERI 161

——— *of Civil and Revenue Courts—Declaratory relief—Discretion of Court—Notice of ejectment, cancellation of, by Revenue Court on ground of perpetual lease—Suit in Civil Court for cancellation or declaration of invalidity of lease—Civil Court, jurisdiction of.*

Where a tenant in a suit to contest a notice of ejectment claimed to be a perpetual lessee and relied on a perpetual lease which was upheld by the Revenue Courts and the notice was cancelled, and a suit was then brought for the cancellation of the lease or for a declaration of its invalidity on the ground that it was a forgery or that it was executed by a person who had no authority to execute the same:

Held, (1) that the decision of the Civil Court on either of those points could not affect the validity or otherwise of the decision of the Board of Revenue in regard to a matter with which it was competent to deal;

(2) that a declaratory decree militating against the decision of a competent Court having exclusive jurisdiction to decide the matter should not be granted. **O** BADRI *v.* KHURSHED ALI KHAN, 20 O. C. 182 15

——— *of Civil and Revenue Courts—Plaint, wording of.*

Where there is a question whether a case is one for a Civil or for a Revenue Court, primarily the plaint alone should be considered; but where the plaint is ambiguous, the Court first hearing the case should always point out to the plaintiff where the ambiguity lies and ask him to make his meaning clear. **P** ALLAH DIA *v.* ALLAH BAKHSH, 43 P. R. 1917; 110 P. W. R. 1917 120

——— *of Civil and Revenue Courts—Title, question of—Partition proceedings, effect of.*

A Civil Court has no jurisdiction to enter into a question of title already adjudicated upon by a Revenue Court during the course of partition proceedings conducted by it. **O** SILWANTA SHUKUL *v.* MAHABIR SHUKUL, 4 O. L. J. 363 88

——— *of inferior Court to set aside decree of superior Court—Fraud—Compromise, suit to set aside.*

An inferior Court has jurisdiction to set aside the decree of a superior Court obtained by fraud, provided it is otherwise competent to try the suit.

It matters not whether the impeached judgment has been pronounced by an inferior Tribunal or by the highest Court of Judicature in the realm: in all cases it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud. **M** ARUNACHELLAM CHETTY *v.* SABAPATHY CHETTY, 6 L. W. 368; 33 M L. J. 499 937

———, want of, whether can be cured by long practice 1

'KUDIVARAM,' *meaning of.*

The word 'kudivaram' has got several meanings. Its literal significance is the share of the cultivator in the produce raised. In that sense, the *kudivaram* belongs to the cultivating tenant, whether he has got a right of permanent occupancy in the land or is a lessee for only one year, or is a lessee from year to year or for a fixed term or is even a mere tenant-at-will. *Kudivaram* is also used in the sense of the *right* of such a tenant of whatever kind in the land so long as he continues in possession of the land. Finally, it is also used to mean the right of a tenant having a permanent occupancy tenure in the land in his holding. In this last sense, it is also called *mirasidari* right and sometimes *kudimiras* right.

In an *inam* village in which there are no tenants having occupancy rights and of which the *inamdar* is also the *mirasidar*, the full ownership right is in the *inamdar* and the distinction between *melvaram* right and *kudivaram* right is of no utility.

A *mirasidar* who gets a *shrotriem* grant from the Government does not lose thereby his original *kudivaram* right in the lands and might be called both an *inamdar* and a *mirasidar*. **M** NAINA PILLAI *v.* RAMANATHAN CHETTIAR, 33 M. L. J. 84 788

LACHES AND ACQUIESCENCE, difference between 722

LAND ACQUISITION ACT (I OF 1894), S. 32—*Compensation money invested under provisions of section—Special Judge, power of, to deal with questions of application of money—Hindu widow, right of, to get fund invested—Burden of proof.*

The sum awarded as compensation for land acquired under the Land Acquisition Act, which is invested in Government securities under the provisions of section 32 of the Act, remains in the custody of the Special Judge, so that he is competent to deal with the question of its application.

Consequently, he is the proper officer to determine whether any portion of the fund so invested should be made over to the widow of the person to whose estate the land acquired belonged and for this purpose to investigate whether contingencies have happened which entitle the widow to make an absolute alienation of the fund.

Where the widow applies to the Special Judge for portions of the fund so invested it is incumbent upon her in the first instance to establish that events have happened which entitle her to spend either in whole or in part the fund in the custody of the Court. When she has satisfied the Court that such events have happened the burden of proof shifts to the reversioners to meet her allegations.

Section 32 of the Land Acquisition Act contemplates the application of the compensation money in the purchase of other lands, which when acquired must become additions to the estate of the full owner from whom the widow derives title. But an application of the money to save a land comprised in the estate inherited by the widow from her husband, from an impending sale, is not an investment "in the purchase of other lands" within the meaning of that section. **C** DEBENDRA NATH DE *v.* TULSIMONI DASI, 26 C. L. J. 123 810

LAND REGISTRATION ACT (VII B. C. OF 1876), S. 78, *bar prescribed by—Previous payment of rent by tenant, effect of.*

A suit for rent brought by the plaintiff, on the allegation that he was owner of the land, was dismissed on the ground that his name was not registered under the Land Registration Act. Subsequently he brought another suit against the same tenant for rent, in which he claimed as a *talukdar* under the proprietor:

Held, that if the plaintiff was in fact a proprietor, the fact that the defendant had previously paid rent to him would not affect the defendant's right to set up the defence that section 78 of the Land Registration Act was a bar to the plaintiff's getting a decree and the mere allegation by the plaintiff in the plaint that he was a *talukdar* under the proprietor would not avail him.

Per *Mookerjee, J.* –The bar prescribed by section 78 of the Land Registration Act to the plaintiff's getting a decree in a suit for rent in consequence of his name having not been registered under the Act does not cease to be applicable, merely because the plaintiff establishes that the defendant has previously paid rent to him amicably or that he brought the defendant upon the land. **C** BANGSHI BADAN *v.* KAMALA KANTA, 26 C. L. J. 90 **477**

LANDLORD AND TENANT—*Abandonment—Mortgage, usufructuary, of non-transferable occupancy holding—Tenant leaving village but not for good.*

There is no abandonment of an occupancy holding where the tenant after execution of an usufructuary mortgage of a portion of the holding leaves the village but not for good, and his heirs come back and resume possession of a portion of the land. **C** RAJAB ALI MIAN *v.* PANDU MULLICK **396**

———*Alluvion and diluvion—Tenant, right of, to diluviated area on its re-formation* in situ—*Rent, remission of, on diluvion, effect of—Abandonment.*

Although the mere fact of a tenant claiming and accepting remission of rent in respect of lands washed away from time to time by the action of a river does not conclusively prove that the tenant abandoned or agreed to abandon his right to such lands on their re-formation *in situ*, still where the tenant surrenders the diluviated area and agrees to pay a reduced rent for the remainder of the lands, he cannot claim the diluviated area on its re-appearance, as in consequence of his act, his original holding becomes divided into two holdings one of which continues to be his tenancy, while the other which is under water is vested in the landlord free from his subordinate right as a tenant. **C** KALAN SINGH *v.* SECRETARY OF STATE **682**

———Bhaoli *land—Road cess return—Recovery of rent at rate higher than that mentioned in return.*

In the case of *bhaoli batai* holdings the landlord is entitled to recover rent at a rate higher than that mentioned in the road cess returns. **PAT.** UPENDRA LAL MISRA *v.* MOTI THAKUR, 2 P. L. W. 35; 2 P. L. J. 617 **61**

———*Construction of document—Rent payable partly in cash and partly in kind—Tenant's liability on failure to pay rent in kind*—Res judicata.

Where a *patta* was granted fixing Rs. 6 as the annual cash rent and $5\frac{3}{4}$ *aris* of paddy, the price of which was Rs. 11-8-0, as the paddy rent, in all Rs. 17-8-0, and the lease provided that upon the lessee

LANDLORD AND TENANT—contd.

keeping the boundaries of the land intact and paying cash rent in equal instalments as mentioned therein and delivering the paddy rent every year in the month of *Magh*, he, his sons, grandsons and heirs should continue to enjoy and possess the land in quiet happiness:

Held, that the tenant had not the option under the terms of the *patta* either to deliver the paddy or to pay the amount mentioned therein as its price but that in default of delivering the paddy he was liable to pay its market price.

Cases like this turn on the words used in the lease, and there is no universal rule that if paddy is not delivered the tenant has the right to pay the amount mentioned for the paddy.

The fact that in a former suit between the parties the amount mentioned in the *patta* was taken as the basis of the amount of the rent payable in kind, cannot operate as *res judicata* in the subsequent suit. **C** SARAT CHANDRA ROY *v.* ABBAS ALI **833**

———Co-sharer landlord, right of, to maintain separate suit for share of rent—Registration of co-sharer's name under Land Registration Act (VI B. C. of 1876) **859**

———*Decree in rent suit obtained when plaintiff not landlord—Execution as rent decree—Precedents, value of.*

A plaintiff, who institutes a suit for arrears of rent and obtains a decree at a time when the landlord's interest is not vested in him by reason of an execution sale thereof, can, after the restoration of his status as a landlord on the cancellation of the execution sale, execute the decree as a rent decree. **C** MANINDRA NATH GHOSE *v.* ASHUTOSH GHOSE, 25 C. L. J. 626; 21 C. W. N. 1132 **525**

———*Easement by prescription, whether can be acquired by tenant—Right to raise water for irrigation —User for* 50 *years—Presumption of lost grant.*

An easement by prescription under the Limitation Act cannot arise between landlord and tenant.

Where the plaintiff's predecessor-in-title has openly and notoriously used the water from the tank of the defendant as of right and without any objection by the latter for 50 years, the Court is justified in presuming the existence of a lost grant. **PAT** KRISHNA CHANDRA MANDAL *v.* RAM SAHAY KATARI, 2 P. L. W. 46 **577**

———*Ejectment, suit for—Occupancy right, plea of* —Inam, *grant of, to temple—Presumption of grant of both* warams—*Onus of proof—Jurisdiction of Court*—Taram faisal muchilika, *recitals of* 'kudimiras', 'swamibogam' *in, effect of—Transfer by tenants—Acquiescence by temple trustees—Estoppel.*

Where trustees of a temple to whom certain lands were granted by the Government as *inam* sue the tenants in ejectment, the burden of proving that the *inamdar* was not the owner of the *kudivaram* right at the time of the grant lies on the defendants inasmuch as the effect of upholding such a plea would be to oust the jurisdiction of the Civil Court

A defendant opposing an action in ejectment on the ground of his possessing occupancy rights should prove it strictly.

The mere execution of *taram faisal muchilikas* to Government prior to the grant to the temple does not indicate the possession by the tenants of perma-

nent occupancy rights. The mention of such expressions as *kudimiras swamibogam*, *ulavadai*, etc., is not conclusive proof of such rights.

Mere length of tenure will not give a right of permanent occupancy to a *ryot*, who has been let in from year to year.

The acquiescence by temple trustees in transfers made by the tenants of the lands in their holdings or their non-opposition to such transfers will not create an estoppel against the landlords nor give the tenants permanent rights. Where a landlord is legally entitled to grant rights as against him to a tenant, he can, by acquiescence or conduct amounting to estoppel, be treated as having made such grant. But the trustees of a temple have no legal right or power to confer higher rights on a temple tenant in the temple lands in his holding than he originally possessed except for the necessities or the clear benefit of the temple. Nor can such higher rights be invoked by the law of limitation or prescription when lesser rights were conferred on the tenant by a document between the parties or by the conduct of the trustees. **M** NAINA PILLAI *v.* RAMANATHAN CHETTIAR, 33 M. L. J. 84 **788**

———*—Gift of non-transferable occupancy holding, whether binding upon heirs of donor.*

A gift of a non-transferable occupancy holding made by a *ryot* without the landlord's consent is binding upon his heirs, as by the gift the property ceases to form part of the estate of the donor so that his heirs cannot claim it as an inheritance. **C** BEHARI LAL GHOSE *v* SINDHUBALA DASI **878**

———*—Lease granted by some co-sharers of joint property—Partition – Lessee, right of.*

A person taking a lease of a property from some of the co-sharers, who have an undivided interest in it, takes subject to the right which the other co-sharers would have on partition, namely, that if the property on partition falls to the lot of the other co-sharers, they would not be bound by the lease.

Although in an ordinary case the purchase of a property by a Hindu widow cannot be presumed to be made out of the income of her husband's estate, yet where the widow permits a portion of the husband's estate to be sold in execution of a decree against her more than fifty years after the death of the husband, and purchases it herself, the presumption would be that the purchase was made by the widow out of the income of the husband's estate, so that by the purchase the property was put back in exactly the same position in which it was before the decree and the sale thereunder.

Where a portion of the husband's estate is sold in execution of a decree against the widow more than fifty years after the death of the husband, the presumption would be that the property was not brought to sale for the liability of the husband. Therefore the onus of proving that the property was brought to sale to enforce a liability of the husband, lies on the person alleging it. **C** NIRANJAN MUKERJEE *v.* SHIB PROSAD **370**

———*—Occupancy holding, non-transferable, purchaser of, in execution of money-decree, rights of, against subsequent purchaser in execution of money-decree recognized by landlord—Settlement.*

The plaintiff purchased a non-transferable occupancy holding in execution of a money-decree but before he took possession from Court, the defendants purchased the same in execution of another money-decree and obtained delivery of possession, and the rent paid by them was accepted by the landlord. In a suit by the plaintiff to recover possession of the holding from the defendants as its prior purchaser:

Held, that as the landlord, who had a right to re enter upon the land on its abandonment by the heirs of the original tenant, had accepted rent from the defendants and treated them as tenants, there was practically a settlement with them by the landlord and that, therefore, the plaintiff as the purchaser of the interest of the tenant did not acquire any interest which could be enforced against the landlord or the defendants claiming under the landlord. **C** ISHWAR CHANDRA SARMA *v.* KAILASH CHANDRA NATH **639**

———*—Occupancy tenancy—Right of landlord to cut trees.*

Where the plaintiff (tenant) failed to show that the loss of a *kikar* tree cut by the landlord was in any way prejudicial to his agricultural interest:

Held, that he was not entitled to an award of damages for the injury done, and that as he was not the proprietor of the tree he was not entitled to its price or any portion of it. **P** POKHAR DAS *v.* AMIR, 5 P. R. 1917 REV.; 3 P. W. R. 1917 REV. **997**

———*—Recognition of tenancy—Withdrawal by agent of money deposited as rent, effect of.*

Where the agent of the plaintiff landlord duly authorised to do so withdrew rent deposited by the defendants in respect of a holding:

Held, that the withdrawal amounted to recognition of the defendants as tenants of the holding, or at all events, to an acknowledgment that the defendants were not trespassers **PAT** MOTIHARI CONCERN, LTD. *v.* LACHMI PRASAD, 2 P. L. W. 158 **885**

———Rent suit—Tenant, whether can plead right of third person to receive rent **97**

———*Small Cause Court, jurisdiction of—Suit for damages for cutting down trees.*

A suit by a landlord against a tenant for damages for cutting down trees on his holding does not lie in a Small Cause Court, where the relief claimed depends upon the determination of the status of the defendant as a tenant. **C** SURENDRA NATH BHAUMIK *v.* GAYESHUDDIN **494**

———*Suit by landlord for* khas *possession of land adjoining tenant's holding—Burden of proof.*

Where a landlord brings a suit against a tenant for *khas* possession of a plot of land, which is contiguous to the tenant's holding, on the ground that it was not included within the holding, the onus is upon the plaintiff to show that the land was not within the limits of the holding of the defendant. **C** MEYOA LALL GHOSE *v.* GOBINDA SUNDER SINHA CHOWDHURY **679**

LANDLORD AND TENANT—contd.

——— *Suit for rent—Persons acquiring interest in tenancy prior to suit, position of—Parties, non-joinder of, in rent suit, effect of—Validation Act (I B. C. of 1903), effect of.*

In a suit for arrears of rent of a tenure, the plaintiff if he desires to affect or override the interest of a person in the tenure acquired prior to the institution of the suit must, if he becomes aware of such interest subsequent to the institution of his suit, join such person as a party to the suit.

A landlord brought a suit for arrears of rent of a tenure against the tenure-holder, whose interest in a part of the tenure had been purchased by the defendants before the institution of the suit at a sale in execution of a money-decree against the tenure-holder but the landlord's fee was not deposited till after the confirmation of the sale. After the institution of the suit the landlord became aware of the defendants' interest in the tenure but did not make them parties to the rent suit and got a decree against the tenure-holder. In execution of that decree the landlord purchased the tenure:

Held, that having regard to the terms of the Validation Act (I B. C. of 1903) the defendants acquired an interest in the tenure before the plaintiff instituted his suit for rent and as he did not make the defendants a party to that suit when he became aware of that interest subsequent to the institution of the suit, he could not affect or override that interest of the defendants by his purchase of the tenure in execution of his decree for rent against the original tenure-holder. **C** KALI CHARAN SHAHA *v.* GOBINDA SUNDAR SANYAL **733**

——— *Suspension of rent—Dispossession of tenant from portion of tenancy.*

The landlord's eviction of a tenant from a substantial portion of the land of his tenancy leads to a suspension of the entire rent due for the period of eviction.

Courts should be reluctant to relax this rule. **C** TIPAN PRASAD SINGH *v.* RAMJI RAM **91**

——— *Tenancy, sub-division of, whether creates new tenancies—Intention of parties.*

The mere sub-division of an old tenancy into several tenancies with apportioned rents is not sufficient to create new tenancies. The answer to the question whether new tenancies have been created by the sub-division depends upon the intention of the parties. No inflexible rule apart from intention can be laid down. **C** PROSUNNA DEB RAIKAT *v.* PANCHKOWRI MAJUMDAR **691**

——— Zurpeshgi *lease, construction of—Lessee under* zurpeshgi *lease, rights of, nature of.*

Under a *zurpeshgi* lease *A* entered into possession of the land in order to secure repayment of the advance that he had made to *B*. He was required to cultivate the land and to pay merely a nominal annual rent of Rs. 2-4-0:

Held, that the object of the *zurpeshgi* lease was not to create the relationship of landlord and tenant but to provide a security as between debtor and creditor and that this being the governing intention between the parties to the contract, *A* had entered into possession in the capacity of a mortgagee and not as a *raiyat* and consequently was not entitled to claim occupancy rights in the land. **PAT** SHEO SAHAI MISIR *v.* BAJO SINGH, (1917) PAT. 271 **495**

LEASE, *construction of*—Istimrari mourasi mokarrari, *meaning of.*

The words *istimrari mourosi mokarrari* in a lease always mean permanent and heritable and not merely permanent for the life of the grantee, even where no other words indicating a heritable interest, such as "the grantee, his sons and grandsons in succession should enjoy the property in perpetuity" are used in the document. **C** BAIKANTA NATH *v.* LAKSHAN CHANDRA **875**

———, *construction of—Lease for indefinite period, whether heritable or permanent—Renewal of lease.*

Where a *kabuliyat* which stated that the lands were settled for five years as a *sarasari jote* at a certain rent, provided that after the expiration of the term the lessee shall take a fresh settlement under a fresh *kabuliyat* and that in case of failure he shall hold and enjoy possession of the land on payment of an excess rent of one anna per rupee every five years, and that the lessee shall not be competent to make a gift, sale or mortgage of the tenure to anybody:

Held, that upon a proper construction of the *kubuliyat* the lessee, if he failed to take a fresh settlement on the expiry of the first term, was to hold and enjoy possession of the land at an increased rent as provided in the *kabuliyat* and that there was no renewal of the lease at the end of every five years; that the tenancy, therefore, after the expiry of the first term was for an indefinite period; but as there were no words of inheritance in the lease nor were any circumstances, such as long possession, or the fact of succession to heirs or a series of transfers established, the tenure could not be presumed to be a heritable or permanent one. **C** JAGADISH CHANDRA ROY *v.* BISWESWARI DEBYA **227**

——, *construction of—Permanent lease—Covenant for re-entry, whether personal—Covenant running with land—Construction of covenant—Landlord and tenant—Tenant, right of, to land annexed to tenancy by way of encroachment.*

The interest created by a *taluka patta* and called a *taluka* constitutes *prima facie* a permanent tenure, where there is nothing, either in the surrounding circumstances or in the instrument which creates it, to show that it was intended to be otherwise.

Where the instrument creating a tenancy called *taluka* was silent upon the questions of heritability and transferability, but during the period of sixty years which had elapsed since its creation, the tenancy had passed in inheritance from father to son and had formed the subject of successive transfers and the succession and transfers were recognised by the landlord and the rent fixed at its inception was never varied and the grant was for residential purposes and structures were erected on the land:

Held, (1) that the lease was intended to be permanent, notwithstanding the fact that there was a covenant in the lease that if the grantor had personal necessity, the grantee would be bound to relinquish the land;

(2) that the said covenant was a personal one and did not run with the land, so that it ceased to be operative after the death of the grantor. In such a case the covenant must be construed most strongly against the grantor and most beneficially in favour of the grantee;

(3) that the same conclusion was applicable not merely to the plot which was covered by the grant but also to another plot which had been annexed to it by the tenant by way of encroachment, as the landlord had not, within the statutory period from the date of encroachment, instituted a suit to eject the tenant from the second plot on the ground that he could not, without his consent, acquire the status of a tenant in that plot.

Quære.—Whether the landlord was entitled to claim additional rent in respect of the plot encroached upon.

The question whether a covenant in a lease is a personal one or runs with the land, depends upon the true intention of the grantor and grantee to be ascertained from the construction of the terms of the instrument. It is impossible to tell by general reasoning what rights will be held to belong to the class of personal covenants or where the line would be drawn between personal covenants and covenants running with the land

A covenant in a lease reserving a right of re-entry to the grantor on a certain contingency must be construed most strongly against the grantor and most beneficially in favour of the grantee, unless the meaning of the covenant is perfectly clear and it is expressed in absolutely unambiguous language. **C** SARADA KRIPALALA *v.* AKHIL CHANDRA BISWAS, 21 C. W. N. 903 **530**

——— *in favour of two lessees—Joint or divisible—Suit by one lessee for his share, maintainability of.*

Where a lease is executed in favour of two persons in equal shares, the contract is a divisible one and each of the lessees is competent to bring a suit for the one half share contracted to be leased to him. **P** RUP CHAND *v.* FAZAL ILAHI, 40 P. R. 1917; 111 P. W. R. 1917 **70**

LEGAL PRACTITIONERS ACT (XVIII OF 1879), S. 4—*Sanction to prosecute granted or refused by Civil Court—Original Side of High Court, history and power of—Practice—Presidency Small Cause Court refusing sanction for prosecution—Vakil's right to appear.*

Per *Teunon, J.* (*Chaudhuri, J.*, dissenting)—The Presidency Small Cause Court is no part or branch of the High Court but is an inferior subordinate Court, and in dealing with its judgments and orders the High Court is a superior Court exercising not original but appellate or revisional jurisdiction. Therefore, under the provisions of section 4 of the Legal Practitioners Act, a Vakil enrolled and ordinarily practising in the High Court is entitled to be heard on behalf of a party in such matters

A question relating to the rival claims of different sections of Legal Practitioners of the High Court cannot be settled by the opinion of a single Judge or of a Division Bench of the Court.

The practice of a Court must give way to the law and to the rights conferred by law.

The history of the Original Side and its powers traced.

The Appellate Divisional Benches of the High Court as such have no power of superintendence over the Presidency Small Cause Court.

The practice of the Court forms the law of the Court and the Court should be loth to depart from the established practice, unless convinced that it has not the sanction of law and is grossly erroneous.

Per *Teunon, J.* The Judges of the High Court appointed by the Chief Justice from time to time to exercise the Ordinary Original Civil Jurisdiction of the High Court do not constitute a separate and independent Court.

A Bench constituted by the Chief Justice to deal with orders and judgments of the Presidency Small Cause Court forms a principal Court of Original Jurisdiction situate in Calcutta, and, therefore, a Vakil enrolled and ordinarily practising in the High Court has no right of audience before such a Bench. **C** BUDHU LALL *v.* CHOTU GOPE, 21 C. W. N. 654; 25 C. L. J. 491; 18 CR. L. J. 793 **313**

——— Ss 13, 14—*Enquiry by Court into conduct of Pleader not entitled to practise before it, legality of.*

A charge of unprofessional conduct in the discharge of professional duty made against a Pleader can be enquired into only by the presiding officer of the Court in which the Pleader practises.

Where a District Judge, in an enquiry into the conduct of a second grade Pleader in the matter of an execution proceeding in a Subordinate Judge's Court, sent a witness to a Magistrate under section 476, Criminal Procedure Code, to be prosecuted for perjury:

Held, that the proceeding was *ultra vires* as the District Court had no jurisdiction to enquire into the Pleader's conduct. **M** NALLASIVAN PILLAI *v.* RAMALINGAM PILLAI, 32 M. L. J. 492; (1917) M. W. N. 303; 6 L. W. 364; 18 CR. L. J. 785 **305**

——— S. 14—*Professional misconduct—Vakalatnama, acceptance of, whether should be endorsed by Pleader acting under its authority.*

In miscellaneous proceedings arising out of a suit a Pleader is entitled to act on the authority of a *vakalatnama* obtained by him in the principal suit.

A Pleader ought to endorse his acceptance on the *vakalatnama* under which he acts as required by the rules of the High Court, and if he does not accept the authority in writing, he should not be allowed by the Judge to be heard or to act in any manner on behalf of the party.

Where a Pleader who had been engaged by the plaintiff withdrew on behalf of the defendant money which he knew was rightly payable to the plaintiff, and took a conspicuous part as an arbitrator in a matter in which he was seriously and personally concerned:

Held, that he was guilty of serious professional misconduct. **PAT** *In the matter of* TWO PLEADERS, 1 P. L. W. 485; 2 P. L. J. 254; (1917) PAT. 277; 18 CR. L. J. 803 **328**

LETTERS PATENT (CAL.) CL. 15—*Judgment, what amounts to—Order remitting appeal for re-hearing on merits, whether judgment.*

To determine whether an adjudication is a judgment within the meaning of the Letters Patent, the

LETTERS PATENT—contd.

test is, not what the form of the adjudication is, but what is its effect on the suit or proceeding in which it is made. If its effect, whatever its form and whatever the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment.

Where in a suit for accounts against the defendant as an agent or, in the alternative, as a partner of the plaintiff, the District Judge in appeal did not hear the appeal on the facts but proceeded to determine the status of the defendant as a pure question of law and a single Judge of the High Court in second appeal set aside the decision of the District Judge and remanded the case for the re-hearing of the appeal on the merits by the District Judge:

Held, that the decision of the single Judge was a judgment within the meaning of the Letters Patent, as it affected the merits of the question between the parties by determining a right or liability which need not be one in controversy in the suit itself, its effect being to deprive the plaintiff of the benefit of the decree made in his favour by the District Judge and to re-open the entire controversy between the parties, as it terminated the appeal in the High Court and vacated the decree made by the District Judge. **C** CHANDI CHARAN SAHA *v.* JNANENDRANATH BHATTACHARJEE, 21 C. W. N. 921 **250**

———*—Judgment, what is—Decision that suit is multifarious and plaintiff must elect, whether judgment—Appeal—Misjoinder of parties and causes of action.*

A decision that a suit is multifarious and has been so constituted as to joinder of parties and causes of action that it cannot be entertained as framed, is a judgment within the meaning of clause 15 of the Letters Patent.

A suit was instituted against four sets of defendants for the recovery of goods and documents of title relating thereto or, in the alternative, of the value of goods, on the allegation that one of the defendants obtained possession of the goods, which were the plaintiff's property, with the documents of title, by means of fraud and subsequently transferred them to the other defendants. The relief claimed in the suit was not the same against all the defendants, and the Trial Court, holding that there had been a misjoinder of causes of action in the suit, adjourned the suit to a specified date with liberty to the plaintiff to elect meanwhile as against which of the defendants he would proceed, but did not specifically order that on the failure of the plaintiff so to elect, the suit would be dismissed:

Held, that the decision of the Trial Court was a judgment, as it was in substance a decision that the suit would not lie as framed, with the result that if the plaintiff did not elect, the suit would be dismissed, and so an appeal lay against it under the Letters Patent.

Per *Mookerjee, J.*—The true test to be applied in the solution of the question of the competence of an appeal under the Letters Patent from an adjudication is, not the form of the adjudication but its real effect on the suit or proceeding in which it has been made. Whatever the form of the adjudication may be

LETTERS PATENT—concld.

if it puts an end to the suit, so far as the Trial Court is concerned, the adjudication may properly be deemed a judgment within the meaning of clause 15 of the Letters Patent. **C** RAMENDRA NATH RAY *v.* BROJENDRA NATH DASS, 21 C. W. N. 794 **944**

——— S. 15—*Review of Division Bench judgment—Application refused by Single Judge of High Court—Appeal.*

An application for review of a judgment of a Division Bench of the High Court was refused by one of the Judges constituting the Bench, the other Judge having ceased to be a Judge of the Court at the time:

Held, that no appeal under section 15 of the Letters Patent lay from the order of the Single Judge refusing the application for review. **C** KAILASH CHANDRA SOMADDAR *v.* REVATI MOHAN ROY, 25 C. L. J. 360; 21 C. W. N. 652 **183**

——— (PATNA)—*Order of Single Judge remitting issue for trial—Appeal, whether lies.*

There is no right of appeal under the Letters Patent against the order of a Single Judge of the High Court directing the trial of a certain issue **PAT** BARA ESTATE, LTD. *v.* ANUP CHANDRA, 2 P. L. W. 71; (1917) PAT 342 **337**

LIMITATION ACT (IX OF 1871), SCH. II, ART. 129, *scope of—Limitation Act (XV of 1877), s. 2—Adoption by Hindu widow—Possession for over 12 years under invalid adoption, effect of—Reversioners' right of suit for possession on widow's death, when adoption not impeached within statutory period—Adverse title, acquisition of, by persons deriving title from adopted son—Prior suit for possession against widow.*

Reversioners to the estate of a Hindu cannot sue, on the death of the latter's widow, for recovery of property, which was in possession of persons under an alleged invalid adoption made by the widow, when the right to impeach the adoption had already become barred under Article 129 of the Limitation Act of 1871. While Act IX of 1871 was in force, time ran against all the reversioners of the last male owner from the date of the adoption and they all became barred on the expiry of the period prescribed by Article 29, and a suit instituted after Act XV of 1877 did not affect the bar

The object of that Article was that all questions relating to adoption, including suits for possession of lands depending on questions of adoption, should be determined within 12 years of the adoption and not long after the death of the widow of the last male owner, it might be, 50 years later.

After the extinction of title of the widow or the reversioners to the property by the expiry of the time mentioned in Article 129 of Act IX of 1871, persons in possession under the adoption, whether as heirs or as alienees, acquire title thereto which is saved under section 2 of Act XV of 1877. **M** SOMASUNDARAM CHETTIAR *v.* VAITHILINGA MUDALIAR, 6 L. W. 253; 40 M. 846 **540**

LIMITATION ACT (XV OF 1877), S. 2 **546**

LIMITATION ACT (IX OF 1908), *construction of.*

The Limitation Act operates as a bar to legally enforceable claims and it should, therefore, be construed as much as possible in favour of the person

LIMITATION ACT - (1908) - contd.

whose right is sought to be barred. M SATHULA VENKANNA *v.* NAMUDURI VENKATAKRISHNAYYA, 33 M. L. J. 35; 6 L. W. 192 807

——— S. 6, *scope of —Civil Procedure Code (Act V of 1908), s. 144—Application for restitution, whether application for execution of decree.*

Section 6 of the Limitation Act is an enabling section to enable persons under disability to exercise their legal rights within a certain time, and it should be construed liberally rather than narrowly.

An application for the execution of a decree within the meaning of section 6 of the Limitation Act is not limited to applications under Article 182 of that Act, but includes an application for restitution in consequence of the decree and the time for making such application in the case of a minor is, therefore, extended under the provisions of section 6. B KURGODIGAUDA *v.* NINGANGAUDA, 9 BOM. L. R 638; 41 B. 625 238

——— Ss. 14, 15, SCH. I, ART. 120 581

——— S. 18 - *Decree in rent suit - Fraud--Suit to set aside decree—Limitation—Burden of proof.*

Where plaintiff brought a suit to have it declared that a compromise decree in a certain rent suit passed in March 1902 had been obtained by fraud and was not binding upon him, and gave the date of his knowledge of the fraudulent proceedings as 17th June 1913, *i.e.*, within three years from the date of the suit, and the defendants pleaded the bar of limitation, alleging that the plaintiff had such knowledge more than three years prior to the date of suit:

Held, that the onus was, in the first instance, upon the plaintiff to give some evidence of fraud committed in obtaining the decree of 1890, and that then the onus would be cast upon the defendants to prove and show that the plaintiff had acquired knowledge of the rent proceedings more than three years prior to the date of the suit, the plaintiff not being required to prove the period of time when he became aware of the alleged fraud that had been practised upon him PAT RAM PERTAP LAL *v.* KESHO PRASAD SINGH, 2 P. L. W. 12 385

——— S. 23 863

——— S. 27, *applicability of, to transferee from Hindu widow.*

Section 27 of the Limitation Act does not apply to a donee or transferee from a Hindu widow in virtue of her powers as representing the estate, as in such a case the transferee succeeds the widow in her capacity as full owner and not as upon the determination of her interest for life. C ERALIJOOL TEA CO., LTD. *v.* NAGENDRO NATH 47

——— SCH. I, ART. 1, *applicability of*

Article 1 of the Limitation Act has no application to a case where an objection against an attachment of property has not been disposed of on the merits. PAT NAND LAL PAL *v.* NARESH CHANDRA DEB, 2 P. L. W. 108 468

——— ——— — ART. 11A, *applicability of—Civil Procedure Code (Act V of 1908), O. XXI, r. 100—Application dismissed without investigation—Person dispossessed, whether bound to bring suit within one year — Limitation.*

If an application made under Order XXI, rule 100, of the Code of Civil Procedure is dismissed without investigation, the person dispossessed is not bound to bring a suit to establish his right to possession within one year under Article 11A of the Limitation Act. M MAJJIGA VENKATASUBBA REDDI *v.* CHUNDI LINGA REDDI 640

——— — SCH I, ART. 12 533

——— ——— ARTS 75, 116—*Limitation, commencement of - Bond, suit on - Interest to be paid every year - Money, entire, to be paid within fixed period—Suit instituted after fixed period.*

Where a bond provided for the repayment of money with interest within a fixed period and further stipulated that the interest should be paid regularly every year and that in case the interest was not so paid or the entire money due on the bond was not paid within the period fixed, the creditor would have the power to recover the entire principal and interest from the debtor:

Held, that limitation could not start running from the date when a default in the payment of interest was made, if the creditor in pursuance of the contract waived such default and sought his remedy in respect of the default in the payment of the entire money within the fixed period O BABU RAM *v.* ABDHOOT SINGH, 4 O L. J. 402 423

——— — ART. 113—"*Certain date,*" *meaning of —Suit for specific performance of contract to transfer decree on payment of decretal amount—Limitation, commencement of*

A agreed with *B* to transfer to *C* a certain decree in *A*'s favour, on condition that *B* paid to *A* the amount due under the decree within six months. *B* paid the sum three days after the lapse of six months. In a suit by *C* against *A* to enforce specific performance of the contract to transfer the decree instituted beyond three years from the date fixed for payment of the amount by *C* but within three years from the date when performance was refused:

Held, that the case fell within the second clause of Article 113 of Schedule I of the Limitation Act and having been brought within three years from the date of refusal of specific performance, it was not barred by time. M SATHULA VENKANNA *v.* NAMUDURI VENKATAKRISHNAYYA, 33 M. L. J. 35; 6 L. W. 192 807

——— ARTS 116, 75—*Limitation, commencement of—Bond, suit on—Interest to be paid every year Money, entire, to be paid within fixed period—Suit instituted after fixed period*

Where a bond provided for the repayment of money with interst within a fixed period and further stipulated that the interest should be paid regularly every year and that in case the interest was not so paid or the entire money due on the bond was not paid within the period fixed, the creditor would have the power to recover the entire principal and interest from the debtor:

Held, that limitation could not start running from the date when a default in the payment of interest was made, if the creditor in pursuance of the centract waived such default and sought his remedy in respect of the default in the payment of the entire money within the fixed period. O BABU RAM *v.* ABDHOOT SINGH, 4 O L J. 402 423

——— — ARTS. 118, 144—*Adverse possession—Limitation.*

D. died in 1878 leaving property consisting of Deshgat and Gaudki *vatans* and some non *vatan* pro-

LIMITATION ACT—(1908)—contd.

perty. In 1880 *D.'s* widow adopted a son *M.* and the latter's name was entered as holder of both classes of *vatans*. The widow was appointed *M.'s* legal guardian under Act XX of 1864 and managed his property. In 1886, on the application of the widow, *M.'s* name was removed from the Deshgat *vatan* register on the ground that he was not a *bhauband* of *D.* in whom under the *sanad* the *vatan* would vest. *M* died a minor in 1895, leaving a widow who was entered as holder in the Gaudki *vatan* register. In 1899 the widow of *D.* got the name of *M.'s* widow removed from the register. In 1901 *D.'s* widow purported to adopt the defendant as son to *D.* and put him in possession of the whole property. *M's* widow died in 1903. In 1912, the plaintiff claiming as the nearest reversionary heir of *M.* sued to recover the estate of *D*:

Held, (1) that time began to run against the plaintiff from the date of the death of *M's* widow and that, therefore, there had been no adverse possession sufficient to bar his suit;

(2) that the suit was, however, barred by Article 118 of Schedule I of the Limitation Act, inasmuch as the defendant enjoyed his possession of the estate as son of *D.*, and as the plaintiff could not challenge the defendant's adoption the latter must be taken to be the brother of *M* and, therefore, a nearer heir than the plaintiff;

(3) that even if defendant's adoption was invalid under the Hindu Law and although the power of adoption of *D.'s* widow had been exhausted before she purported to adopt him, yet the law of limitation was an effective bar to the plaintiff's suit. **B** CHANBASAPPA DODAPPA DESAI *v.* KALIANADAPPA AYAPPA DESAI, 19 BOM. L. R. 724 845

——— SCH. I, ART. 120.

A suit instituted, however, after the death of the arbitrator in regard to matters referred to and not disposed of by him is governed by the residuary Article 120 of the Limitation Act. **M** DORAISAMI PADAYACHI *v.* VAITHILINGA PADAYACHI, 33 M. L. J. 46 581

——— ART. 120, *applicability of—Suit to recover village profits from co-sharer—Limitation—Burden of proof.*

A suit by a co-sharer to recover his share of the village profits from the managing co-sharer is governed by Article 120 of the Limitation Act.

In a suit for the recovery of village profits the plaintiff must not only plead but adduce evidence that the defendant's negligence was responsible for short collections. **N** BALWANT *v.* DEORAO, 13 N. L. R. 127 848

——— ART. 120—*Record of Rights, entry in—Declaration, suit for Limitation.*

A plaintiff can bring a suit for a declaration that an entry in the Record of Rights is wrong within six months from the date on which his title is effectively challenged, though more than six years have elapsed since the publication of the record, provided the plaintiff's enjoyment of the property has not been affected.

Defendant got himself wrongly entered in a Record of Rights prepared under the Bengal Tenancy Act as being jointly entitled to a certain land with the plaintiff who was in reality exclusively entitled to it, but did not actually disturb plaintiff's possession.

LIMITATION ACT (1908)—contd.

More than six years after the publication of the record defendant sued plaintiff in the Small Cause Court claiming to participate in the profits of the land. On notice of the suit being served upon the plaintiff, he instituted a suit within six months for a declaration that the entry in the Record of Rights was wrong:

Held, that the suit was not barred by limitation. **PAT** ALA-UD DIN *v.* ZAIFAN-NISSA, 2 P. L. W. 22; 2 P. L. J. 557 199

——— SCH. I, ART. 120—*Suit for declaration of plaintiff's right to manage* dharamsala.

Plaintiffs sued for possession of certain property and a *dharamsala*, but subsequently amended the plaint and asked for a decree for possession of the property and a declaration to the effect that they were entitled to be managers and supervisors of the *dharamsala*. In the amended plaint it was stated that the person last in possession died in April 1898 and that the cause of action accrued then:

Held, that the suit was governed by Article 120 of the Limitation Act and having been filed more than six years after the last owner's death was barred by time. **P** BHAG MAL *v.* BHAGWAN DAS, 125 P. W. R. 1917 636

——— ——— ART. 123 665

——— ——— ART. 127, *applicability of, to Muhammadans and other non-Hindus—"Joint family property," meaning of*—Stare decisis, *principle of, applicability of.*

By the Full Bench, (Shah, J., dissenting).—Article 127 of the first Schedule of the Limitation Act, 1908, does not apply to the property of a Muhammadan (or any other person not being a Hindu) not having been proved to have adopted as a custom the Hindu Law of the joint family.

The expression 'joint family" in Article 127 of the Limitation Act must be read as a compound adjective and the expression "joint family property" must be read as property appertaining to a joint family.

A long series of decisions based upon a clearly erroneous construction of an Act should not be followed, while a long series of decisions based upon a construction not free from doubt should not be disregarded.

Per *Beaman* and *Heaton, JJ.* The "joint family" as a legal entity involving definite legal notions, incidents and consequences is unknown to any other great system of law prevailing in the Empire. So that where property is spoken of as belonging to a joint family, it must primarily be referred to a Hindu joint family, and only secondarily to such groups of non-Hindus as can prove that they have by custom adopted the Hindu Law of the joint family.

Per *Shah, J.*—Article 127 of the first Schedule to the Limitation Act can apply to Muhammadans even though they may not be proved to have adopted as a custom the Hindu Law of the joint family.

Quære.—Whether the Article can apply to persons other than Hindus and Muhammadans, who are not proved to have adopted as a custom the Hindu Law of the joint family. **B** ISAP AHMAD MOGRARIA *v.* ABHRAMJI MOGRARIA, 19 BOM. L. R. 579; 41 B. 588 701

——— ——— ARTS. 142, 144 728

——— ——— ——— ARS. 142, 144—*Landlord and tenant*

LIMITATION ACT—(1908)—contd.

—Encroachment—Possession, presumption as to—Burden of proof—Proof of proprietary title—Limitation.

In a suit for possession where Article 142 of the Limitation Act applies, plaintiff must prove his possession within 12 years. If the plaintiff proves his proprietary title, there is a presumption that his possession continued till within 12 years of the suit. It is for the defendant to rebut that presumption.

Whereas a tenant is bound to treat an encroachment as held by him under his landlord, there is no corresponding liability upon the landlord to treat the land on which his tenant encroaches as a part of his tenancy. The landlord is entitled to re-enter upon the land encroached upon unless his right is otherwise barred. If the tenant has been in possession of the encroachment for more than 12 years, then it is to be seen whether he has been in such possession adversely to the landlord and whether such adverse possession is in respect of a limited or absolute interest. **PAT** MIDNAPORE ZEMINDARI CO., LTD *v.* PANDAY SARDAR, 2 P. L. W. 142; 2 P. L. J. 506 **114**

——— SCH. I, ART. 142—Possession within limitation, want of—Burden of proof **80**

ARTS. 142, 144—*Suit for possession—Burden of proof—Laches and acquiescence, difference between.*

Where a plaintiff's claim is based on the ground that he or his predecessor has been dispossessed or has discontinued possession, the period, from which limitation runs is the date of dispossession or discontinuance of possession and the burden is on the plaintiff to show that he or his predecessor-in-title has been in possession within 12 years of the date of suit, and the Article applicable to the suit is Article 142 of the Limitation Act.

Where there is a Statute of Limitation applicable to the suit, the objection of simple laches does not apply until the expiration of the time allowed by the Statute. But acquiescence is a different thing; it means more than laches. If a party who can object lies by, and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to and so a kind of permission may be said to be given to another to alter his condition, he is said to acquiesce. **L B** APPAN CHARAN *v.* KYAUSE MA **722**

——— ART. 144 **722, 845, 862**

——— ——— ART. 144—*Symbolical delivery as against Government*—Ryotwari *tenants, continuance of possesion by—Adverse possession, title by*

Where possession of *inam* lands wrongly classed as *ryotwari* is decreed to the *inamdar* and symbolical delivery is made in execution of the decree, a suit brought to oust the *ryotwari* tenants who acquiesced in such delivery wi hin 12 years thereof is not barred by limitation.

Per *Spencer, J.*—The *ryotwari* tenants, when they attorned to Government could not simultaneously prescribe for any title which could endure after the title of Government was negatived in the suit of a third party, and, so long as they were tenants of the plaintiff or her predecessors-in-interest, their possession was not adverse to that of their landlord. A *ryotwari pattadar* does not acquire any rights against Government superior to what he gets at the initial grant of *patta*.

LIMITATION ACT—(1908)—contd.

The rights of a *pattadar* holding land upon *ryotwari* tenure under Government are not the same as those of an occupancy tenant under a landholder of an estate. So it cannot be maintained that the occupant of land under the former tenure can by means of such occupation acquire by prescription a title under the latter tenure

Per *Phillips, J.*—The original possession of the *ryotwari* tenants having been terminated by the delivery in execution, any fresh title by virtue of their subsequently continuing in physical possession would not be perfected until the expiry of 12 years after the symbolical delivery. **M** NARAYANI AMMAL *v.* SECRETARY OF STATE **167**

——— ——— SCH. I, ARTS. 171, 177—*Abatement—Mortgage, joint and indivisible—Mortgagee respondent, death of—Failure to bring legal representatives on record and to have abatement set aside—Limitation.*

In the case of a joint and indivisible mortgage all the mortgagees or their legal representatives are necessary parties to a suit for redemption, and the same principle is applicable to an appeal by the mortgagor against the mortgagees in such suit. Consequently where one of the mortgagee respondents to an appeal dies and no application to bring his legal representatives on record is made within six months, as required by Article 77 of the 1st Schedule to Act IX of 1908, and the application to have the consequent abatement set aside is also out of time, the whole appeal abates **P** FATEH *v.* BHANJU RAM, 49 P. W. R 1917; 95 P. R. 1917 **730**

——— ——— ——— ART. 177 **730**

——— ——— ——— ART. 18, *applicability of.*

An application for a decree absolute made under Order XXXIV, rule 5, sub rule (2), of the Civil Procedure Code, is an application under the Code and is governed by Article 181, Schedule I, of the Limitation Act. **O** JAGDISH SINGH *v.* RAM ADHIN SINGH, 20 O. C. 205 **858**

——— ——— ——— ARTS. 181, 182, *applicability of—Mortgage decree—Appeal—Application for decree absolute—Limitation, commencement of.*

A mortgage decree was passed on 28th September 1908, fixing 28th March 1909 as the date of payment. The decree-holder appealed against the decree and the final decree was passed by the High Court on 29th July 1910. In the meantime the Civil Procedure Code of 1908 had come into force. On 18th July 1913 the decree-holder made an application for the execution of the decree, and on 19th August 1914 applied for a decree absolute:

Held, that the application was governed by Article 181 of the Limitation Act, inasmuch as on the date that the right to apply for an order absolute accrued the new Code of Civil Procedure had come into force, but that the application being within three years of the date of the appellate decree it was within limitation.

Where an appellate decree confirms the decree of the first Court and is silent regarding the time fixed for payment by the Court of first instance, a further period cannot be given for payment from the date of the appellate decree, and the party

in default is not entitled to reckon the time from the date of such decree.

But a party who is not bound to perform any act under the decree of the first Court and appeals to get a larger benefit than what the decree grants him is entitled to reckon the period in his favour from the date of the appellate decree, provided he has not disobeyed any direction given by the first Court. **M** NIMMALA MAHANKALI *v.* KALLAKURI SUBBA RAO, 32 M. L J. 455 **268**

—— SCH. I, ART. 182 **41**

—— —— —— ART 182—*Step-in-aid of execution—Oral application for execution.*

In order that an oral application may be effective as a step-in-aid of execution, the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that, if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application or by reason of the Code or the rules requiring some further acts to be done before the main reliefs prayed for in the execution application could be granted or enforced.

An application for execution of a decree by attachment and sale of the judgment-debtor's property was first made on 13th July 1911. Notice was ordered to issue for 12th August 1911. On that day the judgment-debtor did not appear and an attachment order was issued. The decree-holder failed to pay *batta* within the time allowed and the petition was dismissed on 26th August 1911. A fresh execution petition was presented on 12th August 1914:

Held, (1) that the utmost that could be presumed in such circumstances was that the decree-holder was present in Court on 12th August 1911 either in person or by Pleader, and intimated his decree to proceed with the execution, and not that he made any oral application for further attachment:

(2) that even if he made an oral application on that date, it must be presumed to be an entirely superfluous petition and could not operate to save limitation. **M** MASILAMANI MUDALIAR *v.* SETHUSWAMI AIYAR, (1917) M. W. N. 502; 33 M. L. J. 219; 22 M. L. T. 115 **701**

LIS PENDENS, doctrine of **246**

—— ——, doctrine of, applicability of **413**

MADRAS DISTRICT MUNICIPALITIES ACT (IV MAD. OF 1884), Ss. 188 (1) (b), (5), 189—*License for boiling paddy, application for—Failure to pass order on application within 30 days of receipt, effect of—Section 188 (5), scope of.*

Where, on the expiry of his license under the Madras District Municipalities Act to boil paddy in a particular place, a person applied for a fresh license and no order having been passed on his application until after the expiry of the period of thirty days fixed by section 188 (5) of the Act, he again boiled paddy after the order refusing license was communicated to him:

Held, that no offence was committed as the order refusing the license not having been passed within thirty days, the place must be deemed to have been

licensed for the financial year under section 188 (5) of the District Municipalities Act.

Section 188 (5 of the Madras District Municipalities Act should not be read subject to the reference to the refusal of the license in section 189 of the Act. **M** MATURI VENKATASUBBAYYA, *In re*, 40 M. 589; 18 CR. L. J. 831 **655**

MADRAS ESTATES LAND ACT I MAD OF 1908), S. 3 (2) (*d*) **788**

—— —— Ss. 3 (2) (d) *and* 8, *Exception*—Inam, *grant of—Presumption as to right acquired - Pre-settlement* inams, *presumption as to—Grant with* ashtabogam, *effect of—Ejectment suit—Jurisdiction—Burden of proof*—Kudivaram *right, acquisition of, by relinquishment.*

The presumption, in all cases of grants of *inams*, is that only the *melvaram* was granted as *inam*.

Courts should always start with that presumption, unless the grant-deed expressly confers *kudivaram* rights also.

A grant with *ashtabogam* does not necessarily import the grant of the *kudivaram* also in the same manner that it does not clearly imply the grant of temple and other communal sites.

Pre-settlement *inam* grants must be presumed to be of land revenue only; what the grantor was entitled, in those days, to obtain from the lands as feudal landlord being connoted by the word 'land revenue', though now it would be called *melvaram*.

Where the defendants in a suit for ejectment contest the jurisdiction of the Civil Courts to entertain the suit under section 3 (2) (*d*) of the Madras Estates Land Act, it is for them to prove that the plaintiff was not the owner of the *kudivaram* right at the time of the grant of the *inam* to him. But this is not necessary when, by setting up that the grant was of both *varams*, the plaintiffs admit that they were not the owners of the *kudivaram* at the time of the grant.

It cannot be laid down as a broad proposition of law that the *inamdar* must have the occupancy right when the tenants have no occupancy rights in themselves, though it is open to the Court, from such a state of facts, to infer that, at the time of the grant, the grantee had the *kudivaram* right. *Inamdars* might well be asked to establish that, by transfer or succession etc., they got the *kudivaram* right subsequently, where it is admitted or proved that they had not got the *kudivaram* right at the time of the grant. **M** MOGADASU VENKATADASU *v.* VANKAMAMIDI UDAYANARAYANA, 6 L. W. 142; 33 M. L. J. 548 **122**

—— S 8, *Exception.*

Per *Spencer, J.*—In a suit for ejectment, where plaintiffs rely on the Exception to section 8 of the Estates Land Act for ousting the jurisdiction of the Revenue Courts, the plaint should specifically show by what acts the plaintiff acquired the *kudivaram* interest of his *ryots* and became entitled to both *varams*. **M** MOGADASU VENKATADASU *v.* VENKAMAMIDI UDAYANARAYANA, 6 L. W. 142; 33 M. L. J. 548 **122**

—— —— S. 40—*Commutation of rent payable in kind, suit for—Burden of proof.*

The Madras Estates Land Act is intended to protect the interests alike of the tenant and the landlord and unless it is proved that either of them suffers because of the payment of rent in kind

MADRAS ESTATES LAND ACT—concld.

interference by way of commutation will be unjustifiable.

The party who asks for commutation of rent under section 40 of the Madras Estates Land Act must prove that he is entitled to it. **B R M** KARUPPAYYA THEVAN *v.* ADAIKKALAM CHETTY 511

MADRAS IRRIGATION CESS ACT (VII MAD. OF 1865) Ss. 1, 2—*Water cess—Irrigation—Permanent Settlement—Extent of* zemindar's *or* inamdar's *right of user under engagements with Government—River or stream belonging to Government—"Free of separate charge."*

The Government claimed under the Madras Irrigation Cess Act to levy water cess upon permanently settled lands (*zeraiti* and *inam*) in so far as the user of Government water for irrigation exceeded the user at the time of the Permanent Settlement, whether in respect of the area irrigated or in respect of the fact that two crops were raised instead of one:

Held, (1) that the effect of the Permanent Settlement was to vest the then existing irrigation channels in the *zemindars* through or within whose *zemindaris* the same respectively passed or were situate;

(2) that the right of user from such irrigation channels which passed by the Permanent Settlement could be measured only by the physical conditions existing at that time, and not by the extent to which the water was in fact used: and that assuming that the river with which the channels connected belonged to the Government, the *zemindar's* right of taking water from it was limited only by the size of the channels and the nature of the sluices and works by which water was diverted from the river into the channels. The Government could not complain if the amount of water taken was within this limit. Once the water was lawfully taken into the channels, Government had nothing further to do with the matter.

Whether or not there are other cases which the first proviso to section 1 of Madras Act VII of 1865 was intended to meet, it at least covers the case of engagements with the Government arising out of the Permanent Settlement. If by virtue of such settlement a *zemindar* is entitled to take and use water from any such source of supply as mentioned in the Cess Act and this right is part of or appurtenant to the property in respect of which he pays a single *jama* or *peishcush*, no cess can be levied under the Act in respect of the water which he is so entitled to take and use.

Semble.—The second proviso to the section is intended similarly to safeguard the *ryots'* rights under the periodical temporary settlements. **P C** KANDUKURI BALASURYA PRASADHA ROW *v.* SECRETARY OF STATE, 33 M. L. J. 144; 22 M. L. T. 76, 15 A. L. J. 697; 21 C. W. N. 1089; (1917) M. W. N. 556; 19 BOM. L. R. 751; 6 L. W. 340; 2 P. L. W. 261; 25 C. L. J. 290; 40 M. 886 58

MADRAS LAND ENCROACHMENT ACT (III MAD. OF 1905), S. 2—"Standing and flowing water" 98

MAGISTRATE TAKING COGNIZANCE OF COMPLAINT, duty of 141

MAINTENANCE—*Father, whether bound to pay for medical attendance of child.*

A father who is paying maintenance for his child under the orders of a Court is not bound to defray the charges for the medical attendance of the child, unless he has expressly or impliedly contracted to pay the same. **L B** PHAUNG THA BHI *v.* MI ME BAW 689

MALABAR LAW—Stani, *grant by, of* melcharth *for* 12 *years*—Melcharth, *validity of*—*Power of* stani *to grant perpetual leases.*

The grant by a *stani* of a perpetual lease of *stanom* properties is not necessarily bad, if it is for the benefit of the *stanom*.

Where a *melcharth* is granted for a certain number of years, its binding nature depends upon whether a reasonable rent is reserved for the period of the lease.

Where such *melcharth* is sought to be declared void, it rests on the person who seeks to do so to show that it is not of a reasonable nature, and not granted in the ordinary course of business.

Where *stanom* property was held on *verumpattom* lease for one year and that lease was renewed from time to time in favour of the same tenant and at last the *verumpattom* lease was split up into three different leases and granted to three different lessees, to each of whom a *melcharth* for 12 years was granted:

Held, (1) that the *melcharth* was not necessarily bad, unless it was shown that the grant of a lease of this character was so unusual as evidently not to be in the ordinary course of business;

(2) that the fact that consolidation was beneficial to the estate did not render splitting up of a lease invalid, unless it was proved that it was not usual to grant such leases. **M** ANANTANARAYANA IYER *v.* KOZHIKOTE PATINHARE KOVIALKATH THIRUVEERARAYAN, 33 M. L. J. 459; (1917) M. W. N. 707 536

MALICIOUS PROSECUTION—*Complaint, filing of, whether furnishes cause of action.*

A mere filing of a petition of complaint charging the plaintiff with criminal offences is not by itself sufficient to support an action against the complainants for damages for malicious prosecution. **C** DIGAMBAR DAS *v.* BISWESWAR CHOWDHURY 12

MALICIOUS SUIT, *whether actionable—Damages, suit for, maintainability of—False collusive defence—Costs.*

The malicious institution of civil proceedings without reasonable and probable cause is not generally an actionable wrong which entitles the party aggrieved to sue for damages. The principle is that the latter is sufficiently indemnified by the judgment which gives him costs and that he cannot prove special damage.

An agreement to maintain a false defence in a civil suit is not an actionable wrong. **PAT** DARBHANGI THAKUR *v.* MAHABIR PRASAD 522

MASTER AND SERVANT—Servant permitting drunkenness in shop during master's absence—Master, whether liable. **8** [illegible] 577

MINING LEASE—*Assignment, restraint on, effect of —Forfeiture, accrual of right to- Document, construction of—Stipulation to work mines 'in a skilful and workmanlike manner and continuously without voluntary intermission,' meaning of—Burden of proof.*

Per *Seshagiri Aiyar, J.*, (*Wallis, C.J.*, not expressing any opinion).—A provision in a mining lease restraining the lessee from assigning and empowering the lessor to re-enter in the event of assignment cannot be enforced where the lessee mortgages his right, unless the whole of his interest is transferred to the mortgagee.

Where a lease of mines provides that the lessee should work the mines continuously without voluntary intermission and in a skilful and workmanlike manner the burden of showing that the lessee has not worked as aforesaid lies on the lessor.

A proper and workmanlike manner may not mean the best possible mode of working for the lessor, but it means in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding.

The mere fact that a sufficient quantity of mineral is not produced is not enough to show that the mine has not been worked continuously and efficiently. **M** ANSUR SUBBA NAIDU *v.* SECRETARY OF STATE, (1917) M. W. N. 794 **770**

MINOR, *decree against, without appointment of guardian* ad litem, *whether operative—Decree, cancellation of, effect of.*

A minor, against whom a decree is made in a suit in which though joined as defendant he is not represented by a guardian *ad litem*, occupies the same position as if he were not a party to the litigation.

A mortgage suit instituted against the representatives-in-interest of the mortgagor, who were minors, was decreed without any guardian *ad litem* being appointed for them. In a suit by the representatives to set aside the mortgage decree:

Held, that the decree made in the mortgage suit was not operative against the minor representatives and must stand cancelled, with the consequence that the mortgage suit would be revived and the mortgagee would be entitled to proceed therewith in accordance with law. **C** BANESWAR PRAMANIK *v.* TARAPADA BHATTACHARJEE, 26 C. L. J. 258 **872**

——, whether *personally* liable for simple debt contracted by guardian—Guardian, whether can bind ward's estate. **35**

MISTAKE, *clerical, in name of decree-holder in copy of decree transmitted, whether of consequence*

Where in the copy of a decree transmitted for execution and the certificate of transfer, the name of the decree-holder was written as Benode Behari Das in the place of Benode Behari Bose, the correct name:

Held, that it was apparently a mere clerical mistake and was of no consequence **C** KEDAR NATH *v.* JOGENDRA NATH DAS **815**

MORTAGE—*Annuity reserved for mortgagor—Equity of redemption, acquisition of, by mortgagee, effect of —Liability to pay annuity.*

An annuity was reserved to be payable to the mortgagor under a mortgage. Subsequently the equity of redemption was sold by various auction sales, and finally the whole of it was acquired by the mortgagee:

Held, that the acquisition of the equity of redemption by the mortgagee did not extinguish the right of the mortgagor to receive the annuity reserved under the mortgage **A** LACHHMI NARAIN *v.* SAJJADI BEGAM, 15 A. L. J. 671 **839**

——— *bond, suit on Recital, denial of truth of—Burden of proof.*

In a suit upon a mortgage-deed executed by the defendant, which contained a definite admission that the consideration recited in it had been received in cash, the defendant in his written statement set forth that the consideration for the deed was not a sum paid in cash but the admission of the defendant as the plaintiff's partner and agent in a business and that the deed was in fact a security bond:

Held, that the onus was upon the defendant to prove that the bond which he signed contained a recital which was not in accordance with the facts. **C** KALI CHARAN BASAK *v.* AMAR CHAND DAS **44**

——— *Covenant to pay principal and interest—Suit for interest—Subsequent suit for principal, whether barred.*

A mortgage-bond recited the advance of the money and the promise of the obligor to re-pay it within three years with interest at a stipulated rate, and provided that after the expiration of three years the creditor shall be entitled to sue for the whole amount of principal and interest if default was made in the payment of the amount of the bond with interest within that time. After the expiration of the period of three years the mortgagee brought a suit to recover the interest from the date of the bond, and the suit was decreed. He then brought a suit for the recovery of the principal and for the sale of the property:

Held, that the second suit was barred by Order II, rule 2, of the Civil Procedure Code. **A** MUHAMMAD ZAKARIYA *v.* MUHAMMAD HAFIZ, 15 A. L. J. 557 39 A. 50 **233**

——— *by joint mortgagors - Mortgagors not benefited, whether liable.*

A along with *B* and *C* executed a mortgage, which the mortgagee accepted in lieu of the security of a prior mortgage executed by *A* alone in his favour:

Held, that *B* and *C* were liable under the mortgage, though they had not received any direct benefit for executing it. **C** FANINDRA NARAIN ROY *v.* KACHHEMAN BIBI **673**

——— *Judgment-debtor assignee of mortgage decree, whether can execute decree—Mortgagors, one of several purchasing mortgagee's interest—Rights of other mortgagors.*

The purchase by one of several mortgagors of the mortgagee's interest does not entitle the other mortgagors to apportionment of their debts so as to

enable them to redeem their own shares in the mortgaged property.

By an *ekrarnama* fourteen persons divided between themselves responsibility for a mortgage-debt but only eight of them were actually interested in the mortgaged property. After part payment of the mortgage-debt by some of the persons, the mortgagee sued on his mortgage and got a decree, which was purchased by some of the mortgagors, who then applied for execution by sale of the mortgaged property:

Held, that the equities existing between the parties by reason of the *ekrarnama* could not be worked out in execution proceedings, even though some of the persons liable for the mortgage-debt had individually paid off the shares of the debt due from them; but that the mortgagors who purchased the mortgage decree could not be allowed to sell the mortgaged property for the whole of the decretal debt, but only for the balance on deduction of the shares of the debt due from them. **C** JAGABANDHU PAL *v.* HALADHAR PAL 269

—— *of occupancy holding—Declaratory suit by landlord—Landlord, whether entitled to any relief.*

Where, on an occupancy tenant's mortgaging his holding, the landlord sues him in the Civil Court for possession of his holding by his ejectment and for a declaration that the mortgage is null and void, the Court should not return the plaint for presentation to the proper Court; for, although it is incompetent to grant the possessory relief, it can grant the declaratory relief to the effect that the mortgage is invalid and not binding on the landlord **O** BHAGWATI PRASAD SINGH *v* GOVIND DAT, 4 O. L. J. 374 125

——— *Payment of mortgage-money to one of several co-mortgagees, whether constitutes complete discharge.*

A payment of the mortgage-money to one of several co-mortgagees without the consent of the other co-mortgagees is not a complete discharge of the mortgage-debt binding on all the mortgagees. **P** MATHRA DAS *v.* NIZAM DIN, 68 P. R 1917; 107 P L. R. 1917; 81 P. W. R. 1917 921

——— *Personal covenant to pay interest independently of principal—Suit for interest where personal remedy for principal barred, maintainability of.*

Where a mortgage-deed contains a personal covenant to pay interest independently of the principal, a suit for the recovery of interest will lie although the personal remedy for the principal is barred by limitation. **L B** THAIR MAISTRY *v.* K. N. L. A. CHETTY FIRM 72

—— —— *Provision for redemption on payment of mortgage money—Sale of equity of redemption—Vendee undertaking to pay mortgage money, effect of—Interest, whether charge on property—Vendee, liability of.*

One *D.* mortgaged certain land to the plaintiffs for Rs. 700. The mortgagees were to hold possession and the income was to cover the interest on Rs 420, while the remaining Rs. 280 was to carry interest at Rs. 2-1-4 per cent, per mensem payable half yearly, with compound interest at the same rate in case of default. It was further agreed that the land should be redeemable on payment of the *zar-i-marhuna*. After *D*'s death his son *S.* sold the equity of redemption to one *H.* for Rs. 700, out of which Rs. 60 were paid in cash and Rs. 640 were kept with the vendee

to redeem the mortgage. The sale-deed provided that the vendee would be liable for any moneys that should turn out to be due to the mortgagee over and above Rs. 640. *H.* started proceedings under the Punjab Redemption of Mortgages Act and got possession of the land. The mortgagees thereupon brought a suit for Rs. 1,285 interest and compound interest on Rs. 280 against *S.* and *H.*:

Held, (1) that as there was nothing to show that *H.* knew that any interest was chargeable, he was not personally liable for it;

(2) that according to the terms of the mortgage-deed the mortgagor himself could have redeemed the land on payment of the mortgage money alone and his vendee could not be in a worse position;

(3) that the interest was no charge on the land and the plaintiffs could not, therefore, follow the land. **P** LOK CHAND *v.* HAZAR KHAN, 107 P. W. R. 1917; 98 P. R. 1917 59

—— —— *Redemption, suit for—Admission by mortgagee of receipt of portion of mortgage-money in previous suit, whether binding.*

The land in suit was mortgaged with possession by the plaintiffs' ancestor to the defendant for Rs. 900, out of which Rs 200 was to carry interest at 12 per cent. per annum with half yearly rests. Plaintiffs having sued for possession by redemption, the defendant claimed that the mortgage could not be redeemed without payment of the Rs. 200 together with interest that had accrued due. It appeared that the sons of the mortgagor had some time after their father's death sold a portion of the mortgaged property to the sons of the mortgagee and one *F.* had brought a suit for pre-emption. In the proceedings that followed the mortgagee had been examined and had admitted that he had received the Rs. 200 and that the mortgage could be redeemed at any time on payment of Rs. 700. The first Court held that he was bound by his admission and gave plaintiffs a decree for possession on payment of Rs. 642-4-0. On appeal the Divisional Judge held that the mortgagee was not bound by the admission and that the plaintiffs had failed to prove that the sum of Rs. 200 had, as a matter of fact, been paid He, therefore, varied the decree of the first Court by decreeing possession on payment of Rs 3,042-4-0. On a second appeal being preferred to the Chief Court:

Held, (1) that the onus was on the defendants to show that the decision of the primary Court was erroneous;

(2) that the lower Appellate Court committed a substantial error or defect in procedure and that, therefore, a second appeal lay;

(3) that the mortgagee was bound by his admission and could not claim payment of the sum of Rs. 200 or interest thereon. **P** LAL SHAH *v.* HIRA LAL, 119 P. W. R. 1917 163

—— —— *Redemption, suit for—Mortgage for fixed term of years—Clause providing for abridgment of term, interpretation of—Sale of mortgaged property—Notice of sale to mortgagee stating fictitious price, whether proper.*

In a suit for redemption it appeared that the mortgage was not redeemable for a period of ten

MORTGAGE—contd.

years except under certain conditions embodied in clause 7 of the deed, which ran as follows:—"*Agar mabain miyad das sal main fariq doyam kothi mazkur ko bai karunga to us halat men miyad mundarja bala fiskh ho jawegi, magar shart yeh hai ki jis asli qimat par kothi mazkur bai hogi uski itla tehriri miyadi do hafta fariq awwal ko kar di jawegi. Agar fariq awwal kothi mazkur kharid karna chahega to us qimat par jis par dusra shakhs asal kharidar hoga awwal badast fariq awwal kothi mazkur farokht ki jawegi, basurat inkar tehriri ya jawab na dena ta miyad fariq doyam digar shakhs ke hath farokht kar sakega, aur jo mutalba us waqt ham fariq No 1 ka wajib-ultalab hoga woh kul wasul karkar kothi mazkur khali kar di jawegi.*" In compliance with this clause the mortgagor, on the 11th July 1911, sent a notice to the mortgagees informing them that he had "finally settled to sell" the property to *A* for Rs. 80,000 and as it was necessary to send them a written notice "*before the completion of the sale*," this notice was being sent in order to enable them to purchase the property, if they so desired, at the price of Rs. 80,000. The notice went on to say that after the expiry of the prescribed period the property would, otherwise, *be sold absolutely to A*. On the 24th July the mortgagees replied, saying that they were willing to purchase the property but that the alleged agreement to sell was not genuine, the price being fictitious. They declared their willingness to purchase it at the fair market price. On the 3rd of August the mortgagor executed a deed of sale in favour of *A* who tendered the mortgage money due to the mortgagees, but that being refused he instituted a suit for redemption. It was found that Rs 80,000 had not in fact been paid:

Held, (1) that under the clause recited above if the parties desired to abridge the term of the mortgage, it was incumbent on the mortgagor to give the mortgagees notice of his *intention to sell*, thus giving them an opportunity of buying the property themselves at the price fixed and to be paid by the intending purchaser;

(2) that notice of the *actual price* at which the mortgagees were entitled to redeem the property not having been given to them, they were entitled to retain possession for the term of the mortgage. P ABDUL AZIZ *v.* NIADAR MAL, 123 P. W. R. 1917 **397**

——— *of undivided share during partition suit—Mortgage, property sold free from—Sale-proceeds divided among co-sharers—Mortgagor undertaking to satisfy mortgage-debt—Mortgagee, remedy of.*

One of the co-sharers in an undivided property mortgaged his share in the same, and then filed a partition suit against the remaining co-sharers. During the pendency of this suit the plaintiff co-sharer created a further charge in respect of this very share in favour of his mortgagee. The Court passed a preliminary decree, and in execution thereof appointed a Commissioner to carry out the partition according to his own discretion. The parties to the suit agreed before him in good faith to have the property sold up and the cash proceeds divided among them according to their shares. The Commissioner sold the property free from all encumbrances and submitted his report, which was

MORTGAGE—concld.

accepted by the Court. The property was purchased with a full knowledge of the existence of the mortgage and the further charge, on the assurance that the plaintiff co-sharer would meet the liabilities accruing therefrom. The cash proceeds were divided among the co-sharers, and the plaintiff co-sharer was made liable to satisfy his mortgage-debt, for which no real security was taken from him:

Held, (1) that the doctrine of *lis pendens* had no application to the further charge, inasmuch as it affected the rights of nobody except the person creating the same;

2 that, although the Court had not in the preliminary decree authorised the Commissioner to sell the property, yet the Court having fully ratified the sale, which it had power to do under the Partition Act, the sale was good and valid under the final decree:

(3) that the mortgagee's remedy was to enforce his mortgage and further charge against the property in the hands of the purchaser to the extent of the mortgaged share. O ABDUL WAHAB *v.* BASANT LAL, 4 O. L. J. 586 **413**

———Usufructury mortgagee dispossessed of mortgaged property—Remedy **406**

———, usufructuary—Mortgagee, dispossession of, from portion of mortgaged premises—Acquiescence—Interest from date of dispossession, whether can be allowed **55**

———, usufructuary—Profit amounting to principal **677**

MUHAMMADAN LAW—GUARDIAN. *of lunatic—Mother—Sale of lunatic's property by* de facto *guardian—Widow, right of, to set aside sale—Limitation, commencement of—Cause of action, accrual of.*

Under the Muhammadan Law the mother of a lunatic is not his legal guardian.

A sale of the property belonging to a Muhammadan lunatic made by his *de facto* guardian is invalid, even if the sale is effected for paying off the lunatic's ancestral or family debts or for other family purposes.

The cause of action for a suit by the widow of a lunatic for possession of her husband's property sold by his mother as his *de facto* guardian accrues, not on the date on which the sale of the property is made, but on the date of the husband's death. P MEHR BIBI *v.* CHANAN DIN, 59 P. R. 1917; 100 P. W. R. 1917 **932**

——— —SUCCESSION, *relinquishment of rights of, validity of*—Spes successionis, *transfer of—Transfer of Property Act (IV of* 1882), *ss.* 2, 6—*Renunciation for consideration—Estoppel.*

Per *Spencer, J.*—A mere renunciation of a right of succession is not repugnant to the principles of Muhammadan Law.

Where an heir-apparent renounces such a right by reason of an arrangement whereby he accepts a benefit and compounds for his share in the property, he or any one claiming under him is estopped from repudiating the transaction by which he is benefited.

Per *Sadasiva Aiyar, J.* (*Spencer, J., dissenting*).—The relinquishment of his rights of inheritance by an heir-apparent is invalid under the Muhammadan Law.

MUHAMMADAN LAW—concld.

Chances of succession are not rights of property under the Muhammadan Law, as there can be no heir to a living person under that law.

The said rule of Muhammadan Law is unaffected by the provisions of section 6 of the Transfer of Property Act.

In so far as the Muhammadan Law prohibits relinquishment of rights of future inheritance, whether for consideration or not, a declaration as to present or future intention about such relinquishment cannot be relied on as an estoppel. **M** ASA DEEVI *v.* KARUPPAN CHETTY 361

——— SUCCESSION—*Step-son, whether heir to step-mother.*

Under the Muhammadan Law a step-son is not an heir to the property of his step-mother **P** BEGAM *v.* JALAL DIN, 50 P. R 1917; 116 P. W. R. 1917 263

———WAKF—Mutawalli, *power of, to grant permanent lease of* wakf *property—Consideration spent in improving endowment—Lessee, position of—Refund.*

A *mutawalli* granted a *mokarari maurusi* lease of *wakf* property and out of the *selami* paid for the lease spent Rs. 400 in building a *pucca* house for the endowment:

Held, that the lease was void as there was no urgent necessity for granting it, but that the lessee was entitled to a refund of Rs. 400 spent by the *mutawalli* in building the *pucca* house, and that for this amount the lessee would have a charge upon the *wakf* property, but no personal claim against the *mutawalli*. **C** BADAL MIRZA *v.* TINKORI KOLEY, 26 C. L. J. 263 736

———————Wakfnama *directing portion of income to be paid to daughter of founder, validity of—Mussalman Wakf Validation Act (VI of 1913).*

A *wakfnama*, which is not governed by the provisions of Act VI of 1913, will be valid if the dominating purpose and intention of the grantor in executing the deed was to provide for religious and charitable purposes, and the secondary and subsidiary object was to secure for his descendants any surplus that might remain after defraying the expenses necessary for those purposes.

Where a *wakfnama* enjoined the *mutawalli* to perform the acts and ceremonies mentioned in the document and to provide for the preservation and repair of a mosque and then gave to the daughter of the founder the balance of the income of the *wakf* property after deducting the expenses for those acts and ceremonies:

Held, that the *wakfnama*, though not governed by the provisions of Act VI of 1913, was valid. **C** RAHAMAT ALI *v.* CHIKAN BIBI 684

MUSSALMAN WAKF VALIDATION ACT (VI OF 1913) 684

NON-JOINDER OR MISJOINDER OF PARTIES 616

NOTICE, constructive 628

——— Execution of decree, order for, without notice, validity of 853

OCCUPANCY HOLDING, *non-transferable—Transfer of portion—Abandonment—Landlord, right of, re-entry of—Tenants holding undivided shares, position of.*

So far as the tenants are concerned, an occupancy holding is one and an entire holding of a particular piece of land, though it may be that as between themselves the tenants are entitled in different and undivided shares to the land.

Where a *raiyat* transfers or abandons his undivided share in a non-transferable occupancy holding without parting with the remainder of the holding belonging to his co-sharers, the co-sharer landlord under whom that share was held cannot re-enter as there has been no abandonment of the holding. **C** SWARNA MOYI DASI *v.* GAYRATULLA SARDAR 704

OCCUPANCY RIGHTS—Non-payment of rent for 28 years—Morni hill tract 34

ORISSA TENANCY ACT (II B. C. OF 1913), S. 31—*Occupancy rights, transferability of—Sale in execution of mortgage decree—Procedure.*

The decisions with regard to the transferability of occupancy rights in Bengal are not applicable to the transfer of such rights in Orissa.

In Orissa occupancy rights are transferable without the landlord's consent, unless it is shown to the satisfaction of the Collector that the landlord has good reason for his objection.

The correct procedure in cases in which it is desired to put up for sale an occupancy right in execution of a decree on a mortgage is to allow the sale to go through. The purchaser should then under section 31 of the Orissa Tenancy Act, 1913, apply to the landlord for registration of the transfer. If the landlord accepts the fee authorised, the sale will hold good. If he refuses to do so, the purchaser should apply to the Collector and the Collector will decide whether there is good and sufficient reason for the refusal of the landlord's consent. **PAT** GIRIDHARI NAIK *v.* KASHI TINDI, 2 P. L. J. 476 128

OUDH LAWS ACT (XVIII OF 1876), S. 9—*Pre-emption—Lapse of successful pre-emptor's right by time, whether amounts to sale.*

Where the right of a successful pre-emptor lapses by reason of his failure to apply for execution of his decree within the time permitted by law, such lapse, whether intentional or accidental, does not amount to a re-sale of the pre-empted property, so as to give rise to a right of pre-emption on its own account under section 9 of the Oudh Laws Act. **O** GHUTUR SINGH *v.* ANGAD PANDE, 4 O. L. J. 422 467

OUDH RENT ACT (XXII OF 1886), S. 47—*Compromise enhancing rent—Enhancement, illegal—Rent, suit for—Landlord, position of.*

A suit to contest a notice of ejectment was settled by a compromise, under which the existing rent was enhanced by nearly half as much and one of the relations of the recorded tenant was admitted as a co-tenant of the holding in suit. Subsequently the landlord sued the co-tenants for recovery of rent on the basis of the compromise:

Held, that the suit could not be decreed at the rate entered in the compromise but only at an enhanced rate allowed by section 47 of the Oudh Rent Act. **O** MUHAMMAD ABUL HASAN KHAN *v.* PARKASHI, 4 O. L. J. 407 407

OWNERSHIP, *grazing cattle and cutting grass from time to time, whether constitutes.*

The fact that the plaintiffs have been grazing their cattle and cutting grass from time to time on the land in dispute is not enough to prove their ownership. **P** SANT SINGH *v.* FRANGU, 54 P. W. R. 1917 755

PARDANASHIN LADY, *deed executed by - Burden of proof—Proof, nature of.*

In order to charge a *pardanashin* woman upon an instrument or power purporting to have been executed by her, it is requisite that the person relying on such a document should give satisfactory and conclusive evidence that it was not only executed by her, but explained to and understood by her. **O** SHABKURH RUQAIYA BEGAM *v.* SHEO PRASAD, 4 O. L. J. 425 **435**

PARTITION **912**

——— *Revenue Court - Co-sharers, position of, after partition.*

A partition effected through a Revenue Court between the co-sharers of a village creates a fresh title in each co-sharer to whom a share in the village is allotted, and the parties to the partition case cannot subsequently be allowed to set up a title other than that assigned to them at the time of the partition. **O** JANG BAHADUR SINGH *v.* CHANDREJ SINGH, 4 O. L. J. 265 **171**

——— *Trust - Temple - Right of management and superintendence—Suit for partition, maintainability of.*

A suit for the partition of the right of man gement and superintendence in respect of property with regard to which none of the parties claim to have any personal pecuniary interest, *e.g.*, the property of a temple, is not maintainable. **A** PURAN MAL *v.* BRIJ LAL, 15 A. L. J. 666 **835**

PARTITION ACT (IV OF 1893)—*Preliminary partition decree—Commissioner selling property—Sale sanctioned by Court—Transfer of Property Act (IV of 1882), s 52*—Lis pendens, *doctrine of—Mortgage of undivided share during partition suit—Mortgage, property sold free from -Sale-proceeds divided among co-sharers—Mortgagor undertaking to satisfy mortgage-debt—Mortgagee, remedy of.*

One of the co-sharers in an undivided property mortgaged his share in the same, and then filed a partition suit against the remaining co-sharers. During the pendency of this suit the plaintiff co-sharer created a further charge in respect of this very share in favour of his mortgagee. The Court passed a preliminary decree, and in execution thereof appointed a Commissioner to carry out the partition according to his own discretion. The parties to the suit agreed before him in good faith to have the property sold up and the cash proceeds divided among them according to their shares. The Commissioner sold the property free from all encumbrances and submitted his report, which was accepted by the Court. The property was purchased with a full knowledge of the existence of the mortgage and the further charge, on the assurance that the plaintiff co-sharer would meet the liabilities accruing therefrom. The cash proceeds were divided among the co-sharers, and the plaintiff co-sharer was made liable to satisfy his mortgage-debt, for which no real security was taken from him:

Held, (1) that the doctrine of *lis pendens* had no application to the further charge, inasmuch as it affected the rights of nobody except the person creating the same;

(2) that, although the Court had not in the preliminary decree authorised the Commissioner to sell the property, yet the Court having fully ratified the sale, which it had power to do under the Partition Act, the sale was good and valid under the final decree;

(3) that the mortgagee's remedy was to enforce his mortgage and further charge against the property in the hands of the purchaser to the extent of the mortgaged share. **O** ABDUL WAHAB *v* BASANT LAL, 4 O. L. J. 386 **413**

PARTITION ACT—concld

——— - S. 4, *scope and object of—Decree, form of.*

The object of section 4 of the Partition Act is to provide in certain cases an alternative course, by which a plaintiff claiming partition by metes and bounds may be compelled, at the option of the defendant, whether he himself likes it or not, to forego his legal right to such partition and to accept pecuniary compensation in lieu thereof.

This section involves a statutory interference with the legal rights of the plaintiff in a partition suit, and it should, therefore, be strictly construed so as to limit that interference. The words "*shall undertake*" in the section mean that there must be something more than a mere offer to purchase by the defendant. There must be an undertaking to do so, which means an unconditional offer from which the person making it will not be permitted to resile, and on such undertaking being given, the Court is bound to direct a sale.

A decree passed under section 4 of the Partition Act should be one which has the effect in law of transferring the ownership of the plaintiff's share to the defendant who has undertaken to purchase it, that is to say, which gives the defendant a good document of title against the plaintiff.

Semble—Under section 4 of the Partition Act the Court should pass a decree compelling the plaintiff to execute a deed of sale in favour of the defendant, in the same manner as is done in the case of a suit for the specific performance of a contract of sale. After the execution of such a document by the plaintiff, or by the Court in his behalf, in the event of his declining to do so, the defendant would become liable to the plaintiff for the unpaid purchase-money and the plaintiff would be entitled to maintain a suit for the recovery of the same if it were not paid. **A** ILIAS AHMAD *v* BULAQI CHAND, 15 A. L. J. 677 **867**

PARTNERSHIP, *dissolution of—Declaration of title to shares purchased by firm, maintainability of.*

A suit for a declaration of the plaintiffs' title to a half share in a certain number of shares in a Limited Company purchased out of a fund belonging to a firm, which was carried on by the plaintiffs and the defendants but was subsequently dissolved, is maintainable without an adjustment of accounts of the partnership business, where none of the parties say that any question of accounts remains open, other than the question as to the ownership of the shares.

In such a suit the Court has no power to direct by its decree the Limited Company to register the plaintiffs' names as shareholders, but it should instead direct the defendants to execute a transfer of a half of the shares in suit in favour of the plaintiffs, and to lodge the transfer together with share certificates with the Company for registration.

PARTNERSHIP—concld.

Such a decree is executable on defendants failure to obey its direction in the manner provided for in Order XXI, rule 34, Code of Civil Procedure. C BROJENDRA KUMAR SAHA v. KALI NATH SAHA 77

PENAL CODE (ACT XLV OF 1860), Ss 71, 147, 323 —*Rioting and causing hurt—Joinder of charges, legality of.*

Where the members of an unlawful assembly cause hurt to one person and by a separate act hurt is caused to another person, the offences of rioting and causing hurt under sections 147 and 323 of the Penal Code are not distinct offences and can be tried jointly. A KATWARU RAI v. EMPEROR, 15 A. L. J. 594; 18 CR. L. J. 788 308

——— S. 75 987

——— Ss. 84, 302 —*Murder committed deliberately but under superstition—Insane delusion, plea of.*

The fact that the accused, while committing the crime with which he is charged, was under some insane delusion is not *per se* sufficient to exempt him from criminal liability for his wrongful act, unless the impulse was such as to render him unconscious of what he was doing, or to make him ignorant of the fact that the act which he was about to commit was wrong.

Where a man commits murder deliberately, the fact that he acts under a superstitious belief and under some insane delusion is not sufficient to exempt him from punishment PAT SEAT ALI v. EMPEROR, 18 CR. L. J. 766 112

——— S. 86—*Murder committed under influence of drink—Intention—Punishment, measure of.*

Although section 86 of the Penal Code attributes to a drunken man the knowledge of a sober man when judging of his action, it does not give him the same intention, and, therefore, drunkenness or a state of intoxication affords a sufficient excuse for not exacting the extreme penalty of the law P PAL SINGH v. EMPEROR, 28 P. R. 1917; 18 CR L J. 868; 35 P. W. R 1917 CR. 980

——— Ss. 96, 97 – *Private defence, right of, extent of.*

An act done in exercise of the right of private defence is not an offence (section 97 of the Penal Code and does not, therefore, give rise to any right of private defence in return. L B GOURI SANKER v. SHEIK SULTAN, 18 CR. L. J. 864 832

——— Ss. 96 TO 106, 333 - *Private defence, right of, commencement of—Public servant, assault upon—Offence—Proof.*

In order to set up the right of private defence it is incumbent upon the accused to begin by showing that at the time of their interference an offence affecting the human body was being committed on the person on whose behalf they interfered.

A public servant does not cease to be a private citizen, and the law will take cognizance of an assault committed upon him, independently altogether of his position as a public servant. If, however, it is desired to invoke on his behalf the provisions of section 333, Indian Penal Code, and other similar sections, it is for the prosecution to satisfy the Court that the facts of the case were such as to fulfill the requirements of those sections. A SAMPAT v. EMPEROR, 15 A. L. J. 565; 18 CR. L. J. 803 323

——— Ss. 97, 99 (4)—*Private defence, right of, extent of—Hurt, infliction of.*

PENAL CODE—contd.

If two persons invade another's house in anger, the occupier is entitled forthwith to eject them and to use reasonable force for the purpose. He is not bound to leave them in his house and go off and complain to the authorities. His right of private defence extends to the causing of any harm other than death, subject to the restriction in section 99 of the Penal Code, which provides that only such harm should be inflicted as is necessary for the purpose of defence. L B GORIE SANKER v. EMPEROR, 18 CR. L. J 862 830

——— S. 99 (4) 830

——— Ss. 109, 114 651

——— S. 147 308, 828

——— Ss. 147, 379 147

——— S. 182 134

——— S. 193 305

——— S. 193—*False statement—Intention.*

In a case under section 193 of the Penal Code it is essential to show that the accused gave false evidence or made a false statement intentionally. PAT GOPI NATH PANDA v. EMPEROR, (1917) PAT. 267; 18 CR. L. J. 772 148

——— S. 200 1007

——— S. 206—*Fraudulent removal of property—Accused not liable under decree—Offence.*

A person who, in order to protect his own property, not legally liable for a decree, from confusion with property which is so liable, makes it over to another person, does not commit an offence under section 206 of the Indian Penal Code. B BASAPPA SHIVAPPA, *In re*, 19 BOM. L R. 35; 18 CR. L. J. 784 160

——— Ss. 211, 182—*Criminal Procedure Code (Act V of 1898), s. 195—False charge laid before Police—Sanction, Court, whether can grant—Prosecution.*

Sanction for the prosecution of an offence under section 211 of the Penal Code is required by section 195 of the Criminal Procedure Code and such sanction cannot be given by the Police.

No Court can grant a sanction for the prosecution of an accused in respect of a false charge laid before the Police which does not lead to proceedings in Court.

Section 195 of the Criminal Procedure Code cannot be construed as allowing a prosecution under section 211 of the Penal Code without any previous sanction, if the false charge relates to a serious offence and does not lead to proceedings in Court. L B EMPEROR v MI WA, 8 L. B. R. 534; 18 CR L. J 758 134

——— S 294A, *scope of—"Drawing," meaning of—Lottery, essential factors of—Result dependent solely upon chance.*

Section 294A of the Penal Code does not attack lotteries themselves; what has been rendered indictable is the running of public lotteries and the precise offence envisaged by the section is that of keeping any place for the purpose of drawing any unauthorised lottery.

The word "drawing" is used in the section in its physical sense and the actual drawing of lots is an essential ingredient of the offence provided for in section 294A, Indian Penal Code.

The essential factor in a lottery is that there should be a scheme for distribution of a prize or prizes to be determined solely by chance, and if chance so decrees that no prize is to be distributed

PENAL CODE—contd.

to the adventurers and the stakes are to be appropriated by the organiser of the lottery, the scheme is nonetheless a lottery.

The accused ran two lotteries in the following manner: (*i*) Tickets numbered 1 to 100 were put into a pitcher and the public purchased other tickets and chose a number consisting of either one or two digits which at the time of the sale was written upon their tickets. In the evening three tickets were drawn from the pitcher, their sum was taken and the last two figures of their sum became the winning numbers. Those persons were then adjudged to be winners whose tickets bore either one or both of the last two digits of the total so obtained. (*ii*) Instead of drawing three tickets from a pitcher the average price at which the various sales of opium had taken place that month in Calcutta was calculated and prizes were awarded to those persons who had predicted the last or the last two figures of that price:

Held, (1) that in the first case the distribution of prizes was determined solely by the fortuitous issue of numbers from the pitcher and that it was essentially a lottery within the meaning of section 294A of the Code;

(2) that in the second case also the result of the lottery was determined solely with reference to the two inferior digits of the price, there being no scope for skill, and that this also was a lottery within the meaning of the section, but that since there was no drawing in this particular case, the transaction did not render the accused liable to punishment under section 294A, Indian Penal Code. **P** EMPEROR *v.* MUKANDI LAL, 35 P. R. 1917 CR; 33 P. W. R. 1917 CR; 18 CR. L. J. 768 **144**

——— Ss. 300 *fourthly*, 86—*Murder committed under influence of drink—Intention.*

Where the accused under the influence of liquor assaulted the deceased and literally beat him to death with *lathis* without any direct motive:

Held, that the accused were guilty of murder under section 300 of the Penal Code, as they must have known that their act was "so eminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death." **P** PAL SINGH *v.* EMPEROR, 28 P. R. 1917 CR.; 18 CR. L. J. 863; 35 P. W. R. 1917 CR. **80**

——— Ss. 302, 84—*Murder committed deliberately but under superstition—Insane delusion, plea of.*

The fact that the accused, while committing the crime with which he is charged, was under some insane delusion is not *per se* sufficient to exempt him from criminal liability for his wrongful act, unless the impulse was such as to render him unconscious of what he was doing, or to make him ignorant of the fact that the act which he was about to commit was wrong.

Where a man commits murder deliberately, the fact that he acts under a superstitious belief and under some insane delusion is not sufficient to exempt him from punishment. **PAT** SEAT ALI *v.* EMPEROR, 18 CR. L. J. 766 **142**

——— S. 302—Murder—Evidence **155**

——— S. 304A—*Railways Act (IX of 1890), s. 101—Rash and negligent act causing death—Station Master giving "line clear" with knowledge that another train is standing in the way of the incoming train—Offence.*

PENAL CODE—contd.

An Assistant Station Master gave a "line clear" to an incoming passenger train on a foggy night with the knowledge that a goods train was standing at a particular point where the passenger train might collide with it, but hoping to remove the goods train to a siding before the arrival of the passenger train. The goods train was not removed in time and a collision occurred which was attended with loss of life:

Held, that the Assistant Station Master was guilty of a rash and negligent act in giving the "line clear" and was, therefore, punishable under section 304 A of the Penal Code and section 101 of the Railways Act. **A** TAPTI PRASAD *v.* EMPEROR, 15 A. L. J. 590; 18 CR. L. J. 815 **335**

——— S. 333 **308, 828**

——— Ss 332, 96 *to* 106—*Private defence, right of, commencement of—Public servant, assault upon—Offence—Proof.*

In order to set up the right of private defence it is incumbent upon the accused to begin by showing that at the time of their interference an offence affecting the human body was being committed on the person on whose behalf they interfered.

A public servant does not cease to be a private citizen, and the law will take cognizance of an assault committed upon him, independently altogether of his position as a public servant, if however, it is desired to invoke on his behalf the provisions of section 333, Indian Penal Code and other similar sections, it is for the prosecution to satisfy the Court that the facts of the case were such as to fulfill the requirements of those sections. **A** SAMPAT *v.* EMPEROR, 15 A. L. J. 566; 18 CR. L. J. 803 **323**

——— Ss. 378, 75—*Theft—Cutting string of* hass *and forcing its ends slightly apart in order to remove it, whether constitutes sufficient moving of* hass.

Where the accused cut the string with which a *hass* was fastened round the complainant's neck forcing the ends of the *hass* slightly apart, intending to remove the same from her neck, but on account of the struggle that ensued between him and the complainant the *hass* fell from the latter's neck and was found on the bed later on:

Held, that the act of cutting the string and forcing the ends apart constituted a sufficient moving of the *hass* to bring the act within the purview of section 378 of the Penal Code. **P** BISAKHI *v.* EMPEROR, 29 P. R. 1917 CR.; 18 CR. L. J. 875; 37 P. W. R. 1917 CR. **987**

——— Ss. 379, 147 **147**

——— S. 403 **138**

——— S. 420 **310**

——— Ss 420, 109, 114—*Cheating, person introducing complainant to cheater without himself receiving share of money, whether guilty of—Intention.*

The offence of cheating under section 420, Indian Penal Code, is complete where money is obtained on the false pretence that the complainant would be married to a woman; and a person is guilty of abetment under sections 107 and 114 of the Code who introduces the complainant to the cheater, knowing full well that the offence is going to be

PENAL CODE - concld.

committed, is present at the time when the agreement and the payment are made but remains silent and while taking no share of the money takes no steps to inform the complainant of what is going to happen with him. P MURADI v. EMPEROR, 6 P. W. R. 1917 CR; 18 CR. L. J. 827 651

——— S. 447—*Criminal trespass - Possession of property by complainant, whether essential.*

In a prosecution for criminal trespass it is necessary to determine in whose possession the property was at the date of the alleged trespass. M MANTRIPRAGADA VENKATARAMA RAO, *In re*, 18 CR. L. J. 76. 137

——— S. 448 828

——— Ss. 465, 467 658

——— Ss. 467, 471 - *Production of title-deed in answer to summons, whether amounts to "user"—Sanction for prosecution, necessity of—Witness, whether can be prosecuted before sanction is given for prosecuting plaintiff.*

A person who is cited by the plaintiff to depose as a witness and to produce his title-deed and who produces the title-deed and gives evidence with regard to it, can be prosecuted on a charge under section 471 read with section 467, Indian Penal Code, on the ground that the title-deed is a forged document, before any sanction has been given for the prosecution of the plaintiff, or for the prosecution of the deponent himself under section 193, Indian Penal Code, in respect of the statements made by him regarding the document.

The production of a forged title-deed in answer to a citation in which no particular deed is specified and giving evidence in regard to it amounts to user within the meaning of section 471, Indian Penal Code. C DIGAMBAR CHAKRAVARTI v. RAM TARAN MITTER, 18 CR. L. J. 839 663

——— S. 471 663

——— S. 489A 310

PENALTY 603

PLAINT, *statement of claim in—Court, whether bound by technicalities.*

A Court should not be bound by any technicalities with regard to the form of the statement of claim in a plaint. C SHEIKH YAKUB v. TAZIMUDDI MULLICK, 26 C. L. J. 105 842

PLEADER, *duties of—Misbehaviour—Filing second complaint on identical facts without disclosing dismissal of first—Failure to master instructions—Gross neglect.*

A Pleader should take pains to master his instructions and the law relating to them so as to eliminate all inaccuracies. He should not endeavour to conceal any prior unsuccessful proceedings by the same party on the same complaint in another Court so as to mislead the Court in the administration of justice.

As an officer of the Court it is his duty not deceitfully to circumvent but honestly and loyally to uphold the practice of the Court, and to co-operate in the orderly and pure administration of justice by the Court. S INQUIRY AGAINST MR. M. PLEADER, *Re*, 11 S. L. R. 12; 18 CR. L. J. 819 643

PLEADINGS, amendment of 903

——— , *determination of case on grounds taken in—Relief to be consistent with pleadings - Landlord and tenant—Ejectment - Plaintiff's title proved—Relief—Adverse possession against lessee, whether adverse against lessor.*

In an action in ejectment when the plaintiff has established his alleged title, the Court should not refuse him relief on a ground not only not urged by the defendant but wholly inconsistent with the defence taken by him in his written statement.

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made; although it cannot be maintained as an inflexible rule of law that a Court is not competent to determine that the rights of the parties litigant are really different from what is alleged either by the plaintiff or by the defendant.

The possession of an under-tenant of a tenant who had no power to transfer the demised land does not become adverse to the landlord until the tenancy comes to an end.

The plaintiff instituted a suit for the ejectment of the defendant, on the allegation that the plaintiff was a *raiyat* of the land in suit and had granted a permanent heritable under-*raiyati* interest to the defendant on condition that if the latter transferred the property, the plaintiff would be entitled to re-enter, that in 1908 the defendant No. 1 had sold his right to defendant No. 2 and that defendant No. 3 was in occupation of the land as a trespasser. Defendant No. 3 contested the suit, denying the title set up by the plaintiff and claiming to be a *raiyat* in respect of the land under the same superior landlord. It was found that defendant No. 3 did not hold as a *raiyat* but that he came upon the land as a tenant under defendant No. 1 and was in occupation of the land for more than twelve years and that the plaintiff had proved his alleged title to the land as a *raiyat*:

Held, (1) that the plaintiff should have a decree and relief should not be refused to him on the ground that the third defendant was a tenant under the first defendant, a ground which was never suggested in and was inconsistent with the pleadings of the third defendant;

(2) that the suit of the plaintiff was not time-barred, as time did not begin to run against him till the tenancy of defendant No. 1 had terminated in 1908, when he ceased to pay rent to the plaintiff after having transferred his rights to defendant. C ISHAN CHANDRA DHUPI v. NISHI CHANDRA DHUPI 378

POSSESSION, *suit for, on declaration of title—Defendant admitting land to be joint, but pleading separate title on allegation of partition—Burden of proof.*

In answer to a suit by the plaintiffs for *khas* possession on declaration of their title to a two-thirds share of a land, on the allegation that they along with one of the defendants joined in purchasing certain lands which included the land in suit, the defendant alleged that the land had long ago been partitioned and that the disputed portion had fallen to their share:

Held, that the burden lay upon the plaintiffs to prove their title, notwithstanding the defendants' plea that the land was originally included within a joint property and on partition fell to their share. C OLI SHA v. FARID SARDAR 620

PRACTICE of keeping undecided material issue, propriety of 19

PRECEDENT, *value of.*

The language of a judicial pronouncement must be understood as spoken in reference to the facts under consideration and limited in meaning by those facts. C SYEDUNNESSA KHATUN *v.* AMIRUDDI, 2 C. W. N. 847; 25 C. L. J. 629 353

———, *value of.*

Every judgment must be read as applicable to the particular facts proved, and the general expressions used must be considered to be governed and qualified by the particular facts of the case in which such expressions are found.

A case is an authority for what it decides, and not for what may seem to follow logically from it. C MANINDRA NATH GHOSE *v.* ASHUTOSH GHOSE, 25 C. L. J. 626; 21 C. W. N. 1132 525

PRE-EMPTION 467

———*Sale by stranger vendee to co-sharer before suit, effect of—Pre-emptor, right of, proof of.*

Where property in respect of which a right of pre-emption exists in favour of a co-sharer is sold to a stranger but before a suit for pre-emption is brought, it passes back into the hands of a co-sharer, a suit for pre-emption cannot be maintained, unless the person instituting the suit can establish his right as against the co-sharer, if the former has a right superior to that of the latter to have it

A purchaser may use a title acquired by him subsequently to the origin of the cause of action as a defence against a suit for pre-emption instituted after his acquisition of the said title.

A re-sale of property acquired by a person to the man from whom it was obtained stands on a different footing from the sale of that property to a person who has a preferential right of pre-emption and who is in a position to enforce that right within the time allowed by law for that purpose. The former is a voluntary act, while the latter is more or less an acknowledgment of the right of another to acquire that property in preference to the person by whom it was purchased accompanied by a surrender in his favour.

A vendee against whom a right of pre-emption is asserted by another is not required to sit quiet till the latter has brought a suit to enforce his right or all possible claimants have turned up to assert their rights. If he acknowledges the right of a pre-emptor and sells the property to him to obviate the trouble and expense of meeting a suit for pre-emption, he does so at his own peril, but his act cannot on that account be treated as wrongful. O LALTA PRASAD *v.* RAGHUBAR SINGH, 20 O. C. 160; 4 O. L. J. 459 9

———*Vendee acquiring property after institution of suit—Defence based on title acquired after institution of suit, maintainability of.*

Where after a suit for pre-emption had been filed the defendants-vendees acquired some property by gift, which lay in the same sub-division in which the property sold was situated, and set it up as a defence in the suit:

Held, that they could not be allowed to use this transfer, which was effected subsequent to the filing of the plaintiff's suit, as a shield and thus defeat

PRE-EMPTION—concld.

his claim. O SITLA BAKHSH SINGH *v.* JAGDAT, 20 O. C. 196; 4 O. L. J. 483 909

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), S 31 (b)—*Decree, transfer of, for execution by Small Cause Court to Munsif direct, legality of.*

The transfer by a Presidency Small Cause Court of its decree for execution to a Munsif direct without intervention of the District Judge is perfectly good under section 31 (*b*) of the Presidency Small Cause Courts Act. C KEDAR NATH MANA *v.* JOGENDRA NATH DAS 815

PRESUMPTION of lost grant 577

PREVENTION OF CRUELTY TO ANIMALS ACT (XI OF 1890), S. 3 (b)—*Cruelty, every form of, not punishable—Seeling of bird's eyes, whether cruelty—Carrying by train of birds with their eyes seeled up—Offence.*

The real intention of the language used in section 3 (*b*) of the Prevention of Cruelty to Animals Act is not to punish any form of cruelty but to punish only such cruelty as is inflicted on an animal by causing it unnecessary pain or suffering by reason of the manner or position in which the animal is bound or carried.

The applicant purchased certain cranes whose eyes were seeled or stitched up prior to the applicant's purchase of them. While the applicant was conveying them by rail it was noticed at a station that the birds' eyes were stitched up and were bleeding:

Held, that the cruelty, if any, was caused by the antecedent stitching up of the eyes and not by the manner or position in which the birds were carried in the luggage van of the train.

Obiter—It may well be that the process of seeling up the eyes of cranes or hawks is in itself a cruel practice. B IBRAHIM MIR SHIKARI *v.* EMPEROR, 9 BOM L. R. 524; 18 CR. L. J. 826; 41 B. 654 650

PRINCIPAL AND AGENT—*Power-of-attorney granted by joint co-parceners—Death of some co-parceners, effect of—Termination of agency.*

Where the paramount object of a power-of attorney executed by three out of four brothers, living jointly in a Mitakshara family, in favour of the fourth was to facilitate the raising of joint loans by the latter on mortgages of the joint estate for their joint benefit:

Held, that the death of some of the executants did not put an end to the power but that so long as the object of the power continued to be capable of realisation, it retained its vitality.

Per *Mookerjee, J.*—It cannot be held as an inflexible rule of law that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the agent, not merely as regards the deceased, but also as regards the surviving principal. In each case the true intention of the parties to the contract must be determined from the terms thereof and from the surrounding circumstances.

Where two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, a severance of the joint interest by the death of one of the joint principals may

operate to terminate the agent's authority, unless it is a power coupled with an interest.

Where, however, the principals are joint and several and the power given to the agent is both joint and several, the death of one of the principals does not terminate his authority as regards the surviving principal. **C** SITAL PROSAD, *In re*, 21 C. W. N. 620 **288**

PRINCIPAL AND AGENT—*Power-of-Attorney with reservations, effect of.*

An agent cannot by his acts bind the principal to a larger extent than he is empowered to do under the power-of-attorney granted to him. If the power does not authorise the agent to carry on a business *except with limitations*, any act done by him in excess of such power will not bind the principal **M** MALAIPERUMAL CHETTIAR *v.* ARUNACHALLA CHETTIAR, 6 L W. 417 **224**

— — *Principal, liability of, extent of, for acts of agent—Power-of-Attorney, construction of—Agent's authority, limitation of.*

The question whether the knowledge or acts of an agent can be attributed to his principal depends upon the terms of the authority that the agent has received.

Per *Atkinson, J.*—If a person deals with a known agent endowed with limited authority and power, he is bound to ascertain the scope of the agent's authority: otherwise if such a person deals with such an agent and the agent exceeds the limits of his authority and the person so dealing with him incurs loss or damage by reason of the agent exceeding his authority, then such a person cannot hold the principal liable for the acts of his agent done outside and beyond the scope of his authority.

The authority conferred by a power-of-attorney must, therefore, be strictly adhered to. If the authority is exercised in excess of and outside the reasonable scope of the special powers conferred upon the agent, a third party dealing with the agent will be unable to make the principal liable. **PAT** STOCKING, B *v.* TATA IRON AND STEEL CO, (1917) PAT 74; 2 P. L W. 133; 2 P. L. J. 610 **175**

PROBATE AND ADMINISTRATION ACT (V OF 1881)—*Civil Procedure Code Act V of 1908), O. I, r 10—Will Probate—Procedure—Discharge of caveat, when to be allowed—Death of one of two executors—Survivor, whether can proceed with Probate proceeding.*

If one of two executors dies, the representation of the estate of the deceased and of the interests of the beneficiaries vests in the remaining executor. It is open to the caveators to proceed against him alone.

There is no provision in the Probate and Administration Act for the discharge of a caveat The only rule of procedure governing such a proceeding is Order I, rule 10, of the Civil Procedure Code A caveat should only be discharged where it is shown that the caveator has no interest in the estate.

The petitioner in a Probate proceeding should at first produce substantial considerations upon which *prima facie* it can be held that the caveator cannot possibly have any interest which he claims, and

upon the production of those considerations the caveator should be called upon to rebut the presumption arising from the evidence produced by the propounder. **PAT** GAURI SHANKER JOSHI *v.* MANRAJ SHUKUL, 3 P. L. W. 198 **705**

S. 4—*Will—Executors, rights and duties of—Executor indebted to estate, position of—Trusts Act (II of 1882), s. 87—Legatee, suit by, against executor-debtor, nature of—Limitation Act (IX of 1908), Sch. I, Art. 123—Suit not framed as one for administration—Plaint, amendment of—Civil Procedure Code Act V of 1908, O VI, r. 17—Decree, form of Interest, liability for, by executor-debtor, after testator's death.*

A legatee is not entitled to sue a debtor of the estate for the debt. The only persons who can sue are the executors appointed under the Will.

If, however, the executors fail to do their duty and refuse or neglect to sue, a legatee may sue the executors for his legacy in due course of administration and may join the debtor or his representatives as parties and claim payment of the debt to he estate.

Where the claim is against a stranger indebted to the estate, the suit should be filed within three years from the date when the debt becomes payable.

If, however, the debtor himself is one of the executors in whom the estate vests in legal theory the debt payable by him is assumed to have been paid by him to himself and becomes part of the assets of the deceased testator in his hands.

This is the case whether the executor proves the Will or not, provided he acts as executor.

If, however, a person appointed an executor renounces the office or dies without having acted or obtaining probate, he will be in the position of a stranger debtor, and an action to recover the debt will be barred unless brought within the time limited for an action to recover a debt.

One of two executors cannot sue his co-executor for payment of the assets in the latter's possession, but on his death the surviving executor can sue the legal representatives of the deceased executor for recovery of such assets.

A creditor or a general legatee may for the purpose of recovering his debt or his legacy bring a suit for administration and in that suit claim an account from the representatives of the deceased executor and payment of whatever is found due.

In such an action, it may not be necessary to join as parties persons beneficially interested in the estate; but the decree in such a suit would not be for payment of the debt as a debt, but would be for an account of the moneys belonging to the testator's estate in the hands of the executor.

Such a suit when brought by a legatee is one to recover a legacy, and is governed by Article 123 of the Limitation Act.

Where the plaint does not expressly contain a prayer for administration, either general or limited, and the claim is not made for the recovery of a legacy, but it contains all the necessary allegations

PROBATE AND ADMINISTRATION ACT—concld.

to give the plaintiff the relief to which he is entitled, it may be allowed to be amended and the necessary parties may be ordered to be added.

Where the plaintiff legatee is not entitled, at the date of the decree, to payment of his legacy under the terms of the Will, the proper order is to direct the executors and debtors to the estate to pay the amounts due into Court and direct their investment.

Where an executor who is indebted to the estate retains the amount of the debts as assets of the estate, he is liable to interest on it at 6 per cent. per annum if he does not invest the same. **M** CHUNDURU CHINA *v.* NERALLA VENKATA SUBBA RAO, 6 L. W. 85; 33 M. L. J. 195 **605**

——— S. 90 **775**

PROCEDURE, *law of, retrospective effect of.*

In matters of adjective law, the rules of procedure which are in force at the date on which the right to make an application accrues govern the application. **M** NIMMALA MAHANKALI *v.* KALLAKURI SUBBA RAO, 32 M. L J. 455 **268**

PRO FORMA DEFENDANT, *what is.*

A *pro forma* defendant is not not known to law. **PAT** NAND LAL PAL *v.* NARESH CHANDRA DEB, 2 P. L. W. 108 **468**

PROVINCIAL INSOLVENCY ACT (III OF 1907), S. 18—*Suit to establish right to property—Property sold by Receiver—Receiver, whether necessary party—Court, permission of.*

In a suit to establish title to property which has already been sold by the Receiver, it is not necessary to join the latter as a party defendant, and the mere fact that his name is on the record as a defendant is not sufficient to defeat the plaintiff's claim on the ground that the permission of the Insolvency Court has not been obtained for the prosecution of the claim. **P** KUNDAN LAL *v.* SHADI RAM, 55 P. R. 1917; 130 P. W. R. 1917 **809**

——— S. 18—*Vesting of property in Receiver—Suit to establish right to property—Receiver, whether necessary party—Insolvency Court, permission of, necessity of.*

A Receiver was appointed of an insolvent's estate and the Court holding that certain houses belonged to the insolvent, directed him to deliver possession thereof to the Receiver and ordered the latter to sell the estate. The insolvent's sons put in an objection alleging that they had a two-thirds share in the houses, but their objection was disallowed. They then brought a suit to establish their right to their share in the houses:

Held, (1) that even if the possession of the houses in dispute remained with the plaintiffs, the order of the Insolvency Court deciding that the houses belonged to the insolvent had the effect of vesting the houses, as part of the insolvent's estate, in the Receiver, and the latter was, therefore, a necessary party to the suit;

(2) that the Receiver could not be sued without the permission of the Court which had appointed him;

PROVINCIAL INSOLVENCY ACT—contd.

(3) that such permission was not a condition precedent to the institution of the suit, and the plaintiffs should be allowed a reasonable time to apply to the Insolvency Court for leave to proceed with the suit against the Receiver. **P** MUHAMMAD UMAR *v.* MUNSHI RAM, 54 P. R. 1917; 32 P. W. R. 1917 **802**

——— S. 36—*Transfer, avoidance of—Evidence, opportunity to produce, grant of—Procedure.*

When a *kobala* produced before an Insolvency Court is impeached on the ground that it is a fraudulent transfer under section 36 of the Provincial Insolvency Act, the Court ought not to come to the conclusion that the document is invalid on a mere perusal of the same and hearing arguments without giving the parties an opportunity to adduce evidence in the matter. **C** ABDUL AZIZ *v.* KHIROD CHANDRA DAS **411**

——— S. 37—*Fraudulent preference, essentials of.*

Section 37 of the Provincial Insolvency Act requires four conditions for its operation:—(1) the debtor must be unable to pay his debts as they become due, (2) the transfer must be in favour of a creditor, (3) the debtor must have acted with a view to giving that creditor a preference over other creditors, (4) the debtor must be adjudged insolvent on a petition presented within three months from the date of the transfer.

Where in the case of a transfer for a fair value the first, second and fourth conditions stated above are present, the transfer does not become void under section 37 of the Provincial Insolvency Act merely because the transferee did not believe that it was possible for the debtor to pay off all his creditors with the money obtained by the transfer or did not see to the disposal of the money by the debtor.

The question whether there has been fraudulent preference within the meaning of section 37 depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it.

Where a transfer in favour of a creditor has been made under pressure, it cannot be said that it was made with the view of giving preference to the creditor.

A creditor by means of pressure upon the debtor stole a march on his co-creditors and got a mortgage for a fair value executed in his favour by the debtor, in consideration of his debts and a fresh advance, shortly before the presentation of a petition for the adjudication of the debtor in insolvency, knowing fully the embarrassed circumstances of the debtor and taking steps to conceal the fact of the mortgage from the other creditors:

Held, that the object of the mortgage was not to give fraudulent preference to the creditor, and that, therefore, it was not void under section 37 of the Provincial Insolvency Act. **C** KALI NATH *v.* AMBICA PRASHAD DAS **399**

——— S. 46—"*Aggrieved person*", *meaning of—Receiver, whether "aggrieved person.'*

The words "person aggrieved" in section 46 of the Provincial Insolvency Act do not mean a man who is disappointed of a benefit which he might have

received if some other order had been passed. A "person aggrieved" must be a man who has a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something or wrongly refused him something or wrongly affected his title to something.

A Receiver appointed by the Court under the Provincial Insolvency Act is not an aggrieved person within the meaning of section 46 of the Act and is, therefore, not competent to apply for the revision of an order annulling adjudication. **P** RADHA MOHAN *v.* GHASI RAM, 38 P. W. R. 1917; 93 P. R. 1917 **96**

PROVINCIL SMALL CAUSES COURTS ACT (IX OF 1887), S. 16, *Sch. II, cl.* 31—*Suit to recover specific sum of money—Suit for accounts—Jurisdiction of Small Cause Court—Doubt—Reference to High Court.*

Plaintiff sued defendant in the Court of a Munsif to recover a specific sum of money due on account of salary and house rent, and added that if the correctness of the amount was questioned the amount due might be determined on examination of the accounts. The defendant pleaded that the suit was cognizable by a Court of Small Causes, and the Munsif ordered the plaint to be returned to the plaintiff for presentation to the proper Court. The plaint was then presented in the Court of Small Causes, but the Judge of the Small Cause Court held that the suit was not cognizable by him and returned the plaint for presentation to the proper Court:

Held, (1) that the suit was one for the recovery of money and not for accounts and was cognizable by the Small Cause Court;

(2) that the procedure adopted by the Small Cause Court Judge was wrong, inasmuch as if he entertained a doubt as to the *forum* in which the suit should be instituted, he should have referred the matter to the High Court for decision under rule 6 of Order XLVI of the Civil Procedure Code, and that if he was so confident of the correctness of his view as to entertain no doubt whatsoever in the matter within the meaning of rule 6, he might have sent the record to the District Judge with a request that action might be taken by him under rule 7 of Order XLVI.

A suit for the recovery of a specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined.

There cannot in essence be a suit for accounts by a plaintiff against a defendant, unless the defendant is under a liability to render accounts to the plaintiff. **C** KSHETRA NATH BHUIYA *v.* KALI DASI DASI, 21 C. W. N. 784 **929**

——— S. 25—*Dismissal for default—Application to set aside dismissal—Sufficient cause—Revision.*

Courts of Small Causes should not show themselves too rigid or exacting in the case of a litigant who is acting evidently with a *bona fide* purpose of prosecuting his suit.

Where neither party was present when a case was called on, and the suit was dismissed for default, but the plaintiff put in his appearance later on in the course of the same day, and his explanation was that he had set out hoping to reach the Court in time

but had taken longer on the journey than he had anticipated:

Held, that his application to set aside the dismissal for default should be allowed. **A** SARFARAZ KHAN *v.* PARBATIA, 15 A. L. J. 628 **918**

——— S. 25—*Civil Procedure Code (Act V of 1908), O. VII, r.* 10—*Jurisdiction of Small Cause Court Judge to dismiss suit on merits after holding it to be non-cognizable.*

A Judge of a Small Cause Court cannot proceed to try and dismiss a suit on the merits, which he, on the objection of the defendant, holds not to be cognizable by a Small Cause Court, for under Order VII, rule 10, Civil Procedure Code, it is incumbent upon him to return the plaint at any stage of the suit for presentation to the proper Court.

A suit which was in essence a suit for rescission of a contract and consequential relief was brought in a Small Cause Court. The defendant objected to the jurisdiction of the Court and also objected to the claim on the merits. The Judge found that the suit was not cognizable by the Court but nevertheless proceeded to try the case on the merits and ultimately dismissed it.

On the application of the plaintiff for setting aside the judgment, the High Court set it aside and directed the plaint to be returned to the plaintiff in order that he might present it to the proper Court for trial of his claim. **C** PADU MOHAMMAD *v.* CHUTRA NATH **203**

——— S. 25—*Object of Act—Procedure—Arbitrary decision—Revision—High Court, power of interference of.*

The Provincial Small Causes Courts Act proceeds upon the very reasonable view that cheap and speedy justice in petty cases, without a right of appeal, is in the main of advantage to the public, even though a certain amount of risk is taken of erroneous decisions. The procedure provided for Courts of Small Causes leaves a great deal to the discretion of the Court, and the revisional jurisdiction of the High Court must be limited, as far as possible, to insisting upon such observance of rules of procedure, as is necessary to ensure to both parties a fair opportunity of laying their case before the Court, and to protecting the public against the risk of arbitrary decisions.

Where the judgment of a Court of Small Causes is not based upon any reasoned consideration, either of the pleadings or of the evidence, and does not proceed upon any allegation made by the plaintiff or upon any admission made by the defendant or upon the evidence of either party, it is a purely arbitrary decision and the High Court will interfere with it in revision.

A Court of Small Causes must place on the record just enough materials to make it clear to the High Court, in the event of an application for revision what the grounds really are on which its decision proceeds. **A** MANGER CHAMAR *v.* GAJAI SINGH, 15 A. L. J. 680 **873**

——— S. 25—*Revision—Admission of claim—Court, power of, to dismiss suit.*

In a suit on a hand-note the defendant put in a petition admitting the plaintiff's claim and prayed

that he might be allowed to pay the money in two instalments. The Small Cause Court Judge dismissed the suit on the ground that there was no consideration for the hand-note:

Held, that the Court ought to have decreed the suit when the defendant admitted the claim. **C** GANGARAM BHOJRAJ *v.* DHANMAN SIRDAR **393**

——— SCH. II, ART. 31 **929**

——— ART. 31—*Suit for accounts, nature of—Suit by agent against principal, cognizance of.*

A suit for an account within the meaning of Article 31 of the Provincial Small Cause Courts Act is a special form of suit. It does not mean every case in which accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff. The distinguishing feature of suits falling under Article 31 of the Act is the defendant's duty to furnish detailed accounts, the plaintiff being more or less precluded by reason of the nature of the relations between the parties from putting the precise pecuniary outcome of those relations before the Court.

The plaintiffs advanced a certain sum of money to the defendants upon the security of yarn, which the defendants agreed to send to the plaintiffs for sale as commission agents. The yarn was sold by the plaintiffs and the price was credited to the defendants. Plaintiffs sued for the recovery of a certain sum alleged to be due to them from the defendants on account:

Held, that the suit was not one for an account within the meaning of Article 31 of the Provincial Small Causes Courts Act, inasmuch as it was a suit by an agent against his principal, and that it was, therefore, cognizable by a Small Cause Court. **P** MUHAMMAD SAID *v.* TIDDOO MAL, 34 P. R. 1917, 109 P. W. R. 1917 **46**

——— ART. 35 (*ii*)—*Provincial Small Causes Courts (Amendment) Act (VI of 1914)—Suit for damages for cutting and taking away trees, whether cognizable by Small Cause Court.*

A suit for recovery of damages for trees alleged to have been forcibly cut and taken away by the defendant is excluded from the cognizance of a Small Cause Court. **C** HELALUDDI MOLLA *v.* ABDUL GAFUR **936**

——— ART. 35, *sub-cl.* (ii)—*Suit for compensation for unlawfully cutting and removing tree—Jurisdiction, objection to, whether can be waived.*

A suit for compensation for unlawfully cutting and removing a tree and misappropriating crops is excepted from the cognizance of a Court of Small Causes by Article 35, sub-clause (*ii*), of the Second Schedule to the Provincial Small Causes Courts Act as amended by the Provincial Small Causes Courts Amendment Act of 1914.

Where, after such a suit has been decreed by a Small Cause Court without objection by the defendant as to the Court's jurisdiction to entertain the suit, the defendant applies for review, the Court hould not refuse the application for review on the ground that the objection as to jurisdiction was not raised at the trial.

Where there is an entire absence of jurisdiction, no action on the part of the plaintiff and no inaction on the part of the defendant c n invest the Court with jurisdiction, for jurisdiction cannot be created by waiver or consent. **C** RAM PROSAD PRAMANIK *v.* SRICHARAN MANDAL, 21 C. W N 1109 **276**

PROVINCIAL SMALL CAUSES COU TS (AMENDMENT ACT VI of 1914 **936**

PUBLIC DEMANDS RECOVERY ACT I B. C. OF 1895)—*Sale for arrears of road-cess—Certificates issued against persons having no interest in property, validity of—Sale, whether binding on real owner*

A sale of a property held under the Public Demands Recovery Act by issuing certificates for arrears of road-cess against the persons on the Collector's books who have virtually no interest in the property, does not affect the real owner of the property. **PAT** SHAHZADI BEGAM *v.* FASIH-UD-DIN AHMAD **252**

PUBLIC NUISANCE **672**

PUNJAB ALIENATION OF LAND ACT XVII OF 1900, S. 9 2—*Regulation XVII of 1806—Mortgage by way of conditional sale—Sale clause struck out by Deputy Commissioner—Foreclosure proceedings, validity of—Redemption*

Defendant executed a mortgage by way of conditional sale in favour of plaintiff When the alienation was put up for mutation, the Revenue Officer, thinking that the clause relating to conditional sale was incapable of enforcement under the provisions of the Punjab Alienation of Land Act, enquired of the mortgagee whether he would agree to its erasure from the deed, and upon the latter giving his consent the Deputy Commissioner struck out the said clause. The mortgagor, however, was not a member of an agricultural tribe, and the Deputy Commissioner's action was, therefore, *ultra vires* Subsequently, the plaintiff, ignoring the erasure of the clause, issued the usual notice of foreclosure, and upon the ex iry of the year of grace sued for possession as vendee:

Held, that the sale clause having been struck out of the deed, the mortgagor was justified in ignoring the notice of foreclosure which he knew to be unwarranted by the deed as it existed, and that the mortgagee was, therefore, equitably estopped from relying upon the foreclosure proceedings. **P** SALIG RAM *v* CHAJJU, 46 P. R. 1917; 113 P. W R. 1917 **222**

PUNJAB COURTS ACT (III OF 1914), SS 2 2, 38, 39—*Additional Judge, powers of—Case not assigned by District Judge to Additional Judge—Appeal, form of*

The functions of an Additional Judge as a Civil Court are confined to the cases made over to him by the District Judge acting under section 21 (2) of the Punjab Courts Act.

A Subordinate Judge does not necessarily merge in an Additional Judge, and there is no legal obstacle in the way of one and the same officer acting as an Additional Judge with respect to the business specially made over to him by the District Judge under section 21 (2) of the Punjab Courts Act, and as a Sub Judge *qua* all other judicial work.

So that, where a Sub-Judge acting as an Additional Judge hears and decides a case not assigned to him by the District Judge under section

PUNJAB COURTS ACT—concld

2 (2 of the Act, the appeal fr m his decision lies to the District Ju ge, and not to the Chief Court. P NIRINJAN D S-JETHU MAL v. KIRORI MAL, 38 P. R. 1917; 0 P. W R .9.7 42
——— Ss. 38, 39 42
S. 4 755

PUNJAB LAND REVENUE ACT (XVII OF 1887).
S. 44—*Settlement Records of* 1863 *and* 1892, *entries in, value of—Presumption—Rebuttal.*

After the Settlement of 1852, the Settlement Records of 1863 and 1892 have been prepared with much greater care and accuracy, consequently the presumption to be attached under section 44 of Act XVII of 1887, to the correctness of the entries made therein cannot be rebutted by the provisions of the *rewaj-i-am* prepared in the Settlement of 1852. P SANT SINGH v. FRANGU, 34 P. W. R. 1917 755

——— Ss. 45, 158 (2) (vi)—*Suit for declaration that entries in revenue papers are incorrect—Revenue Court, whether competent to entertain suit—Civil Courts, jurisdiction of*

The plaintiffs alleged that the entries in the revenue papers relating to the ownership of certain *khasra* numbers of a village were incorrect, in so far as the land comprised in those *khasra* numbers was shown as the property of the defendants whereas it really formed part of the *shamilat deh*, and the relief prayed for by them was that the proceedings relating to the mutation of the land in question in the Settlement Record be held null and void and the entries in the Record of Rights and the annual record be corrected. The suit was tried and dismissed by the Revenue Courts on the merits. The Financial Commissioner referred the case to the Chief Court under section 60 of the Punjab Tenancy Act:

Held, that the suit as laid was not covered by any of the clauses of sub-section 3 of section 77 of the Punjab Tenancy Act: and since section 158 (2) of the Land Revenue Act, which debars the Civil Courts from exercising jurisdiction over matters specified therein, did not confer jurisdiction on a Revenue Court, as distinguished from a Revenue *Officer*, to try a suit relating to any of those matters, the present suit as laid could not be taken cognizance of by a Revenue Court.

2 that even if the present suit be considered as one for the correction of an entry in a Record of Rights, annual record, or the register of mutations, it was clearly not cognizable by a Revenue Court as no express jurisdiction was conferred upon a Revenue Court by either the Tenancy Act or the Land Revenue Act to entertain a suit of that description;

(3) that as upon a liberal interpretation of the plaint it was reasonable to hold that the real object of the plaintiffs was to obtain a declaration that the entries relating to the land in question in the Record of Rights and the annual record were incorrect and that the land was part of the village *shamilat* and did not belong exclusively to the defendants, such a suit was cognizable by a Civil Court, for the relief claimed by the plaintiffs was not the actual

PUNJAB LAND REVENUE ACT—contd.

correction of the entries complained of, as contemplated by clause *vi* of sub-section 2 of section 158 of the Land Revenue Act, but only to obtain a declaration under section 45 of the Act in respect of certain rights of which the plaintiffs claimed to be in possession and in respect of which they alleged that a wrong entry had been made in the Record of Rights and in the annual record. P RAM SINGH v. BAKHSHI, 64 P. R. 1917; 102 P. W. R. 1917 895

——— Ss. 111, 115, 117—*Custom Joint holding—Widow right of, to demand partition—Procedure—Question of title.*

A widow in the enjoyment of a life-estate in an undivided or unseparated share of a holding has a *locus standi* under section 111 of the Land Revenue Act before a Revenue Officer for claiming, that is, for applying for partition which she may or may not be entitled to obtain in virtue of her life-estate.

Agricultural custom in the Punjab, however, does not concede to such a widow the right to obtain partition.

Such a widow is in all cases entitled to separate possession of her share as distinguished from a definite partition, but such separate possession must be obtained and enforced by the decree of a Civil Court. It cannot be given by a Revenue Officer under the provisions of Chapter IX of the Land Revenue Act.

Case-law discussed.

In cases where a widow in possession of her life-estate in a joint holding applies for partition, it is generally desirable that the Revenue Officer should proceed under section 117 of the Land Revenue Act rather than under section 115, due attention being paid to the instructions contained in paragraph 8 of Financial Commissioner's Standing Order No. 17. The Revenue Officer should thus treat the question of the widow's right to obtain partition as one of title. Where he has *prima facie* ground for thinking that the widow is being obstructed by her co-sharers in the due and reasonable enjoyment of her life-interest in a share of the undivided holding and the co-sharers object to partition, the Revenue Officer should himself proceed, in the exercise of the discretion allowed him by section 117, to decide the question of title as a Civil Court, the burden of proving the widow's right to obtain partition being placed upon her. Where, on the other hand, there is no such *prima facie* ground and the co-sharers object the Revenue Officer should decline to grant the application for partition until the question has been determined by a Civil Court, the proceedings being filed with leave to the widow to have them re-opened after decision of the Civil suit in her favour. If and when the Civil Court should find on the question of title that the widow has a right to obtain partition, then the mere fact of her widowhood would no longer constitute as against her "a good and sufficient cause" under section 115 for refusing partition. P ABDUL QADIR v. RABIA, 4 P. R. 1917 REV.; 1 P. W. R. 1917 REV. 473
——— S. 117 473
——— S. 158 (2) (vi) 755

PUNJAB PRE-EMPTION ACT (I OF 1913), Ss. 19, 20—*Notice to pre-emptor, defective—Suit, whether barred.*

Where a notice issued by the vendors to a pre-emptor under section 19 of the Punjab Pre-emption Act does not state the price at which the vendors are willing to sell, and the vendors sell the land before the expiry of three months after the issue of notice, the notice is bad and the pre-emptor's right of suit is not barred thereby.

A notice by the owners of a half share in the property comprised in the sale does not debar a pre-emptor from suing to pre-empt the whole bargain. **P** AMIR CHAND *v.* AMAR SINGH, 53 P. R. 1917; 115 P. W. R. 1917 **266**

PUNJAB TENANCY ACT (XVI OF 1887), S. 8—*Occupancy rights—Non-payment of rent for 28 years—Morni hill tract.*

The position of tenants in the Morni hill tract who pay revenue and cesses only is a peculiarly strong one.

Where a tenant in the Morni hill tract had, for 28 years during which he and his immediate predecessor-in-interest had been in cultivating possession of the land, paid no rent over and above revenue and cesses:

Held, that he was entitled to occupancy rights under section 8 of the Punjab Tenancy Act. **P** PAT RAM *v.* ABHA, 3 P. R. 1917 REV. **34**

——— Ss. 53, 56—*Occupancy holding, joint, sale of, by one of several co-tenants to one of several co-landlords—Reversioner of tenant, whether can contest transfer.*

A sale by one only of several co-tenants to one only of several co-landlords, of a specific portion of a joint occupancy holding which has fallen to the vendor's share in a private partition, is valid and it cannot in any way be contested by his reversioners, but at the time of a regular partition of the holding either between the remaining joint tenants or the landlords the vendee's position will be exactly the same as that of the vendor. **P** GURDIT SINGH *v.* MUSA, 66 P. W. R. 1917 **301**

——— S. 56 **301**

—— S. 77 (3) **895**

—— S. 77 *(e)* **120**

PUTNI REGULATION (VIII OF 1819), S. 13—*Lien of depositor for rent paid to superior landlord—Transfer of Property Act (IV of 1882), s. 72, applicability of, to deposit under s. 13 of Regulation VIII of 1819.*

The holder of a tenure under a *patni* who is in possession under section 13 of Regulation VIII of 1819, has not a lien under that section for the amounts paid by him as rent to the superior landlord for the years during which he has been in possession, so that he is not entitled to add to his demand the amount of rent so paid.

Section 72 of the Transfer of Property Act has not given a new power to the mortgagee and is not applicable to such a case.

While the holder of a tenure under a *patni* was in possession of it under section 13 of Regulation VIII of 1819, the *patni* was sold under the Regulation and the purchaser offered to pay to the tenure-holder the amount still due to him out of his original deposit:

Held, that the purchaser of the *patni* was entitled

PUTNI REGULATION—concld.

to recover possession of it on re-payment only of the sum which was still due to the tenure-holder out of his original deposit, but it was not necessary for him to re-pay the amounts of rent paid by the tenure-holder to the superior landlord for the years during which he was in possession, for the tenure-holder had no right to retain possession until he had recouped himself for such payments of rent. **C** BEHARI LAL *v.* NASIMANNESSA BIBI **694**

—— S. 13, *sub-s.* 4—*Tenure-holder put in possession of* putni, *whether landlord—Limitation for recovery of arrears of rent by tenure-holder—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2.*

A tenure-holder or *dur-patnidar* who on deposit of the *putni* rent is put into possession of a *putni* under the provisions of section 13, sub-section 4 of Regulation VIII of 1819, occupies the position of a mortgagee put into possession of the mortgaged property under an English mortgage, and is a landlord for the time being of the defaulting *putnidar's* tenants within the meaning of the Bengal Tenancy Act. Therefore, he has a right to recover the unrealised rent that accrued due before he was put into possession and the period of limitation for his suit to recover the arrears of rent is that provided for in the Bengal Tenancy Act, and not that under the Limitation Act. **C** ABDUL AZIZ *v.* BEHARI LAL **711**

RAILWAYS ACT (IX OF 1890), S. 101—*"Endangering," meaning of—Shunting train to wrong line—Facts, consideration of.*

In every case where a travelling railway train is unexpectedly shunted on to a wrong line by an erroneous laying of the points in a station yard, the safety of persons in the train or about the yard is endangered within the meaning of that term in section 101 of the Railways Act, and if the error in the points is due to such disobedience as is referred to in the enactment, an offence punishable thereunder is committed.

No safe analogy can be drawn from the facts of one case to decide whether in another case danger has arisen. Every case must be judged according to its own facts. **N** LOCAL GOVERNMENT *v.* HAR PERSHAD, 13 N. L. R. 90; 18 CR. L. J. 822 **646**

——— S. 101—*Penal Code (Act XLV of 1860), s. 304A—Rash and negligent act causing death—Station Master giving "line clear" with knowledge that another train is standing in the way of the incoming train—Offence.*

An Assistant Station Master gave a "line clear" to an incoming passenger train on a foggy night with the knowledge that a goods train was standing at a particular point where the passenger train might collide with it, but hoping to remove the goods train to a siding before the arrival of the passenger train. The goods train was not removed in time and a collision occurred which was attended with loss of life:

Held, that the Assistant Station Master was guilty of a rash and negligent act in giving the "line clear" and was, therefore, punishable under section 304 A of the Penal Code and section 101 of the Railways Act. **A** TAPTI PRASAD *v.* EMPEROR, 15 A. L. J. 590; 18 CR. L. J. 815 **335**

RECITAL *in document of conveyance as to boundaries of land sold, admissibility of—Document admitted in evidence without objection—Appeal, objection in.*

Where a document which was not receivable in evidence against some of the defendants was admitted in evidence in the Primary Court without any objection, and it was apparent that had objection been taken the plaintiffs could have taken some steps to introduce the document as evidence against all the defendants:

Held, that the Appellate Court was not in error in using the document as evidence against those defendants against whom it was improperly received, inspite of objection raised to its admissibility in that Court. **C** AMBAR ALI *v.* LUTFE ALI, 25 C. L. J. 619; 21 C. W. N. 996 116

RECORD OF RIGHTS, entry in—Declaration, suit for—Limitation 71

——, *entry in draft of.*

An entry in the draft Record of Rights is not admissible in evidence, as the presumption of correctness applies only to the record when finally published. **C** AMBAR ALI *v.* LUTFE ALI, 25 C. L. J. 619; 21 C. W. N. 996 116

—— *entry in, mode of proving.*

A party against whom an entry in the Record of Rights has been put in evidence, is not limited to a particular mode of proof, for the purpose of establishing its incorrectness, but he can prove *aliunde* that the entry is in fact incorrect, *e. g.*, as having been based upon materials, not admissible in evidence. **C** BAGHA MOWAR *v* RAM LAKHAN MISSER 804

REGISTRATION—*Property included fictitiously in sale-deed for purposes of registration—Sale-deed, validity of.*

Where an item of property of little value not belonging to the vendor is included in a sale-deed in order to give jurisdiction to a Registration Officer to register the sale-deed, the sale-deed is invalid and does not pass any title to the property purported to be sold thereby. **A** MANGALI LAL *v.* ABIDYAR KHAN, 15 A. L. J. 550; 39 A. 523 3

REGISTRATION ACT (XVI OF 1908), Ss. 17, 49—*Transfer of Property Act (IV of 1882), ss. 4, 54—Sale of land less than Rs.* 100 *in value—Unregistered sale-deed, admissibility of—Delivery of possession.*

Section 54 of the Transfer of Property Act still leaves it open to the parties desirous of doing so to make a valid sale of immoveable property of less than Rs. 100 by oral contract and delivery of possession.

Per *Beaman, J.*—By the operation of section 4 of the Transfer of Property Act, section 54 of the Act must be annexed to section 17 of the Registration Act, with the consequence that an unregistered deed of sale of immoveable property below the value of Rs. 100 is not only not effectual to transfer the property but also falls within the comprehensive and stringent prohibition of section 49 of the Registration Act and is inadmissible in evidence.

Per *Macleod, J.*—Section 4 of the Transfer of Property Act does not make documents purporting to be sale-deeds of immoveable property under the value of Rs. 100 compulsorily registrable, so that if they are not registered they cannot be adduced in evidence under section 49 of the Registration Act.

REGISTRATION ACT—contd.

In cases of transfer of property under the value of Rs. 100, if the transfer is effected by delivery of possession accompanied by an unregistered document, that document can be adduced in evidence in order to show what was the character of the possession given by the vendor of the land to the purchaser. **B** DAWAL PIRANSHAH *v.* DHARMA RAJARAM, 19 BOM. L. R. 622; 41 B. 550 273

—— S. 17 (1) (b)—*Acknowledgment of partition, whether compulsorily registrable.*

A document which professes to be nothing more than an acknowledgment that a partition was effected at a certain time does not create any right in any property and is not compulsorily registrable. **P** BABU LAL *v.* HARI BAKHSH, 122 P. W. R. 1917 479

—— S. 17 (1) (d)—*Landlord and tenant—Evidence—Compromise, petition of, varying rent payable, whether admissible in evidence without registration.*

In a suit for the recovery of arrears of rent, petition of compromise between the parties which was filed in a previous suit for rent was put in evidence for proving the amount of rent payable:

Held, that the petition of compromise not having been registered was not admissible in evidence.

A document which embodies a contract for variation of the rent payable in respect of a lease is in essence a lease and is compulsorily registrable. If it is not registered in accordance with law, it is not only, not admissible in evidence, it does not even constitute a valid and operating contract between the parties. **C** BAGHA MOWAR *v.* RAM LAKHAN MISSER 804

—— Ss. 23, 77—*Document presented beyond limitation—Refusal to extend time—Suit.*

Where a deed is not presented for registration within four months from the date of its execution, as required by section 23 of the Registration Act, the Court should refuse to pass a decree directing its registration under section 77 of the Act. **P** JAHANGIRI MAL *v.* KANSHI RAM, 39 P. R. 1917; 64 & 123P. L. R. 1917; 112 P. W. R. 1917 64

—— S. 25.

The Civil Courts have no right to question the propriety of the discretion vested in the Registrar under section 25 of the Registration Act. **P** JAHANGIRI MAL *v.* KANSHI RAM, 39 P. R. 1917; 64 & 123 P. L. R. 1917; 112 P. W. R. 1917 64

—— S. 28—Evasion of Registration Law—Property included fictitiously in sale-deed for purposes of registration—Sale-deed, validity of 3

—— S. 49 273

—— S. 49—*Sale of immoveable property of less than Rs.* 100 *in valuc—Unregistered instrument of sale.*

For the sale of an immoveable property of less than Rs. 100 in value an unregistered instrument, unaccompanied by delivery of possession, is of no avail and confers no title. **C** JUMAN *v.* MOHAMMAD NABINBOAZ, 21 C. W. N. 1149 779

—— Ss. 72 77,—*Order refusing registration—Suit—Limitation.*

REGISTRATION ACT—concld.

Where a Registrar, under section 72 of the Registration Act, orders that either a new and clear sale-deed should be executed, or a note should be added making an ambiguous passage quite clear, the order is tantamount to a refusal to register within the meaning of section 77 of the Act. P KIRPA RAM *v.* ASA SINGH, 41 P. R 1917; 55 P W. R. 1917 76

—— Ss. 72, 73

No appeal lies to the Registrar against the refusal of a Sub-Registrar to register a document upon the wilful failure of the executant of the document to appear before the Sub-Registrar, as such failure amounts to a denial of execution within the meaning of section 72 of the Registration Act In such a case the only procedure open to the party presenting the deed is to apply to the Registrar under section 73 of the Registration Act to direct registration. C ANILA DEBI *v.* MONI MOHAN MUKEBJEE 57

—— Ss. 76, 73—*Application under s.* 73, *dismissal of, for default Registrar, power of, to restore.*

When an application under section 73 of the Registration Act has been dismissed for default, the Registrar has full power to restore the matter and to re-hear the case, at any rate before he has finally dealt with the matter under section 76 of the Act. C ANILA DEBI *v.* MONI MOHAN MUKERJEE 57

—— S. 77—"*Date of the making of the order*", *interpretation of.*

The expression "making of the order" in section 77 of the Registration Act means, not merely recording the order of refusal in writing, but communicating it to the party concerned so as to bind him by it

If, however, the party affected by the order acts in such a way as to prevent the officer from communicating it to him within a reasonable time after he has written it, the date of the order would be the date when it could have been brought to the knowledge of the party

On the other hand, where the party affected by the order, instead of being negligent, makes every endeavour to learn the contents of the order, but is frustrated in his effort, the date of the order must be taken to be the date on which he obtains knowledge of the contents thereof P KIRPA RAM *v.* ASA SINGH, 41 P. R 1917; 55 P. W. R 917 76

REGULATION XVII OF 1806—*Mortage by way of conditional sale—Sale clause struck out by Deputy Commissioner—Foreclosure proceedings, validity of—Redemption—Punjab Alienation of Land Act (XIII of 1900), s.* 9 2.

Defendant executed a mortgage by way of conditional sale in favour of plaintiff. When the alienation was put up for mutation, the Revenue Officer, thinking that the clause relating to conditional sale was incapable of enforcement under the provisions of the Punjab Alienation of Land Act, enquired of the mortgagee whether he would agree to its erasure from the deed, and upon the latter giving his consent the Deputy Commissioner struck out the said clause. The mortgagor, however, was not a member of an agricultural tribe, and the Deputy Commissioner's action was, therefore, *ultra vires*. Subsequently, the plaintiff, ignoring the

REGULATION XVII OF 1806—concld.

erasure of the clause, issued the usual notice of foreclosure, and upon the expiry of the year of grace sued for possession as vendee:

Held, that the sale clause having been struck out of the deed, the mortgagor was justified in ignoring the notice of foreclosnre which he knew to be unwarranted by the deed as it existed and that the mortgagee was, therefore, equitably estopped from relying upon the foreclosure proceedings P SALIG RAM *v.* CHAJJU, 46 P. R 1917; 113 P. W R. 1917 722

REGULATION V OF 1812, S 3, construction of 561

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), Ss 4, 18—*Suit under s.* 4—*Leave granted under s.* 18 *to several persons—Death of one, effect of—Abatement.*

A suit once instituted under section 14 of the Religious Endowments Act by the persons to whom leave is granted under section 8 of the Act does not abate merely on account of the subsequent death of one of the persons to whom leave was originally granted

Per *Ayling, J* —The language of section 8 of the Religious Endowments Act is very similar to section 195 of the Code of Criminal Procedure and differs from section 92 of the Code of Civil Procedure. Under the former, a sanction granted by one person may be utilised by another, but under section 92 of the Code of Civil Procedure, the persons who institute the suit must be identical with those who obtained the sanction But section 18 of the Religious Endowments Act merely interposes an independent condition, that the suit shall not be entertained unless leave has been previously granted on application, and does not indicate by whom the application should be made. That clearly indicates an intention that the suit need not be by the same person to whom leave was granted

Per *Sadasiva Aiyar, J.* - A suit under section 14 of Act XX of 1863 is as much a representative suit as one brought under section 92 of the Civil Procedure Code or some of the suits under Order I, rule 8, of that Code, as it is equally brought in the name and as it affects the rights of all those interested in the religious endowment All such interested persons become, in the eye of the law, parties to such a suit and the death of one or more of them cannot cause the suit to abate, nor would it prevent the suit from being heard till "its finish" after it has been once properly and legally instituted. M PANA ANA ANA ALAGAPPA CHETTIAR *v.* RAVANNA MANA PA A CHANA MUTHIAH CHETTIAR, 33 M. L. J. 173; (1917) M. W. N. 740 745

—— S. 18 745

REMAND 735

RENT-DECREE—*Decree-holder ceasing to be sole landlord, at time of sale, effect of—Execution-sale, effect of, on status of decree-holder.*

The legal effect of an execution sale should depend upon the status of the decree-holder at the time proceedings for sale are taken by the Court at his instance

Where a landlord decree-holder continues to be the sole landlord at the date of his application for execution of a decree for rent, and in his character as landlord decree-holder takes the necessary steps

RENT-DECREE—concld.

for sale of the defaulting under-tenure in conformity with the statutory provisions in Chapter XIV of the Bengal Tenancy Act, the effect of the execution sale is to pass the under-tenure, and not merely the right, title and interest of the tenant, to the purchaser, even though the decree-holder has lost his interest partially or entirely as landlord before the actual sale. **C** SYEDUNNESSA KHATUN *v.* AMIRUDDI, 21 C. W. N. 847; 25 C. L. J. 629 **353**

RENT LAW—*Ex-proprietary rights, sale of, validity of —Agreement to relinquish ex-proprietary rights for consideration.*

Plaintiff judgment-debtor sold a *zemindari* to the defendant decree-holder and agreed to file a relinquishment of her ex-proprietary rights in the *sir* lands, and in consideration thereof the defendant agreed to file a certificate of the satisfaction of the decree and further bound himself to pay to the plaintiff a monthly allowance of Rs. 5 for the rest of her life, which was to be a charge on the property sold. Plaintiff sued the defendant to recover arrears of the allowance agreed to be paid to her:

Held, that the arrangement between the parties was merely a device to get round the provisions of the Rent Act of 1881 and amounted in fact to a sale of ex-proprietary rights, and was, therefore, absolutely void and unenforceable. **A** RATAN DEI *v.* DURGA SHANKAR BAJPAI, 15 A. L. J. 656 **892**

RES JUDICATA. See CIVIL PROCEDURE CODE (ACT V OF 1908), S. 11.

———, constructive—Suit decreed without decision of material issue **19**

———, *doctrine of, whether applies to suit dismissed for default.*

No question of *res judicata* arises in favour of either of the litigants where a suit is dismissed for default. **C** GIRIBALA DASI *v.* NITYA LAL SINHA **905**

———*Execution proceedings.*

Where on an application for execution by way of sale of certain properties, the Court ordered attachment of the properties and issue of notice to the judgment-debtor for the settlement of the sale proclamation, and inspite of the judgment-debtor's objections to such execution, ordered issue of the sale proclamation in his presence, but did not in express terms pass any order for sale or decide that execution could be enforced by sale:

Held, that the orders of the Court would not operate as *res judicata* on the question of the decree-holder's right to execution by sale of those properties, so as to estop the judgment-debtor from raising the same question on a subsequent application for execution by way of sale of the same properties. **C** GOBINDA CHUNDRA PAL *v.* KAILASH CHANDRA PAL **73**

——— *Rent suit—Decision as to* jama *payable.*

The case of *res judicata* may arise in a rent suit just as much as in any other suit.

Where in a rent suit the question as to what is the *jama* payable is raised and adjudicated upon, the decision operates as *res judicata* on that question in a subsequent suit for rent. **C** MIDNAPUR ZEMINDARY CO., LTD. *v.* JOGENDRA KUMAR **584**

RESUMPTION OF LAND—Sanad, *construction of—Resumption committee—Majority award, validity of —Arbitrators and valuers, distinction between.*

In the absence of a special provision parties confiding their differences to the judgment of a body made up of an uneven number of individuals ought to be understood as implying that they would accept the decision of the majority of them.

A resumption term in a *sanad* provided that if Government wanted to resume the land it could do so on the payment of a just valuation, such valuation to be determined by a committee appointed by Government. The latter resumed the land and appointed a committee to determine the valuation. The majority of the committee fixed a certain valuation and the Government paid the sum fixed by the majority. The plaintiff contended that the committee was a board of arbitrators and had no power to give a majority award:

Held, that when the *sanad* was drafted it was the understanding and within the contemplation of all the parties to it that the determination of the just value of the land to be made by a committee appointed by Government should be accepted, if that determination represented the concurrent opinion of a majority of such committee, and that, therefore, the plaintiff's contention was unfounded. **B** MAHOMEDALI ADAMJI *v.* SECRETARY OF STATE, 19 BOM. L. R 618 **264**

REVIEW *of Criminal judgment by High Court.*

Under the provisions of the Criminal Procedure Code, 1898, the High Court has no power to review its own judgment. **B** NAGANGOWDA NILAPAGOWDA *v.* EMPEROR, 19 BOM L. R 695; 18 CR L. J. 889 **1091**

REVISION. *See* CIVIL PROCEDURE CODE (ACT V OF 1908), S 115.

———. *See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 439.

RIPARAIN RIGHTS—*River changing course—Old course, whether becomes private property—Fishing rights in sheets of water adjacent to river.*

When priver has changed its course, its old dry course (in the absence of special circumstances) must be taken to have become private property, and the owner of the soil is entitled to *bheels* or ponds, gulfs or *dangooshes* in which water remains but which do not communicate with the river except in the time of floods.

The owner of a fishing right in a river has no title to fish in sheets of water adjacent to the river with which the river communicates only in the time of flood, unless those sheets are part of land in the bed of the river itself. **C** SASI KANTA ACHARJEE *v.* KUNJA MOHAN MOITRA, 22 C. W. N. 63 **425**

SALE—*Property in possession of third person—Purchaser, duty of—Constructive notice.*

Where a person purchases immoveable property which is in the possession of a person other than the seller he must be held to have had constructive notice of the right of the possessor, for if he had enquired he would have found out the true state of affairs. **L B** MAUNG KYI NYO *v.* MAUNG AUNG THA **628**

SECOND APPEAL—*Objection as to non-admissibility of private* chittas, *whether can be taken for first time.*

Where private *chittas* were admitted in evidence in the primary Court without objection and the Judges of the lower Courts and the Commissioner acted on them:

SECOND APPEAL—concld.

Held, that an objection to the proceedings in the lower Courts, on the ground that they were based on the terms of the *chittas* which were inadmissible in evidence, could not be allowed to prevail in second appeal. **C** NAFAR JOARDAR *v.* PRATIMA SUNDARI DASSYA **726**

SETTLEMENT RECORDS OF 1868 AND 1892, entries in, value of **755**

SIND COURTS ACT (BOM. ACT XII OF 1866), S. 16 **643**

SIND COURTS CRIMINAL CIRCULARS, CHAP. V., R. 22—*Magistrate, duty of, to proceed from day to day -Court, inherent power of, to check prolix examination and cross-examination of witnesses.*

It is the duty of a Magistrate to insist on the trial proceeding from day to day as required by rule 22 of Chapter V of the Sind Courts Criminal Circulars.

The Courts should rigidly check prolix examination and cross-examination of witnesses in the exercise of their inherent powers to prevent abuse of the process, *i. e.*, proceedings of the Court. **S** SOLER, F. W. *v.* EMPEROR, 11 S. L. R. 27; 18 CR. L. J. 834 **658**

SMALL CAUSE COURT, *jurisdiction of—Landlord and tenant—Suit for damages for cutting down trees.*

A suit by a landlord against a tenant for damages for cutting down trees on his holding does not lie in a Small Cause Court, where the relief claimed depends uponthe determination of the status of the defendant as a tenant. **C** SURENDRA NATH BHAUMIK *v.* GAYESHUDDIN **494**

SONTHAL PARGANAS REGULATION (III OF 1872), S. 6, *applicability of—Mortgage, usufructuary —Profit amounting to principal.*

A usufructuary mortgage is clearly a debt or a liability within the meaning of section 6 of the Sonthal Parganas Regulation III of 1872, so that when on taking an account upon a usufructuary mortgage it is found that the profits of the property have amounted to the principal sum advanced, it should be decreed that the mortgage has been extinguished. **PAT** CHIRANJIB LAL CHOWBEY *v.* DAULTEA, 2 P. L. W. 20 **677**

SPECIFIC PERFORMANCE -*Minor, suit by.*

It is not within the competence of the guardian of a minor to bind the minor's estate by a contract for the purchase of immoveable property, and as the minor is not bound by such contract there is no mutuality and consequently the minor cannot obtain specific performance of the contract. **N** SURAJMAL *v.* PANDHARI, 13 N. L. R. 98 **45**

———, *suit for—Appeal—Pleas of inadequacy of consideration and ignorance of* pardanishin *vendor, whether can be raised—Consideration, payment of —Evidence.*

Where the widow of a deceased Hindu and his executor entered into a contract with the plaintiff for the sale to him of certain lands but subsequently sold the lands to another and the plaintiff brought a suit for specific performance, in which the defendants failed to take the pleas of inadequacy of consideration and the ignorance of the *pardanashin* vendor:

Held, that it was not open to vendors to raise the pleas for the first time in appeal.

SPECIFIC PERFORMANCE—concld.

Where the question is whether the plaintiff paid a certain amount to the defendant and it appears that under the contract for sale he was contractually bound to advance the same to the defendant, the consideration "whether he would be willing to advance so large a sum" is entirely out of place. **P C** NAROTTAM DAS *v.* KEDAR NATH SAMANTA, 21 C. W. N. 665; 6 L. W. 61 **957**

SPECIFIC RELIEF ACT (I OF 1877), S. 9—*Decision upon question of title, effect of.*

Where a plaintiff files a suit under section 9 of the Specific Relief Act basing his right to relief merely on the fact of his previous possession and pays half the usual Court-fee for the determination of his right to that relief, neither the Court nor the defendant has any power to enlarge the scope of that suit or to treat it as if it were an ordinary suit resting on a ground of title.

Where in spite of the limited character of such a suit the Court gave a decision upon the question of title and an appeal was also wrongly filed from that decision:

Held, that in a subsequent suit brought by the defeated party to establish his title to the same property the decision in the previous suit did not operate as *res judicata*. **O** MUHAMMAD HAIDAR *v.* WAZIR ALI 20 O. C. 237 **974**

—— S. 21—*Civil Procedure Code (Act V of 1908) Sch. II, cl. 22—Arbitration, reference to—Suit pending reference, maintainability of—Death of arbitrator, whether restores right of suit—General Clauses Act (X of 1897), s. 6 (c)—Limitation Act (IX of 1908), ss. 14, 15, Sch. I, Art. 120.*

A contract to refer a dispute to arbitration confers on the parties a right to have the question decided by arbitrators and not by suit. This is a substantive right of an important character, and section 21 of the Specific Relief Act bars a suit pending disposal of the reference by the arbitrators.

The repeal of section 21 of the Specific Relief Act by clause 22 of Schedule II, Civil Procedure Code, does not affect a right which had accrued under the former Act where the contract to refer was made before the enactment of Act V of 1908.

The institution of a suit after the contract to refer is a sufficient refusal to perform such contract to bar the suit under section 21 of the Specific Relief Act.

Opinion of Richards, J, in *Ram Kumar Singh* v. *Jagan Mohan Singh*, 9 Ind. Cas. 80; 33 A. 315; 8 A. L. J. 66, approved.

The death of the arbitrator, however, without disposing of the reference removes the bar created by section 21 and restores to the parties the right of suit, and time commences to run for the suit from the date of the arbitrator's death.

Per *Wallis, C. J.*—Whether the effect of section 21 of the Specific Relief Act is merely to suspend the running of time under the Limitation Act or to bring the case under Article 120 of the latter Act, the cause of action for a suit arises only when, by the death of the arbitrator, further proceedings in the arbitration became impossible.

Per *Seshagiri Aiyar, J.* A right of appeal granted under a repealed Act is not affected by the new Act.

SPECIFIC RELIEF ACT—concld.

A vested right is not ordinarily taken away by a new Act.

The right created by section 21 of the Specific Relief Act is not a mere incident of processual law and it operates as an effective bar to a suit so long as the arbitration is operative.

The instruction of a suit pending a reference to arbitratien would be an overt act on the plaintiff's part indicative of an intention not to perform the contract entered into by him. M DORAISAMI PADAYACHI v. VAITHILINGA PADAYACHI, 33 M. L. J. 45 581

——— S. 31 747

——— S. 42—*Declaratory suit, maintainability of—Consequential relief.*

Where plaintiff sued for a declaration in respect of what he described as a hereditary trust under the management of his adoptive father, and it appeared that if the devolution of the office of hereditary trustee was to be held as governed by the rules bearing on the holding of joint family property, the plaintiff could claim joint possession and management:

Held, that a suit for a mere declaratory decree was unsustainable under the proviso to section 42 of the Specific Relief Act. PAT SHEO LOTAN RAI v. BHIRGUN RAI, 1 P. L. W. 784; 2 P. L. J. 481 375

——— S. 42—Decree in such suit, form of—Execution 77

S. 42—Declaratory relief—Discretion of Court 15

——— S. 53—*Injunction, temporary, whether can be mandatory in form.*

The description of temporary injunctions in section 53 of the Specific Relief Act does not exclude injunctions of a mandatory nature. A temporary injunction may take not only the form of restraining a person from further erection of a building, but may also direct that he should pull down as much of it as he has erected after he became aware of the institution of the suit. M KANDASWAMI CHETTI v. SUBRAMANIA CHETTI, 6 L. W. 140; (1917) M. W. N. 501; 33 M. L. J. 448 384

——— S. 54 24

——— S. 55 47

STAMP ACT (II OF 1899), s. 2 (5)—*Bond or promissory note Attestation—Ambiguity Construction of document—Evidence—Penalty.*

A document whereby a person has obliged himself to pay money to another and which is neither payable to order or bearer nor attested by a witness is not a bond within the meaning of section 2 (5) of the Stamp Act.

Where the question is whether a document is a bond or a promissory note within the meaning of the Stamp Act and an ambiguity arises as to its attestation by a witness, it is permissible to look only at the document itself. Evidence cannot be referred to for the purpose of determining the character of the document:

Where a question of penalty is involved in the matter of the stamping of an ambiguous document and there can be two alternative explanations relating to the character of the document, the one more favourable to the executant should be preferred. PAT MOHAMAD SADIK v. AMIYA NATH DUTT, 2 P. L. W. 225; (1917) PAT. 345 693

"*STARE DECISIS*," doctrine of 761

STATUS of person, dispute as to—Burden of proof.

In cases which involve the *status* of individuals, those who challenge such *status* must show that they have not by their own conduct led the person concerned to imagine that his *status* was accepted by them. In this respect there is a considerable difference between cases of, say, mortgage and the like and cases of alleged adoptions, the legitimacy of children and the validity of marriages. P CHUHAR v. JAS KAUR, 69 P. R. 1917; 103 P. W. R. 1917 927

SUCCESSION—Suit for possession of share of estate, nature of. 579

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—*Rent, arrears of, due to deceased landlord, suit for recovery of—Succession certificate, necessity of.*

A succession certificate is necessary for the recovery of arrears of rent in respect of homestead land by the heirs or the legal representatives of a deceased landlord to whom the rent was due.

The words "land used for agricultural purposes" in section 4 of the Succession Certificate Act govern the words "rent, revenue or profits" that precede them. C SAHEBJAN KHANSAMA v ABDUL JALIL 84

——— S. 26 2) *proviso—Order rejecting applicition for certificate—Appeal—Court, proper.*

An appeal against an order of a Senior Subordinat Judge rejecting an application for a succession certificate lies to the District Court and not to the High Court P JAGRAM DAS v. MANGAL DAS, 121 P. W. R. 1917 640

SUIT FOR POSSESSION OF LANDS—*Plaint, amendment of, by addition of new lands—Operation of plaint.*

Where the plaint filed in a suit for possession of certain plots of land was subsequently amended by the inclusion of certain other plots in the plaintiff's claim:

Held, that the case was not one of amendment of plaint but of an addition of entirely new lands and that, therefore, as regards such new lands the suit must be taken to have been filed on the date when the claim in respect thereof was made by the application for amendment, and not from the date when that application was granted by Court. C MANINDRA CHANDRA NANDI v. RANGALAL 729

TEMPLE PROPERTIES *owned and managed by villagers*—Grama janam—*Award laying down scheme of management—Decree, whether can be altered by majority Managers, position of.*

The relationship of the inhabitants of a village in respect of a temple and its properties owned and managed by them in common is more in the nature of a corporation than that which exists among the members of a club, and the law regulating the latter does not apply to them.

Per *Abdur Rahim, J.*—A decree passed on an award cannot be treated as standing on a different footing from a contract, and a decree passed on the basis of such a contract must not be construed as laying down that the mode of management laid down therein is intended to be incapable of being altered afterwards.

Per *Napier, J.*—Where the majority of the inhabitants of a village are parties to a decree relating to the management of trust properties, they cannot subsequently alter the mode of management laid down by the decree by a majority vote.

TEMPLE PROPERTIES—concld.

The inhabitants of a certain village owned a temple in common, and the temple owned both moveable and immoveable properties. Disputes as to the management of the temple's properties were referred to arbitrators who passed an award, upon which a decree was passed entrusting the management of the temple and its properties to two persons selected by the residents of particular streets. The scheme worked for two years, but disagreements subsequently arose and at a meeting the majority of the members present, resolved to increase the number of trustees to 5:

Held, (*Napier*, *J.*, dissenting) that the majority of the members present had power to alter the schame fixed by the decree and increase the number of trustees to 5, and that their decision was binding on the minority. **M** YEGNARAMA DIKSHITAR *v.* GOPALA PATTAR, (1917) M. W. N. 595 **738**

THEFT. *See* PENAL CODE (ACT XLV OF 1860), s. 378.

TORT—*Custom—Irrigation—Reservoir, accumulation of water in—Overflow of water damaging crops—Damages, suit for.*

Where by ancient custom defendant was entitled to accumulate water in reservoirs for purposes of cultivation, and owing to the deposit of silt in the bed of the reservoirs and to no "non-natural" acts of the defendant, the water in the reservoirs overflowed and submerged the lands of the plaintiff and damaged his crops:

Held, that the defendant was not liable to the plaintiff for the damage to his land and crops.

The rule laid down in *Rylands* v. *Fletcher*, (1868) 3 H. L. 330; 37 L. J. Exch. 161; 19 L. T. 220, is not generally applicable to the circumstances in India. **PAT** SHAH YAD ALI *v.* SHYAM PRATAP DUBEY, 2 P. L. W. 8 **382**

TRANSFER, *enforcement of, suit for—Consideration money, whether can be recovered as damages.*

Where a transferee brings a suit to enforce the transfer, he is not entitled to recover in that suit the consideration money as damages, in case the transfer is found to be such as cannot be enforced under the law. **O** SHAHRUKH RUQAIYA BEGAM *v.* SHEO PRASAD, 4 O. L. J. 425 **435**

TRANSFER OF PROPETY ACT (IV OF 1882) S. 2 *(d)* **246**

——— S. 2 **361**

——— Ss. 4, 54—*Registration Act (XVI of 1908), s. 17, 49—Sale of land less than Rs. 100 in value—Unregistered sale-deed, admissibility of—Delivery of possession.*

Section 54 of the Transfer of Property Act still leaves it open to the parties desirous of doing so to make a valid sale of immoveable property of less than Rs. 100 by oral contract and delivery of possession.

Per *Beaman*, *J.*—By the operation of section 4 of the Transfer of Property Act, section 54 of the Act must be annexed to section 17 of the Registration Act, with the consequence that an unregistered deed of sale of immoveable property below the value of Rs. 100 is not only not effectual to transfer the property but also falls within the comprehensive and stringent prohibition of section 49 of the Registration Act and is inadmissible in evidence.

TRANSFER OF PROPERTY ACT—contd.

Per *Macleod*, *J.*—Section 4 of the Transfer of Property Act does not make documents purporting to be sale-deeds of immoveable property under the value of Rs. 100 compulsorily registrable, so that if they are not registered they cannot be adduced in evidence under section 49 of the Registration Act.

In cases of transfer of property under the value of Rs. 100, if the transfer is effected by delivery of possession accompanied by an unregistered document, that document can be adduced in evidence in order to show what was the character of the possession given by the vendor of the land to the purchaser. **B** DAWAL PIRANSHAH *v.* DHARMA RAJARAM, 19 BOM. L. R. 622; 41 B. 550 **273**

——— S. 6 **361**

——— S. 6 *(e)—Damages, right to sue for, transfer of.*

A mere right to sue for damages cannot be transferred under the provisions of section 6 *(e)* of the Transfer of Property Act. **O** SHAHRUKH RUQAIYA BEGAM *v.* SHEO PRASAD, 4 O. L. J. 425 **435**

—— —— S. 51.

Section 51 of the Transfer of Property Act does not apply, even by analogy, to the case of a tenant, as it cannot be said that he is a person believing in good faith that he is absolutely entitled to the land; and a tenant who believes he has occupancy rights cannot, under the section, claim compensation for improvements made by him. **M** NAINA PILLAI *v.* RAMANATHAN CHETTIAR, 33 M. L. J. 84 **788**

—— —— S. 52 **413**

——— Ss. 52, 2 *(d)—Mortgage suit—Charge created pending suit, how far effective—Transfer in execution of order of Court—Mortgagee, second, position of.*

Plaintiff instituted a mortgage suit in the High Court against the mortgagor, a Company in liquidation, and the second mortgagee. The liquidators of the Company applied to the District Court in which the liquidation proceedings were going on for sanction to raise Rs. 25,000 for costs of litigation on the security of the assets of the Company except the goods pledged to the plaintiff. The plaintiff and the second mortgagee both opposed the application, but the District Judge gave the sanction and apparently decided that the mortgaged property was assets which could be charged. Thereafter the liquidators executed two documents of charge for Rs. 10,000 each in favour of the plaintiff reciting the decision of the District Judge, and agreed that upon the sale of the mortgaged premises the sums so charged and all interest due thereon should be payable out of the sale proceed in priority to all other payments. The mortgaged property was ordered to be sold, and out of the surplus sale proceeds after the satisfaction of the plaintiff's mortgage, the latter claimed by virtue of the documents of charge to be paid the amount secured thereby in priority to the claim of the second mortgagee:

Held, (1) that the second mortgagee as party to the pending mortgage suit was protected, by section 52 of the Transfer of Property Act, against any postponement of his security by the charges created *pendente lite* by the liquidators, inasmuch as the authority of the District Court could not affect orders in a pending suit in the High Court;

TRANSFER OF PROPERTY ACT—contd.

(2) that the liquidators' charges could not be treated as transfers in execution of an order of a Court, within the scope of section (2) (*d*) of the Transfer of Property Act, inasmuch as the District Court's sanction was not an order capable of execution but merely an authority to the liquidators to act in a certain manner if occasion should arise. **B** MOTILAL SHIVLAL *v.* POONA COTTON AND SILK MFG. CO., LTD., 19 BOM L. R. 602 **245**

——— S. 54 **273**

—— S. 54—*Contract for sale of property, whether creates interest in property.*

Obiter.—Under section 54 of the Transfer of Property Act a contract for the sale of a property does not of itself create any interest in or charge on the property itself. **PAT.** NAND LAL PAL *v.* NARESH CHANDRA DEB, 2 P. L. W. 108 **468**

—— S. 54—*Evidence Act (I of 1872), s. 91—Sale of immoveable property of less than Rs. 100 in value—Unregistered instrument of sale, admissibility of in evidence.*

Where an immoveable property of less than Rs. 100 in value is sold by delivery of possession and an instrument of sale is also executed but not registered, the instrument is admissible as evidence of the nature of the transaction as under section 91 of the Indian Evidence Act such an instrument, although it does not confer any title and is merely evidentiary, is the only admissible evidence of the nature and terms of the transaction. **C** JUMAN *v.* MOHAMMAD NABINBOAZ, 21 C. W. N. 1149 **779**

—— S. 54—*Sale of land valued at less than Rs. 100 to person in possession without registered document, validity of.*

The sale of land of the value of less than Rs. 100 to its usufructuary mortgagee, who is already in possession, without a registered document in accordance with the provisions of section 54 of the Transfer of Property Act, is not valid. **C** TILAK BRITTIAL *v.* RUDESWAR **8**

—— S. 58.

The definition of the various classes of mortgage contained in section 58 of the Transfer of Property Act should not be read as amplifying the *quantum* of interest which a mortgage by law confers upon the mortgagee. Clauses (*b*), (*c*), (*d*) and (*e*) only prescribe the forms in which the various mortgages are to be expressed. The general legal effect is that which is predicated in clause (*a*).

Where the mortgaged property is situate in the *muffassal* and one of the parties is a Hindu, an English mortgage, notwithstanding the form in which the document is expressed, does not transfer an absolute interest in favour of the mortgagee. **M** ANSUR SUBBA NAIDU *v.* SECRETARY OF STATE, (1917) M. W. N. 794 **770**

—— S. 59—*Delivery of property—Possession.*

The delivery contemplated by section 59 of the Transfer of Property Act is delivery of property contemporaneous with the execution of the deed. **O** SURAJ BARAN SINGH *v.* PRATAB BALI SINGH, 4 O. L. J. 446 **455**

——— S. 59—*Mortgage—Attestation—Admission by mortgagee—Proof, necessity of.*

Even where the defendant admits execution of what purports to be a mortgage-deed, the transaction does not amount to a valid mortgage, if the defendant does not admit that it was attested by two witnesses who saw him execute it or if it is not proved that it was attested by two such witnesses. **M** VADLA NAGIAH *v.* VALURU DIVAKARA MUDALIAR, 6 L. W. 147: (1917) M. W. N. 583 **585**

——— Ss. 65, 68—*Mortgage, usufructuary—Dispossession of mortgagee—Right to sue for mortgage-money.*

Where the dispossession of a usufructuary mortgagee is due to his own fault he has no remedy under section 68 of the Transfer of Property Act.

A usufructuary mortgagee who fails to take a defence to a suit by a subsequent mortgagee which would preserve the security is not entitled under section 68 of the Transfer of Property Act to sue for the mortgage money. **PAT.** DUNIA LAL *v.* NOWRATAN KOER, 2 P. L. J. 490 **806**

—— S. 67—*Mortgage—Usufructuary mortgagee dispossessed of mortgaged property—Remedy.*

An usufructuary mortgagee who has been dispossessed of the mortgaged property has no remedy either by foreclosure or sale, but his remedy is confined to a money-decree against the mortgagor, as provided for in the mortgage-bond. **C** AGHORE NATH SHAHA *v.* NATABAR BAIRAGI **406**

— S. 68.

Where a usufructuary mortgagee is dispossessed of a portion of the mortgaged property but continues in possession of the remainder for a considerable time, he must be deemed to have acquiesced in the dispossession and cannot claim interest from the date of dispossession, although it may have been stipulated for in the mortgage-deed. **PAT** UCHAIT MANDAR *v.* GOSAIN SINGH BAIT **55**

——— Ss. 68, 65—*Mortgage, usufructuary—Dispossession of mortgagee—Right to sue for mortgage money.*

Where the dispossession of a usufructuary mortgagee is due to his own fault he has no remedy under section 68 of the Transfer of Property Act.

A usufructuary mortgagee who fails to take a defence to a suit by a subsequent mortgagee which would preserve the security is not entitled under section 68 of the Transfer of Property Act to sue for the mortgage money. **PAT** DUNIA LAL *v.* NOWRATAN KOER, 2 P. L. J. 490 **806**

——— S. 72, applicability of, to deposit under s. 13 of Regulation VIII of 1819 **694**

—— S. 90, *decree under—Civil Procedure Code (Act V of 1908), s. 151—Amendment of decree not in accordance with judgment—Inherent power of Co.*

If on the face of it a decree made under section 90 of the Transfer of Property Act is not in accordance with the previous judgment, then the Court will be justified under the inherent powers given to it by section 151 of the Civil Procedure Code in making the decree in accordance with the judgment. **PAT** RAMESHWAR SINGH *v.* JOTINDRA CHANDRA SINHA, 2 P. L. W. 205 **206**

——— S. 91 (f)—*Mortgage—Redemption—Purchaser in execution, right of.*

A purchaser of mortgaged property in execution of a money-decree, who is not made a party to a subsequent suit on the mortgage in which the mortgaged property is sold, is entitled to redeem the property

TRANSFER OF PROPERTY ACT—concld.

under section 91 *(f)* of the Transfer of Property Act as against the purchaser in execution of the mortgage decree. **A** LAKHPAT RAI *v.* FAKHR-UD-DIN, 15 A. L. J. 471; 39 A. 536 **190**

——— S. 99—*Sale of mortgaged property in contravention of section, whether void or voidable—Limitation Act (IX of 1908), Sch. I, Art. 12—Civil Procedure Code (Act V of 1908), O. XXI, r. 90, O. XXXIV, r. 14—Equity of redemption, extinction of.*

A sale in contravention of section 99 of the Transfer of Property Act is only voidable and not void. It must be set aside under rule 90 of Order XXI of the Civil Procedure Code by a suit within one year of the confirmation of the sale under Article 12, Schedule I, of the Limitation Act before redemption can be allowed.

A suit for redemption cannot be regarded as a suit to set aside the sale, though the irregularity may be sufficient by itself to entitle the plaintiff to vacate the sale by a proper proceeding under the Civil Procedure Code or by a suit. **PAT** SHEO NARAIN OJHA *v.* RAM JATAN OJHA, 1 P. L. W. 729; 2 P. L. J. 587 **533**

——— S. 111 (g)—*Lease—Non-payment of rent—Forfeiture.*

Where the rights and obligations of the parties to a lease are regulated by section 111 *(g)* of the Transfer of Property Act, there is no determination of the lease by a forfeiture immediately on breach of a covenant, but the lessor is required to do some act thereafter showing his intention to determine the lease.

The act, however, need not be a formal notice to quit, and may be a demand for possession, oral or written; what is essential is an overt act which intimates to the tenant the intention of the landlord to determine the lease. **C** NAURANG SINGH *v.* JANARDON KISHORE LAL SINGH DEO **952**

——— S. 119—*Exchange—Warranty of title—"Agreement to the contrary"—Suit to recover equivalent portion of land given in exchange, maintainability of.*

In the absence of an agreement to the contrary, parties making an exchange are deemed to covenant for title, and if in consequence of defective title either party to the transaction is deprived of the property, or part thereof, received by him in exchange, he is entitled at his option either *(a)* to cancel the bargain and to get back his property or *(b)* to obtain compensation for the loss suffered by him. He is not, however, entitled to recover an equivalent portion of the land given by him in exchange.

A clause in a deed of exchange, to the effect that neither party would have any claim against the other contrary to the exchange, does not amount to an agreement excluding the implied warranty of title **P** SALABAT *v.* ABDUL RAHMAN, 51 P. R. 1917; 114 P. W. R. 1917 **248**

—— S. 123 **389**

TRESPASS **954**

TRESPASSERS, *tacking of period of possession of.*

Two independent trespassers cannot tack the period of their possession as against the owner. **PAT** MIDNAPORE ZEMINDARI CO., LTD. *v.* PANDAY SARDAR, 2 P. L. W. 143; 2 P. L. J. 506 **114**

TRIAL IN JAIL, legality of **820**

TRUST **835**

——— *Hindu Law—Religious and charitable trust—Nomination of trustee, right of, by founder's heirs on extinction of line of original trustees.*

Per *Wallis, C. J.*, and *Abdur Rahim, J.*—It is competent to the heir of the founder of a religious or charitable trust, in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees.

Per *Srinivasa Aiyangar, J.*, dissenting.—Whatever other rights the founder's heirs may have, they have no right of nominating new trustees. Where a founder of a charity commits the management to a trustee, the presumption raised or the legal inference drawn in cases where he makes no arrangement for the management, does not arise; and there is no presumption under the Hindu Law, any more than under the English Law, that he reserves any right of interference or reversion of management after he has once definitely placed the properties given by him in the possession and management of third parties. **M** BOIDYO GAURANGA SAHU *v.* SUDEVI MATA, 32 M. L. J. 597; 40 M. 612; (1917) M. W. N. 429 **589**

——, religious and charitable—Nomination of trustee, right of, by founder's heirs on extinction of line of original trustees **589**

TRUSTS ACT (II OF 1882), S. 87 **665**

TRUSTEES, *joint, powers of.*

Ordinarily all the trustees should be co-plaintiffs and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being joined as plaintiffs.

Where the administration of a trust is vested in several trustees, they all form, as it were, but one collective trustee, and they must exercise the powers of their office in their joint capacity, and not separately. **C** NORENDRA NATH KUMAR *v.* ATUL CHANDRA BANDOPADHYA **837**

UNDIVIDED ESTATE, *share in, transfer of—Co-sharers rights, of—Partition, subsequent—Transferee, right of, to follow security.*

Where a person transfers a share in an undivided estate, which is owned by himself and other persons, the transfer cannot be permitted to affect injuriously the interests of his co-sharers: and, where a non-fraudulent division of the undivided shares subsequently takes place, the remedy of the transferee is to follow the transmuted security, although in cash, in the hands of his transferor. **O** ABDUL WAHAB *v.* BASANT LAL, 4 O. L. J. 386 **413**

U. P. LAND REVENUE ACT (III OF 1901), S. 107 **912**

—— S. 110 **912**

——— S. 233 *(k)* **88**

——— Ss. 233 *(k)*, 107, 110—*Partition—Civil suit, maintainability of—"Partition and union of* mahals,' *interpretation of.*

Certain co-sharers in a village applied for partition of their shares under section 107 of the U. P. Land Revenue Act. Under section 110 of the Act notice was issued to all the recorded co-sharers and thereupon an application was made by some co-sharers praying for partition of their shares and setting forth the extent of the shares which they prayed should be formed into one lot. A proceeding was thereafter drawn up by the Revenue Court under section 114 of the Act declaring the basis on

which partition was to be effected and putting down the plaintiff's share as that given in the application. Nearly a year after this the plaintiff brought a suit to recover possession of a share allotted to the defendants:

Held, (*Richards, C. J.*, dissenting) that the suit was barred by the provisions of section 233 (*k*) of the U. P. Land Revenue Act.

Per *Banerji, J.*—In determining whether section 233 (*k*) of the U. P. Land Revenue Act applies to a suit, the Court must look to the substance of the claim and not to the form in which it is dressed up.

Per *Richards, C. J.*—The word "partition" and the words "union of *mahals*" in section 233 (*k*) of the U. P. Land Revenue Act refer to "units" of area which the Revenue Authorities create in the course of partition proceedings. **A** FIJAI MISIR *v.* KALI PRASAD, 15 A. L. J. 496; 39 A 469 **912**

VAKIL AND CLIENT—*Vakil, authority of, to compromise suit, extent of—Decree passed on compromise—Appeal, whether lies.*

An authority given to a Vakil to compromise a suit, if necessary, does not necessarily give him authority to negotiate the terms of the compromise without reference to his client. Such authority must be strictly construed and an appeal lies against a decree passed on a compromise entered into by a Vakil without reference to his client. **M** THENAL AMMAL *v.* SOKKAMMAL, 22 M. L. T. 149 **429**

VALIDATION ACT (I B. C. OF 1903), effect of **733**

VILLAGE SITES, *ownership of—Zemindars, rights of—Tenants allowed to use land, effect of—Temporary user—Adverse possession.*

In ordinary agricultural villages *zemindars* are owners of the entire village land, but as the village develops and becomes bigger it is possible that the holders of land in the village may obtain proprietary rights either by grant from the *zemindars* or by adverse possession. The mere fact that a village has become big enough to be called a town does not by itself affect or alter the *zemindars'* rights, but it is by the process of transfer, grant or adverse possession that the various owners acquire their rights.

A *zemindar* very often does allow tenants to use the land in his village in many ways beneficial to the tenants but which are not injurious to him. They are mere acts of grace and favour, and cannot by themselves be regarded as acts indicating adverse possession.

Where a *zemindar* allows the occupants of shops in the village to use the land in front of the shops, the user does not confer any rights on the owners of the shops, nor does it constitute a case of adverse possession. **A** PUTTU MAL *v.* BHARAT INDU **613**

WAJIB-UL-ARZ, entry in, presumption as to correctness of.

There is a strong presumption in favour of the correctness of an entry in a *wajib-ul-arz* in the absence of any real proof to the contrary. **P** SULTAN *v.* GHULLA, 68 P. W. R. 1917 **283**

———, *entries in, value of, Fatehpur, Tahsil Gugera.*

Entries in the administration papers of *Mauza* Fatehpur make it plain that the trees growing in the land of an occupancy tenancy are not the property of the occupancy tenants, but they may cut them in order to supply themselves with agricultural implements with the consent of the landlords, a consent which must not be withheld without reasonable cause.

Musammat Gur Devi v *Sondha*, 61 P. R. 1881, is applicable to occupancy tenants of Fatehpur and the proprietor is not entitled, in the absence of reliable evidence as to his right, either by custom or otherwise, to enter upon the land in the occupation of a hereditary tenant and cut and sell the trees growing thereon without the said tenant's consent, but this only means that the tenant is entitled to be safeguarded in the exercise of certain rights of user, not that he can claim the price of a tree which the landlord has cut. **P** POKHAR DAS *v.* AMIR, 5 P. R. 1917 REV.; 3 P. W. R. 1917 REV. **907**

WAKF **684 736**

WATERS, *law of—Riparian rights—Channel irrigating a* mitta, *right of* mittadar *to dam—Rights of lower owners.*

In systems of connected tanks in different *mittas* or villages supplied with water by or through a permanent or artificial channel, each upper owner is entitled in the flood season to fill his tank, which in general is of sufficient storage capacity for the *ayakat*, and, subject to this, is bound to allow the water to flow freely on to the lower tank till the last of them is supplied. Whatever may be the means adopted to let out the surplus, the owner of the tank, in such cases, has no right to increase the storage capacity of his tank beyond what it was at the time the channel was dug, which, in many cases, can only be proved by the customary flow of water into the tank. **M** SECRETARY OF STATE *v.* PALANIYAPPA PILLAI, (1917) M. W. N. 571; 6 L. W. 572; 22 M. L. T. 345 **24**

WHIPPING ACT (IV OF 1909), S. 3—*Appeal—Whipping, sentence of, after part of sentence of imprisonment has been served, legality of—Appellate Court, power of.*

Under section 3 of the Whipping Act a whipping can only be imposed in lieu of any other punishment and the intention of the law is infringed by ordering a man to be whipped after he has already served part of a sentence of imprisonment. **L B** EMPEROR *v.* PO WUN, 8 L. B. R. 466; 18 CR. L. J. 773 **149**

WILL, *construction of—Probate, whether necessary before dealing with interest expectant on death of legatee—'Santan,' meaning of.*

A Will provided:—"and on my said daughter attaining her majority.....the executor...will give her my estate and make over the accounts ...God forbid if my daughter should die childless then my full brother... will get the properties....." The daughter survived her father, attained majority, but died without issue:

Held, that under the Will the daughter took an absolute interest liable to be defeated either by death during the testator's life-time or during her own minority; so that the gift over in favour of the full brother could not take effect on the daughter's death without issue after attainment of majority.

The word 'santan' as used in Bengalee documents at the end of the 19th and beginni of the 20th

WILL—contd.

century means issue generally and is not limited to male descendants.

A reversionary interest, expectant on the death of a legatee, granted by a Will can be sold, dealt with and taken in execution without the Will being proved. **C** KUMUD KRISHNA MANDAL *v.* JOGENDRA NATH, 21 C. W. N. 854; 26 C. L. J. 250 **511**

——, *execution of—Execution on different dates—Disposition of property, rules for—Revocation—Extraneous evidence, admissibility of—Evidence Act (I of 1872), s 94.*

Where several Wills are executed on different dates by a person, if the subsequent instrument does not profess to be a codicil and is adequate to the disposition of the entire property, there is no such *a priori* impossibility that it was intended wholly to supplant the prior instrument. The case then rests on the true construction of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first.

Where there is something on the face of the instrument raising doubt or ambiguity as to whether it was intended by the testator to be in substitution for or addition to a previous Will, the Court is justified in having recourse to external evidence to ascertain the testator's intentions.

A testator had properties both in Cochin State and in British territories He executed four Wills by which he disposed of all his properties, *viz.*,

1. In 1901 a Will bequeathing certain properties to his wife.

2. A Will in 1905 bequeathing all his properties in Ponnani to his wife Elchar.

3. A Will in 1906 bequeathing 38 items of properties to Elchar for her maintenance during life.

4. A last Will making certain additional bequests to Elchar and others and bequeathing the rest of his property to his niece's children:

Held, that the last instrument superseded the earlier ones;

WILL—concld.

Held, further, that the fact that the properties were situate in different jurisdictions did not affect the question. **M** PANAKKAL IYYAPPAN *v.* ELACHAR CHAKKUNNI, (1917) M. W. N. 645 **556**

———*Probate, application for, whether can be treated as application for Letters of Administration—Court, whether to enquire into testator's title or his right to dispose of property.*

It is not the business of the Court receiving an application for Probate to hold an enquiry as to the property of the deceased or to consider any issue as to the title of the testator or his power to dispose of the property which the Will purports to deal with.

An application for Probate cannot be converted into one for Letters of Administration. **PAT** BEHARI LAL *v.* GANGA DAI, 1 P. L. W. 744 **279**

WORDS AND PHRASES—Maxim: Certum est quod certum reddi potest, *applicability of.*

In cases where a right to enforce specific performance vests in a third party to whom the ascertainment of the date on which performance becomes due need not necessarily be known, the doctrine *certum est quod certum reddi potest* has no application. **M** SATHULA VENKANNA *v.* NAMUDURI VENKATAKRISHNAYYA, 33 M. L. J. 35; 6 L. W. 192 **807**

— *"Tanka," meaning of.*

The use of the word "tanka" in a document creates security and not merely assignment of revenue. **M** VENKATA PERUMEL RAJU *v.* UDDAGIRI PAPA NAIDU, 21 M. L. T. 351 **208**

WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859), S. 2, *applicability of—Cartman, whether labourer.*

A cartman is not a labourer to whom the provisions of Act XIII of 1859 apply. **P** GURDITTA *v.* EMPEROR, 33 P. R. 19 7 CR. 18 CR. L. J. 891; 39 P. W. R. 1917 CR. **1003**

TABLE

OF

Cases Cited in Volume XLI of Indian Cases, 1917.

A

Page.

Abdool Hosein v. Goolam Hoosein, 30 B 204; 7 Bom L R 742 ... 65
Abdul v. Mahomed, 5 Bom L R 355 ... 764
Abdul Ali v. Mirja Khan, 28 B 8; 5 Bom L R 622 ... 77
Abdul Aziz v. Karu, 21 Ind Cas 443; 18 C L J 95 .. 228
Abdul Gafur v. Albyn, 30 C 713; 7 C W N 821 ... 447
Abdul Gafur Mandal v. Uma Kant Pandit, 24 Ind Cas 266; 19 C W N 260 ... 838
Abdul Hakim v. Bilochni, 47 P R 1900; P L R 1900 p 381 ... 816
Abdul Hakim v. Ganesh Dutt, 12 C 323 at p 826: 6 Ind Dec (N. S.) 210 ... 864
Abdul Haque v. Abdul Hafiz, 5 Ind Cas 648: 14 C W N 695: 11 C L J 636 ... 162, 941
Abdul Kadir v. Dulanbibi, 20 Ind Cas 539; 17 B 563; 15 L R 672 ... 484
Abdul Kadir Rowther v. Krishna Malamal Nair, 23 Ind Cas 533; (1914) M W N 563; 38 M 695; 1 L W 271; 26 M L J 433 ... 701
Abdul Karim v. Thakordas Tribhovandas, 22 B 88; 11 Ind Dec N. S.) 640 613
Abdul Majid v. Jawahir Lal, 23 Ind Cas 649; 36 A 350: 12 A L J 624; 16 Bom L R 395; 18 C W N 963; 19 C L J 626; 27 M L J 17; (1914) M W N 485; 16 M L T 44; 1 L W 483 P C.) ... 269
Abdul Rahman v. Emperor, 3 Ind Cas 952; 32 A 30; 6 A L J 963; 10 Cr L J 424 ... 307
Abdul Rahman v. Sarafat Ali, 31 Ind Cas 896; 22 C L J 412; 20 C W N 667 ... 201
Abdul Wahid Khan v. Nuran Bibi, 11 C 597; 12 I A 97; 9 Ind Jur 283; 4 Sar P C J 627; Rafique and Jackson's P C No 89; 5 Ind Dec (N. S.) 1157 ... 365
Abdulla v. Zainab, 5 P L R 1904; 1 Cr L J 39 ... 333
Abdullah v. Kunja Behari Lal, 12 Ind Cas 149; 14 C L J 467; 16 C W N 252 ... 119
Abhoyeswari v. Kishori Mohan Banerjee, 23 Ind Cas 700; 42 C 19; 18 C W N 1201; 15 Cr L J 348 ... 611
Abinash Chandra v. Purnananda Khan, 21 Ind Cas 420; 18 C L J 174 .. 501
Abu Mahomed v. S. C. Chunder, 1 Ind Cas 827; 36 C 345; 13 C W N 384 ... 445
Achina Bibee v. Ajeejoonissa Bibee, 11 W R 45 ... 762
Addlestone Linoleum Company, *In re*, (1888) 37 Ch D 191 at p 198; 57 L J Ch 249; 58 L T 428; 36 W R 227 ... 262

A—contd.

Page.

Agandh Mahto v. Khajah Aliullah, 11 C W N 862 ... 78
Agin Bindh Upadhya v. Mohan Bikram Shah, 30 C 20; 7 C W N 314 ... 228
Ahinsa Bibi v. Abdul Kader Saheb, 25 M 26 at p 39 ... 922
Ahmad Ali Shah v. Amir Shah, 35 P R 1898 ... 487
Ahmadi Begum v. Mahasy Taranath Ghosh, 21 Ind Cas 233; 17 C W N 1173. 18 C L J 399 ... 427
Ah Shein v. Empress, L B R (1872-1892) 373... 977
Ah Sin v Empress, L B R (1893-1900) 489 ... 977
Airey, *In re*, Airey v. Stapleton, (1897) 1 Ch 161; 66 L J Ch 152; 76 L T 151; 45 W R 286 ... 794
Aiya Gounden v. Jayan Mandalathipathi Gopanna Mauradiyar, 26 Ind Cas 57; 27 M L J 480; 1 L W 726; 16 M L T 253; (1914) M W N 832 ... 281
Ajab Lal Khirher v Emperor, 32 C 783; 9 C W N 810; 2 Cr L J 524 ... 660
Ajant Singh v Sundar Mall, 16 Ind Cas 567; 17 C W N 862 ... 42
Ajodhia Parshad v. Ram Lal, 13 Ind Cas 284; 34 A 197; 9 A L J 124; 13 Cr L J 44 ... 312
Akaloo Chandra Das v. Mohesh Lal, 4 Ind Cas 696, 36 C 936; 11 Cr L J 28 ... 827
Akbar Ali v. Jezuddin, 8 C 399; 6 Ind Jur 530; 4 Ind Dec (N. S.) 255 ... 204
Akhil Chandra Sen v King-Empress, 22 C 1004; 11 Ind Dec (N. S.) 667 ... 663
Alejan Bibi v Raham Ali, 31 Ind Cas 26; 22 C L J 232; 20 C W N 756 ... 228
Alhusen v. Prest, (1851) 6 Ex 720; 20 L J Ex 440; 155 E R 735 ... 674
Alimuddin Khan v. Hira Lall Sen, 23 C 87 at p 105; 12 Ind Dec (N. S.) 59 ... 861
Ambalavana Pandara Sannathi v. Secretary of State, 28 M 539; 15 M L J 251 ... 56, 251
Ambica Pershad Singh v. Surdhari Lal, 10 C 851; 5 Ind Dec (N. S.) 569 .. 702
Ambica Tewari v. Emperor, 34 Ind Cas 320; 1 P L J 206; 17 Cr L J 208 ... 312
Aminunnissa v Jinnat Ali, 27 Ind Cas 271; 42 C 751; 19 C W N 43; 20 C L J 548 ... 379
Amir Ali Sardar v. Nazir, 20 C W N clxxxvii ... 412
Amir Hasan v. Sardar Begam, 3 Ind Cas 546, 12 O C 229 ... 111, 906
Amir Hassan Khan v. Sheo Baksh Singh, 11 C 6; 11 I A 237; 4 Sar P C J 559; Rafique and Jackson's P C No. 83; 5 Ind Dec (N. S.) 760 ... 885, 920

Page.

A—contd

Amiruddin v. Saidur Rahman, 35 Ind Cas 433; 1 P L J 73 ... 100
Amjad Ali v. Ali Husain, 6 Ind Cas 574; 15 C W N 353; 12 C L J 519 ... 944
Amolak Chand Parak v. Sharat Chandra Mukherjee, 11 Ind Cas 943; 38 C 913; 16 C W N 49 ... 858
Amolak Ram v. Chandan Singh, 24 A 483; A W N (1902) 137 ... 418
Amulya Ratan Sarkar v. Tarini Nath Dey, 27 Ind Cas 235; 42 C 254; 21 C L J 187; 18 C W N 1290 ... 879
Ananda Chandra Roy v. Makram Ali, 3 Ind Cas 204; 10 C L J 144 ... 273
Ananda Chandra Sen v. Parbati Nath Sen, 4 C L J 198 ... 32
Anandamoyee v. Lakhi Chandra Moitra, 33 C 339; 3 C L J 274 ... 953
Anandibai v. Hari Suba Pai, 10 Ind Cas 911 35 B 293; 13 Bom L R 287 ... 488
Anant Singh v. Durga Singh, 6 Ind Cas 787; 32 A 363; 14 C W N 770; 7 A L J 704; 12 C L J 36; 12 Bom L R 504; 8 M L T 79: 20 M L J 604; 13 O C 163 (P. C.); 37 I A 191; (1911) M W N 324 ... 961
Ananta Coomari Dassi v. Radharani Dassi, 3 C L J 199 ... 318
Anichini v. Anichini, (1839) 2 Curt 210 ... 452
Annapurami Ammal v. Subramanian Chettiar, 31 M 347; 4 M L T 197 ... 803
Annoda Prasonno Mukherjee v. Nil Madhab Parui, 11 Ind Cas 123; 15 C L J 52 ... 802
Aparna Charan Ghose v. Karam Ali, 4 C L J 527; 10 C W N 527 ... 563
Applebee, *In re*, Leveson v. Beales, (1891) 3 Ch 422; 60 L J Ch 793; 65 L T 406; 40 W R 90 ... 608
Archbould v. Scully, (1861) 9 H L C 360 at p. 383; 7 Jur (N. S.) 1169; 5 L T 160; 11 E. R 769; 131 R R 223 ... 724
Arfunnessa v. Peary Mohun Mookerjee, 1 C. 378; 25 W R 209; 1 Ind Dec (N. S.) 237 ... 758
Arjuna Reddi v. Venkatachala Asari, 32 Ind Cas 611; 32 M L J 525; 19 M L T 121; 5 L W 242 ... 535
Arthur Henry Forbes v. Maharaj Bahadur Singh 23 Ind Cas 632; 41 I A 91 at p. 101; 18 C W N 747; 41 C 926; 35 C L J 434; 15 M L T 380; (1914) M W N 397; 12 A L J 653; 27 M L J 4; 1 L W 1059 (P. C.) 354, 526, 543, 711
Arumuga Goundan v. Chinnammal, 12 Ind Cas 185; 10 M L T 214; 21 M L J 918; (1911) 2 M N 524 ... 60
Arunachellam Chettiar v Velappa Tambiran, 28 Ind Cas 237; 28 M L J 410; 18 M L T 5 ... 942
Arun Chandra Singh v. Kamini Kumar, 22 Ind Cas 347; 41 C 638; 8 C W N 364; (1914) M W N 175; 15 M L T 184; 26 M L J 251; 12 A L J 24; 19 C L J 202; 6 Bom L R 323 (P. C.) ... 683
Asgar Ali v Troilokya Nath Ghose, 17 C 631 at p. 634; 8 Ind Dec (N. S.) 960 ... 728

Page.

A—concld.

Ashton Gas Company v. Attorney-General, (1906) A C 10 at p. 11; 75 L J Ch 1; 93 L T 676; 70 J P 49; 13 Manson 35; 22 T L R 28 ... 969
Ashutosh Sikdar v. Behari Lal Kirtania, 35 C 61; 11 C W N 1011; 6 C L J 320 ... 535
Asim Mandal v. Raj Mohan Das, 11 Ind Cas 385; 13 C L J 532 ... 588
Asita Mohan Ghose v. Nirode Mohan Ghose, 35 Ind Cas 127; 20 C W N 901 ... 376
Assanulla Khan Bahadur v. Tirthabashini, 22 C 680 at p. 688; 11 Ind Dec (N. S.) 453 ... 566
Aswini Kumar Aich v. Sarada Charan Basu, 37 Ind Cas 253; 24 C L J 79 at p. 82 ... 699
Attorney-General v Ashton Gas Company, (1904) 2 Ch 621 at p. 629; 73 L J Ch 673; 68 J P 477; 53 W R 49; 20 T L R 601 ... 969
——— ——— v. Marquis of Ailesbury, (1887) 12 A C 672; 57 L J Q B 83; 58 L T 192; 36 W R 737 ... 321
——— ——— v. Tomline, (1877) 5 Ch D 750; 46 L J Ch 654; 36 L T 684; 25 W R 802 ... 533
Aubhoy Churn Mohunt v. Shamont Lochun Mohunt, 16 C 788; 8 Ind Dec (N. S.) 523 ... 184
Aulia Khan v. Kanshi Ram, 17 Ind Cas 677; 45 P R 1913; 25 P W R 1913; 145 P L R 1913 ... 61
Ayyagiri Veerasalingam v. Kovvuri Basivireddi, 25 Ind Cas. 56; 27 M L J 173; 16 M L T 125; 1 L W 541 ... 429
Azimuddin Patwari v. Secretary of State for India, 21 C 330; 10 Ind Dec (N. S.) 871 ... 464

B

Babajirao v. Laxmandas, 28 B. 215; 5 Bom L R 932 ... 615
Babban Singh v. Baldeo Singh, 4 A L J 97; A W N (1907) 50; 5 Cr L J 117 ... 653
Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee, 12 M I A 1; 9 W R (P. C.) 15; 2 Suth P C J 114; 2 Sar P C J 348; 20 E R 241 ... 217
Baboo Thakoor Pershad Singh v. Baboo Mohesh Lall, 24 W R 390 ... 421
Babu Lal v Emperor, 14 Ind Cas 666; 34 A 319; 9 A L J 288; 13 Cr L J 282 ... 979
Bachcho Kunwar v. Dharam Das, 28 A 347; A W N (1906) 34; 3 A L J 155 ... 884
Bacon v. Bacon, (1877) 25 W R 560 ... 453
Badr-un-nisa v. Muhammad Jan, 2 A 671; 1 Ind Dec (N. S.) 1010 ... 204
Bai Hirakore v. Trikamdas, 32 B 103; 10 Bom L R 23 ... 420
Bai Jannubbi v. Mithabhai, (1881) P J 150 ... 765
Bai Shirinbai v. Kharshedji, 22 B 430; 11 Ind Dec (N. S.) 869 ... 962
Bai Vijli v. Nansa Nagar, 10 B 152; 5 Ind Dec (N. S.) 487 ... 785
Baijnath Pandey v. Gauri Kanta Mandal, 20 C 634; 10 Ind Dec (N. S.) 427 ... 660
Baijnath Sahai v. Ramgut Singh, 23 C 775 at p. 787; 23 I A 45; 7 Sar P C J 1; 12 Ind Dec (N. S.) 514 ... 463
Bailey v. Croft, (1812) 4 Taunt, 611; 128 E R 470 ... 673

B—contd. Page.

Bailur Krishna Rau v. Lakshmana Shanbhogue, 4 M 302; 1 Ind Dec (N. S.) 1046 ... 684
Baird v. Williamson, (1863) 15 C B (N. S.) 376 at pp. 391, 392; 33 L J C P 101; 9 L T 412; 10 Jur (N. S.) 152; 12 W R 150; 143 E R 831; 137 R R 51 ... 53
Bakshi Das v. Nadu Das, 1 C L J 261 ... 785
Balamoney v. Ramasami Chettiar, 30 M 230; 17 M L J 79; 2 M L T 88 ... 944
Bala Ram Naik v. Kanhai Bharan, 38 Ind Cas 385; 1 P L J 364 ... 858
Baldeo Baksh Singh v. Raj Ballam Singh, 2 A L J 274; 2 Cr L J 236 ... 654
Baldeo Lall v. Emperor, 38 Ind Cas 305; 18 Cr L J 273 ... 716
Bal Gangadhar Tilak v. Sakwarbai, 26 B 792; 4 Bom L R 637 ... 280
Balkishen Das v. Simpson, 25 I A 151 at p. 158; 25 C 833; 2 C W N 513; 7 Sar P C J 363; 13 Ind Dec (N. S.) 543 (P. C.) ... 460
Balkrishna v. Debrao, Second Appeal No. 118-B of 1913 ... 849
Balkrishna Trimbak Tendulkar v. Savitribai, 3 B 54; 2 Ind Dec (N S.) 36 ... 368
Ball v. Stowell, 2 A 322; 4 Ind Jur 461; 1 Ind Dec (N. S.) 763 ... 424
Balthazar v. Burma Engineering and Trading Co, 17 Ind Cas 916; 5 Bur L T 163 ... 803
Bamundoss Mookerjea v. Omeish Chunder Raee, 6 M I A 289; 1 Sar P C J 542; 19 E R 108 ... 349
Bandhu Acharja v. Nathni Bahar Singh, 7 C L J 460 ... 619
Bandon (Earl) v. Becher, (1885) 3 Cl & Fin 479 at p. 510; 9 Bligh (N. S.) 532; 6 E R 1517 ... 941
Baneswar Mukherji v. Umesh Chandra Chakrabarti, 7 Ind Cas 875; 37 C 626 ... 833
Banka Behari Lal v. Pokhe Ram, 25 A 48; A W N (1902) 179 ... 352, 938
Banka Behary Das v. Raj Kumar Das, 27 C 231; 4 C W N 289; 14 Ind Dec (N. S.) 153 ... 785
Banku Behary Dey v. Harendra Nath Mukherjee, 8 Ind Cas 1; 15 C W N 54 ... 803
Bansidhar v. Ganeshi, 22 A 338; A W N (1900) 107; 9 Ind Dec (N. S.) 1258 ... 637
Bansi Singh v. Kishun Lall Thakur, 26 Ind Cas 203; 41 C 632 ... 935
Bansraj Singh v. Rajbans Bharthi, 24 Ind Cas 451; 12 A L J 918 ... 6
Bapu v. Bapu, 14 Ind Cas 805; 22 M L J 419; 11 M L T 367; (1912) 1 M W N 499; 13 Cr L J 209; 39 M 750 ... 316
Barber Maran v. Ramana Goundan, 20 M 461; 7 M L J 269; 7 Ind Dec (N. S.) 327 ... 922
Barclay v. Pearson, (1893) 2 Ch 154; 62 L J Ch 636, 3 R 388, 68 L T 709; 42 W R 74 ... 785
Barhamdeo Singh v. Ram Narain Singh, 22 Ind Cas 284; 19 C L J 182 ... 28
Barkat Ali v. Hussain Khan, 6 P R 1906; 61 P L R 1906 ... 484
Bartlett v. Parker, (1912) 2 K B 497; 81 L J K B 857; 106 L T 869; 76 J P 280 ... 145

B—contd. Page.

Basant Bibi, *In the matter of the petition of*, 12 A 69; A W N (1889) 202; 6 Ind Dec (N. S.) 794 ... 611
Basartulla Mandle v. Kasirunnessa Bibi, 11 C W N 190 ... 848
Basi Nath Pal v. Jagat Kishore Acharjee, 35 Ind Cas 298, 20 C W N 643, 23 C L J 583 ... 794
Basiruddin Baiddy v. Hari Mohan Ghose, 39 Ind Cas 720 ... 833
Bavasha v. Masumsha, 14 B 70; 7 Ind Dec (N.S.) 504 ... 766
Baylis v. Le Gros, (1858) 4 C B (N. S.) 537, 4 Jur (N. S.) 513; 140 E R 1201; 31 L T (O. S.) 215, 114 R R 840 ... 954
Bazlul Karim v. Satish Chandra, 10 Ind Cas 325; 13 C L J 418; 15 C W N 752 ... 961
Beall v. Hilliary, 54 Am Dec 649; 1 Maryland 186 ... 608
Bechu Lal v. Oliulah, 11 C 338; 5 Ind Dec (N. S.) 985 ... 616
Begg Dunlop & Co. v. Jagannath, 11 Ind Cas 417; 39 C 104; 16 C W N 402; 14 C L J 228 447
Behari Lal Pal v. Srimati Baran Mai Dasi, 17 A 53, A W N (1894) 201, 8 Ind Dec (N. S.) 358 ... 900
Bengal Coal Company v. Rajendra Lal Mitra, 21 Ind Cas 920; 18 C W N 420 ... 229
Bengal Indigo Company v. Roghobur Das, 24 C 272; 1 C W N 83 23 I A 158; 7 Sar P C J 94; 12 Ind Dec (N. S.) 848 ... 496
Beni Madho Singh v. Pran Singh, 14 Ind Cas 456, 15 C L J 187 ... 911
Beni Ram v. Kundan Lal, 21 A 496; 1 Bom L R 400; 3 C W N 502; 26 I A 58; 7 Sar P C J 523; 9 Ind Dec (N. S.) 1022 ... 724, 928
Beni Ram v. Nanhu Mal, 11 I A 181; 7 A 102; 4 Sar P C J 564; 4 Ind Dec (N. S.) 138 ... 587
Beni Singh v. Barhamedeo Singh, 28 Ind Cas 211; 19 C W N 473; 22 C L J 66 ... 269
Benode Behary Bose v. Nistarini Dassi, 33 C 180; 15 M L J 331; 7 Bom L R 887; 32 I A 193; 2 C L J 189; 9 C W N 961 (P. C.) 938
Bernstein v. Bernstein, (1893) P 292; 63 L J P 3; 6 R 609; 69 L T 513 ... 448
Bhadreswar Goloi v. Bishnu Charan Sen, 8 Ind Cas 3; 17 C W N 525 *note* ... 754
Bhagat Singh v. Jai Ram, 26 Ind Cas 402; 22 P R 1915 at p. 128, 19 P W R 1915, 66 P L R 1915 ... 782
Bhag Bhari v. Wazir Khan, 14 Ind Cas 45; 70 P R 1912; 91 P. W. R. 1912, 124 P L R 1902 ... 475
Bhagirath Samanta v. Prem Chand Pal, 16 Ind Cas 852; 17 C L J 201 ... 293
Bhag Singh v. Jhanda Singh, 7 P R 1879 ... 919
Bhan Nanaji Utpat v. Sundra, 11 B H C R 249 ... 10
Bhaskari Kasavarayudu v. Bhaskaram Chalapatirayudu, 31 M 308, 18 M L J 343, 8 Cr L J 265, 4 M L T 301 ... 827
Bhavanamma Garu v. Ramasami Garu, 4 M 19; Ind Dec (N. S.) 961 ... 219
Bhawal Sahu v. Baijnath Pertab Narain Singh, 35 C 350; 12 C W N 256; 3 M L T 156 ... 37

Page.

B—contd.

Bheema Venkataramana v. Bommini Gurappa, 28 Ind Cas 970; 28 M L J 488; 2 L W 537 ... 740
Bhoba Tarini Debya v. Peary Lall Sanyal, 24 C 646; 1 C W N 578; 12 Ind Dec (N. S.) 1100 ... 514
Bhogirath Chandra Mandal v. Sital Chandra Sarkar, 17 Ind Cas 15; 16 C W N 955 ... 960
Bhola Jha v. Kali Prasad, 34 Ind Cas 288; 1 P L J 180 ... 535
Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry, 5 I A 138; 4 C 23; 3 C L R 339; 3 Sar P C J 815; 3 Suth P C J 537; 2 Ind Jur 430; 1 Shome L R 241; 2 Ind Dec (N. S.) 16 ... 514
Bhukandas Vijbhukandas v. Lallubhai Kashidas, 17 B 562, 9 Ind Dec 368 ... 484
Bhupati Roy Chowdhury v. Secretary of State, 5 C L J 662 at p. 663 ... 21
Bhupendra Krishna Ghose v. Amarendra Nath Dey, 34 Ind Cas 892; 43 C 432; 20 C W N 169; 19 M L T 97; 30 M L J 110; 23 C L J 169; 14 A L J 167; 3 L W 252; (1916) 1 M W N 73; 18 Bom L R 347 (P. C.) ... 512
Bhupendra Nath Bose v. Bansi Tanti, 22 Ind Cas 416; 40 C 870 ... 396
Bhup Kunwar In the matter of the Petition of, 26 A 249; A W N (1904) 15; 1 Cr L J 73 ... 321
Bhurrut Chunder Mojoomdar v. Ram Gunga Sein, 5 W R 59; B L R Sup Vol 362 ... 497
Bhuyan Abdus Sobhan Khan, *In re*, 2 Ind Cas 846, 13 C W N 753; 36 C 643; 10 Cr L J 190 ... 831
Bibee Soloman v. Abdool Azeez, 6 C 687; 8 C L R 169; 3 Ind Dec (N. S.) 446 ... 957
Bibee Soloman v. Abdool Aziz, 4 C L R 366 ... 940
Bibi Sodhan v. Harsa Singh, 34 Ind Cas 585; 51 P R 1916; 138 P W R 1916; 155 P L R. 1916 ... 637
Bilasmoni Dasi v. Raja Sheopersad Singh, 8 C 664; 6 Ind Jur 274; 4 Sar P C J 325; 9 I A 33; 11 C L R 215; 4 Ind Dec (N. S.) 427 (P. C.) ... 228
Bipin Behari Hati v. Amrita Lal Bhattacharji, 3 Ind Cas 685; 9 C L J 76 ... 848
Bipin Behary Mitter v. Sarat Chandra Sirkar, 7 Ind Cas 760; 13 C L J 148 ... 570
Bipro Charan v. Suchand Roy, 8 Ind Cas 945; 12 C L J 5 5 ... 374
Biraj Mohini Dassee v. Kedar Nath Karmokar, 35 C 1010; 8 C L J 90; 12 C W N 854 ... 806
Birj Mohun Thakur v. Rai Uma Nath Chowdhry, 20 C 8; 19 I A 154; 6 Sar P C J 245; 10 Ind Dec (N. S.) 6 (P. C.) ... 241
Birj Nath De v. Chandar Mohan Banerji, 19 A 458; A W N (1897) 106; 9 Ind Dec (N. S.) 295 ... 280
Biseswari Koeri v. Ram Partap Singh, 4 Ind Cas 547; 14 C W N 366 ... 87
Bishoka Dasia v. Anunto Lal Pani, 4 C L R 65 299
Bisseswar Ray Chowdhry v. Rajenda Kumar Singha, 25 Ind Cas 228; 18 C W N 949 ... 692
Blackburn v. Vigors, (1887) 12 A C 531 at p. 537; 57 L J Q B 114; 57 L T 720; 36 W R 449; 6 Asp M C 216 ... 178
Bladers v. Free, (1829) 9 B & C 167; 4 Man & Ry 282; 7 L J K B (o. s.) 211; 109 E R 63; 32 R R 620 ... 292
Blakeney v. Fergusson, 14 Ark 641 ... 118
Blenkinsopp v. Blenkinsopp, (1846) 10 Beav 143; 2 Phillips 607; 16 L J Ch 83; 11 Jur 721; 50 E R 537; 78 R R 216 ... 118
Blount v. Layard, (1891) 2 Ch 681*n* at p. 691*n* ... 614
Boidya Nath Adya v. Makhan Lal Adya, 17 C 680; 8 Ind Dec (N. S.) 994 ... 96
Bond v Evans, (1888) 21 Q B D 249; 57 L J M C 105; 59 L T 411; 36 W R 767; 52 J P 612 ... 979
Bonner v. G. W. R. Co., (1883) 24 Ch D 1; 48 L T 619; 32 W R 190; 47 J P 580 ... 385
Bourne, *In re*, Davey v. Bourne, (1906) 1 Ch. 697; 75 L J Ch 474; 94 L T 750; 22 T L R 417 ... 607
Bourne v. Swan and Edgar, Ltd, *In re* Bouene's Trade Marks, (1903) 1 Ch 211; 72 L J Ch 168; 87 L T 589; 51 W R 2 3 ... 541
Brendon v. Shrimant Sunderabai, 23 Ind Cas 221; 38 B 272; 16 Bom L R 164 ... 487
British and Foreign Marine Insurance Co. v. India General Steam Navigation and Ry. Co, Ltd, 9 Ind Cas 364; 15 C W N 226; 38 C 28 ... 920
British and Foreign Marine Insurance Co. v. India General Steam Navigation and Ry., Co. 9 Ind Cas 960; 38 C 50 ... 919
British India Steam Navigation Company Ltd., v. Hajee Mahomed Esack & Co., 3 M 107; 1 Ind Dec (N. S.) 631 ... 920
Brohmo Moyee Dabee v. Burkut Sirdar, 13 W R 264 ... 891
Brojendra Kishore Roy v. Bharat Chandra Roy, 31 Ind Cas 242, 20 C W N 481 at p. 484; 22 C L J 283 ... 864
Brommo Moyee Debia Chowdhrain v. Komoodinee Kant Banerjee, 17 W R 466 ... 723
Brooke v. Price, (1917) A C 115; 85 L J Ch 329 ... 970
Brooks v. Marbury, 11 Wheaton 78 at p 90; 24 U S 423; 6 Law Ed 423 ... 357
Brown v. Mclachlan, (1872) 4 P C 543 at p. 550 9 Moore P C (N S) 384; 42 L J P C 18; 21 W R 277; 17 E R 559 ... 949
Bryan, *In re* the Estate of, (1907) P 125; 76 L J P 30; 96 L T 584 ... 560
Bryant v. La Banque Du Peuple, (1893) A C 170 at p 177; 62 L J P C 68; 1 R 336; 68 L T 546; 41 W R 600 ... 179
Buddha Singh v. Laltu Singh, 30 Ind Cas 529; 20 C W N 1 at p. 9; 29 M L J 434; 2 L W 897; 13 A L J 1007; 18 M L T 409; 17 Bom L R 1022; 22 C L J 481; (1915) M W N 772; 37 A 604; 42 I A 208 (P. C.) ... 512
Budh Singh Dudhuria v. Denendra Nath Sancul, 11 C L R 323 ... 294
Budhu Lal v Chattu Gope, 39 Ind Cas 465; 21 C W N 269; 25 C L J 193; 18 Cr L J 497; 44 C 816 ... 948
Budree Das Mukim v. Chooni Lal Johurry, 33 C 789; 10 C W N 581 ... 638
Budyar Rahman v. Matia Rahman, 21 Ind. Cas 47; 18 C L J 271 ... 531

B—concld.

Page.

Bullock v. London General Omnibus Co., (1907) 1 K B 264 at pp. 271, 274; 76 L J K B 127; 95 L T 905; 23 T L R 62 ... 946
Bunko Behary Gangopadhya v Nil Madhub Chuttopadhya, 18 C 635; 9 Ind Dec (N. S.) 423 ... 587
Bunwaree Chand Thakoor v. Mudden Mohun Chattoraj, 21 W R 41 at p. 42 .. 740
Buta v. Bishen Das, 9 Ind Cas 956; 37 P L R 1911; 176 P W R 1911 ... 900
Buta v. Jiwani, 82 P R 1898 (F. B.) ... 474
Butler v. Butler, (1890) 15 P D 66; 50 L J P 25, 62 L T 344; 38 W R 397 ... 453
Buzlul Karim v Satish Chandra, 10 Ind Cas 525; 15 C W N 752; 13 C L J 438 ... 495
Byjnath Lall v. Ramoodeen Chowdry, 1 I. A. 106, 21 W R 2 3 371, 416

C

Cailland v. Champion, (1797) 7 T R 205; 101 E R 933 ... 302
Campbell v. Campbell, Deane 285 at p. 288 ... 452
Carus v. Wilson, *In re*, (1887) 18 Q B D 7; 56 L J Q B 530; 55 L T 864; 35 W R. 43 ... 265
Chadammi Lal v. Shib Charan, A W N (1905) 18, 2 A L J 59 .. 904
Chairman of the Purnea Municipality v. Siva Sankar Ram, 33 C 899 ... 300
Chaitanya Gobinda Puari Adhikari v. Dayal Gobinda Adhikari, 9 C W N 1021; 32 C. 1082 ... 621
Chalakonda Alasani v. Chalakonda Ratnachalam, 2 M H C R 56 ... 410
Chalho Singh v. Jharo Singh, 18 Ind Cas 61; 39 C 995 ... 118
Chamatkar Mohiney Dabee v. Mohesh Chunder Bose, 26 C 651*n*; 3 C W N 751; 13 Ind Dec (N. S.) 1018 ... 610
Champsey Bhimji & Co. v. Jumna Flour Mills Co. 28 Ind Cas 121; 16 Bom L R 566 ... 385
Chamru Sahu v. Emperor, 11 C W N 170; 5 Cr L J 13 ... 103
Chandi Prasad v. Maharaja Mahendra Mahendra Singh, 23 A 5; A W N (1900) 173 ... 484
Chand Kour v. Partab Singh, 15 I A 156; 16 C. 98, 5 Sar P C J 243; 12 Ind Jur 331; 8 Ind Dec (N. S.) 15 ... 906
Chandra Kanta Dass v. Ramanath Barman, 6 Ind Cas 478; 11 C L J 591 ... 95
Chandra Kunwar v. Chaudhri Narpat Singh, 29 A 184; 9 Bom L R 267; 2 M L T 109; 17 M L J 103; 5 C L J 115; 11 C W N 321; 4 A L J 102 (P. C.) ... 163
Chandran, *In re*, (1917) W N 137, (1917) 1 Ch 639, 86 L J Ch 464 ... 972
Chandranath Chakrabarti v. Jadabendra Chakrabarti, 28 A 639; A W N (1906) 173 ... 594
Chattar Singh v. Lekhraj Singh, 5 A 293; A W N (1883) 39; 3 Ind Dec (N S) 281 ... 943
Chatterjee Brahmin v. Durgadutt Agarwalla, 84 Ind Cas 394; 23 C L J 436; 20 C W N 943 ... 957
Chattrapat Singh v. Gopi Chand Bothra, 26 C 750; 4 C W N 446; 13 Ind Dec (N. S.) 1080 356, 544

C—contd.

Page.

Chengiah v. Damara Kumara Thimma, 15 Ind. Cas 445: 24 M L J 268 ... 953
Chennanagoud, *In re*, 26 M 139; 2 Weir 197 ... 321
Chenna Reddi v. Pedda Obi Reddi, 2 Ind Cas 802; 32 M. 416; 6 M L T 130; 19 M L J 318 ... 497
Chhabila Ram v. Durga Prasad, 28 Ind Cas 681; 37 A 296, 13 A L J 379 ... 746
Chhayunnessa Bibi v. Basirar Rahman, 5 Ind Cas 532; 11 C L J 285; 37 C 399 ... 686
Chidambara Pillai v. Thiruvengadathiengar, 7 M L J 1 ... 799
Chidambara Rao v. Secretary of State, 26 M 66 ... 101
Chidrie Kristappa v. Siddamsetti Yamanappa, 13 Ind Cas 159; 11 M L T 13; (1912) M W N 35 ... 931
Chinnan v. Kondam Naidu, 23 Ind Cas 113; 26 M L J 169; 1 L W 41 ... 796
Chinnayya Rawutan v. Chidambaram Chetti, 2 M 212; 5 Ind Jur 356; 1 Ind Dec (N. S) 419 ... 216
Chinnu Pillai v. Venkatasamy Chettiar, 34 Ind Cas 507; 40 M 77; 30 M L J 347; (1916) 1 M W N 245; 19 M L T 21 ... 700
Chintaman v. Gangabai, 27 B 284; 5 Bom L R 90 ... 554
Chiruvolu Punnamma v. Chiruvolu Perrazu, 29 M 390 at p. 39 ; 1 M L T 183; 16 M L J 367 ... 551
Chit Tun v. Crown, I L B R 238 ... 152
Chockalinga Pillai v. Vythealinga Pundara Sunnady, 6 M H C R 164 ... 798
Chockalingam Pillai v. Mayandi Chettiar, 19 M 485 *et seq*; 6 M L J 247; 6 Ind Dec (N. S.) 1043 ... 799
Chova Kara v. Isa bin Khalifa, 1 B 209; 1 Ind Dec (N. S.) 139 ... 381
Chuckun Lall Singh v. Poran Chunder Singh, 9 W R 483 ... 39
Chukkun Lal Roy v. Lalit Mohan Roy, 20 C 906; 10 Ind Dec (N. S.) 609 ... 862
Chultan Mahton v. Tilukdari Singh, 11 C 175; 5 Ind Dec (N. S.) 876 564
Chunder Monee Debia v. Mehraj Bibee, 22 W R 185 ... 765
Chundi Churn Mookerjee v. Empress, 9 C 849; 12 C L R 508; 4 Ind Dec (N. S.) 1215 ... 979
Churaman Sahu v. Gopi Sahu, 1 Ind Cas 945; 37 C 1; 13 C W N 994; 10 C L J 545 ... 48
Churchward v. Churchward, (1895) P 7; 64 L J P. 18, 71 L T 782; 43 W R 380. 11 R 626 ... 453
Chutterput Singh v. Sait Sumari Mal, 36 Ind Cas 602; 43 C 903; 23 C L J 645; 20 C W N 889 ... 853
Cochrane, *Ex parte*, Mead, *In re*, (1875) 20 Eq 282; 44 L J Bk 87; 32 L T 508; 23 W R 726 ... 803
Collector of Trichinopoly v Lukkamani, 1 I A 282 at p. 293; 21 W R 358; 14 B L R 115; 5 M H C R 303; 7 Mad Jur 190; 3 Sar P C. J 318 (P. C.) ... 217
Colline v. Blantern, (1765) 2 Wilson 341; 1 Sm L C 369; 95 E R 847 ... 785

C—concld. Page.

Collins v. Sedgwick, (1917) 1 Ch 179; 86 L J Ch 156 ... 972
Colonial Sugar Refining Company v. Irving, (1905) A C 369; 74 L J P C 77; 92 L T 738; 21 T L R 513 ... 583
Colville v. Kristo Krishore Bose, 26 C 746; 13 Ind Dec (N. s.) 1077 ... 138
Compania Sansinena v. Houldar, (1910) 2 K B 354; 79 L J K B 1094; 103 L T 333 ... 946
Connor v. Fitzgerald, 11 L R Ir 106 ... 119
Consett v. Bell, (1842) 1 Y & C C C 569 at p. 579; 11 L J Ch 401; 6 Jur 869; 62 E R 1020; 57 R R 451 ... 607
Cooper v. Gordon, (1869) 8 Eq 249; 38 L J Ch 489; 20 L T 732; 17 W R 903 ... 739
Coppen v. Moore, (1898) 8 Q B D 306, 62 J P 453; 67 L J Q B 689; 78 L T 520; 14 T L R 414; 46 W R 620 ... 978
Cotterell v. Jones, (1851) 11 C B 713; 21 L J C P 2; 16 Jur 88; 138 E R 655; 87 R R 754 ... 523
Court of Wards v. Venkata Surya Mahipati Ramakrishna Rao, 20 M 167 at p. 181; 6 M L J 218; 7 Ind Dec (N. s.) 118 ... 217
Cox, *Ex parte*, (1888) 20 Q B D 1; 57 L J Q B 98; 58 L T 323; 36 W R 209; 52 J P 484 ... 321
Crisp v. Adlard, 23 C 956; 12 Ind Dec (N. s.) 635 ... 583
Crowther, *In re*, Midgley v. Crowther, (1895) 2 Ch 56; 64 L J Ch 537; 13 R 496; 72 L T 762; 43 W R 571 ... 506
Cursandas Natha v. Ladkavahu, 19 B 571; 10 Ind Dec (N. s.) 381 ... 487

D

Dagdu v. Bhava, 28 B 420; 6 Bom L R 126 ... 749
Daji Vithal Dhok v. Moreshwar Venkatesh Gharpurey, 1 N L R 112 ... 955
Dakeshur Pershad Narain Singh v. Rewat Mehton, 24 C 25; 12 Ind Dec (N. s.) 681 ... 872
Dakkata Thotapalli v. Sasanapuri Dali Seth, 22 Ind Cas 524; 1 L W 96 at p. 97; (1914) M W N 270 ... 212
Dalglish v. Gazuffer Hassain, 23 C 427; 12 Ind Dec (N. s.) 284 ... 962
Damodar v. Raghunath, 26 B 551; 4 Bom L R 267 ... 943
Damodar Das v. Birj Lal, 30 Ind Cas 77; 37 A 567; 13 A L J 769 ... 630
Dan Singh v. Sukhan, 11 P R 1895 Rev. ... 474
Daropti v. Jaspat Rai, 49 P R 1905; 28 P L R 1905 ... 60
Daryao Shah Gond v. Tiran Shah Gond, 2 N L R 45 ... 956
Dasarath Mandal v. Emperor, 34 C 325; 5 Cr L J 424 ... 829
Dattagiri v. Dattatraya, 27 B 363; 4 Bom L R 743 ... 617
Datto Atmaram Hasabnis v. Shankar Dattatraya, 21 Ind Cas 318, 38 B 32; 15 Bom L R 841 ... 858
Dau Dial v. Munna Lal, 24 Ind Cas 978; 36 A 564; 12 A L J 955 ... 162, 352

D—contd. Page.

Daula v. Gonda, 35 P R 1903; 101 P L R 1903 ... 916
Daulat Khan v. Mahtab Bibi, 4 Ind Cas 1016; 155 P W R 1909; 100 P L R 1909 ... 475
Daulat Ram v. Sayad Abdul Kasim, 60 P R 1893 ... 922
Davalava v. Bhimaji Dhondo, 20 B 335; 10 Ind Dec (N. s.) 687 ... 771
Davis, *In re*, Evans v. Moore, (1891) 3 Ch. 119; 61 L J Ch 85; 65 L T 128; 39 W R 627 ... 608
Davuluru Vijaya Ramayya v. Davuluru Venkatasubba Rao, 32 Ind Cas 881; 39 M 853 at p. 873; 30 M L J 465 ... 937
Dawdy, *In re*, (1885) 15 Q B D 426; 54 L J Q B 574; 53 L T 800 ... 265
Dayabhai Tribhovandas v. Lakhmichand Panachand, 9 B 358; 5 Ind Dec (N. s.) 238 ... 784
Daya Ram v. Sohel Singh, 110 P R 1906; 31 P L R 2907; 59 P W R 1907 ... 231
Dayamoyi v. Ananda Mohan Roy, 27 Ind Cas 61; 42 C 172; 18 C W N 971; 20 C L J 52 ... 704, 878
Debendra Nath Biswas v. Hem Chandra Roy, 8 C W N 135; 31 C 253 ... 506, 621
Debi Dayal Sahoo v. Bhan Pertap Singh, 31 C 433 at p. 439; 8 C W N 408 ... 348
Debi Dial Sahu v. Maharaj Singh, 22 C 764; 11 Ind Dec (N. s.) 507 ... 816
Debilal v. Dhajadhari Goshami, 9 Ind Cas 577; 15 C W N 565; 12 Cr L J 191 ... 663
Debi Pershad Singh v. Joynath Singh, 24 I A 60 at p. 68; 24 C 865; 1 C W N 401; 7 M L J 120; 7 Sar P C J 202; 12 Ind Dec (N. s.) 1245 (P. C.) ... 99
Debi Prosad Chowdhry v. Golap Bhagat, 19 Ind Cas 273; 40 C 721; 17 C W N 701; 17 C L J 499 ... 634
Deokali Koer v. Kedar Nath, 15 Ind Cas 427; 39 C 704; 16 C W N 838 ... 377
Deo Nandan v. Bhirgu Rai, A W N (1887) 215 ... 300
Deo Nandan Pershad v. Meghu Mahton. 34 C 57 at p 63, 5 C L J 181, 11 C W N 225 ... 954
De Rozario v. Gulab Chand Anundjee, 6 Ind Cas 877; 37 C 358 ... 13
Desai Ranchhoddas v. Rawal Nathubhai, 21 B 110; 11 Ind Dec (N. s.) 75 ... 963
Desoo Venkatesa v. Srinivasa Ranga Row, 4 Ind Cas 306; 33 M 187; 7 M L T 32 ... 857
Devarayan Chetty v. Muthuraman Chetty, 18 Ind Cas 515; 37 M 393; 24 M L J 310; (1913) M W N 200 ... 784
Devi Ditta v. Pareman, 71 P R 1898 ... 921
Dhanna Singh v. Gurbakhsh Singh, 4 Ind Cas 337, 91 P R 1909; 161 P W R 1909; 148 P L R 1909 ... 910
Dhapi v. Ram Pershad, 14 C 768; 12 Ind Jur 97; 7 Ind Dec (N. s.) 509 ... 943
Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai, 22 M 302; 8 Ind Dec (N. s.) 215 ... 556
Dharm Chand v. Karm Devi, 6 P R 1893 ... 487
Dharmodas Das v. Nistarini Dasi, 14 C 446; 7 Ind Dec N. s) 297 ... 391
Dhondiram v. Taba Savadan 27 B 330; 5 Bom L R 198 ... 73

D—contd.

Page.

Dhonkal Singh v. Phakkar Singh, 15 A 84; A W N (1893) 36; 7 Ind Dec (N. S.) 770 ... 589
Dhoorjeti Subbaya v. Dhoorjeti Venkayya, 30 M 201; 2 M L T 184 ... 361
Dhunput Singh v. Mahomed Kazim Ispahani, 24 C 296; 12 Ind Dec (N. S.) 864 ... 93
Dhuri v. Mohanlal, 4 N L R 184 ... 885
Dhuttaloor Subbayya v. Paidigantam Subbayya, 30 M 470; 17 M L J 119; 2 M L T 104 ... 554
Didaru v. Banna, 31 P R 1896 ... 301
Diljan Mihha Bibi v. Hemanta Kumar Roy, 29 Ind Cas 395; 19 C W N 758 ... 588
Din Tarini Debi, *In re*, 15 C 775; 7 Ind Dec (N. S.) 1100 ... 611
Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani, 29 C 187 at p. 201; 29 I A 24; 6 C W N 386; 12 M L J 83; 4 Bom L R 167; 8 Sar P C J 224 (P. C.) ... 72, 163
Dino Nath Dey v. Golap Mohini Dasi, 1 C W N 183 ... 544
Diwan Abdul Hakim v. Hari Lal, 62 P W R 1908 ... 782
Diwan Ran Bijai Bahadur Singh v. Indarpal Singh, 26 C 871; 26 I A 226; 4 C W N 1; 2 Bom L R 1; 7 Sar P C J 578; 13 Ind Dec (N. S.) 1158 ... 555
Dixon v. Dixon, (1882) 67 L T 394 ... 455
Dooly Chand v. Mamuji Musaji, 41 Ind Cas 295; 21 C W N 387; 25 C L J 339 ... 358
Doorga Churn Thakoor v. Kally Doss Hazrah, 10 W R 463 ... 299
Doorga Pershad v. Radha Mohun, 15 W R 536 ... 470
Doraisawmy Pillai v. Sandanathamal, 30 Ind Cas 225; (1915) M W N 478; 2 L W 577 ... 594
Doraiswamy Mudaliar v. Sudarsana Chariar, 27 Ind Cas 767; 17 M L T 142; 16 Cr L J 207 ... 672
Doucett v. Wise, 2 Ind Jur (N. S.) 280 at p. 296 ... 252
Drincqbier v. Wood, (1899) 1 Ch 393; 68 L J Ch 181; 79 L T 548; 47 W R 252; 6 Manson 76; 15 T. L. R. 18 ... 951
Duncombe v. Brighton Club and Norfolk Hotel Co., (1875) 10 Q B 371; 44 L J Q B 216; 32 L T 863; 23 W R 795 ... 808
Dunne v. Kumar Chandra Kisore, 30 C 593; 7 C W N 390 ... 802
Durga v. Tota Ram, 19 Ind Cas 837; 16 O C 45 ... 254
Durga Charan Mahto v. Raghunath Mahto, 20 Ind Cas 810; 18 C W N 55; 18 C L J 559 ... 962
Durga Das Hazra v. Samash Akon, 4 C W N 605 ... 861
Durga Dutt v. Gita, 9 Ind Cas 498; 33 A 443; 8 A L J 220 ... 367
Durgadut Singh v. Maharaja Sir Rameshwar Singh Bahadur, 4 Ind Cas 2; 36 C 943; 13 C W N 1013; 11 Bom L R 901; 6 M L T 68; 10 C L J 233; 6 A L J 847; 19 M L J 667; 36 I A 176 ... 21
Durgamani Debya v. Ambica Charan Sarma, 4 C L J 367 ... 904

D—concld.

Page.

Durga Pershad v. Mendi Lal, 1 O C 174 ... 903
Durga Prosonno Bose v. Raghu Nath Dass, 26 C 254; 3 C W N 299; 13 Ind Dec (N. S.) 767 ... 76
Durga Singh v. Mathura Das, 6 A 460; A W N (1884) 173; 4 Ind Dec (N. S.) 134 ... 650
Dursan Singh v. Durbejoy Singh, 1 Ind Cas 530; 9 C L J 623 ... 529
Dwarkanath Roy v. Ram Chand Aich, 26 C 428; 3 C W N 266; 13 Ind Dec (N. S.) 876 ... 779
Dyawappa Basgunda Patil, *In re*, 29 Ind Cas 66; 17 Bom L R 382; 16 Cr L J 434 ... 655

E

Earl of Harrington v. Corporation of Derby, (1905) 1 Ch 205 at pp. 226, 227; 74 L J Ch 219; 92 L T 153; 69 J P 62; 3 L G R 321; 21 T L R 98 ... 864
East Indian Railway Co. v. Changa Khan, 28 Ind Cas 245; 22 C L J 212; 42 C 888; 19 C W N 1034 ... 339
——— v. Sispal Lal, 12 Ind Cas 596; 14 C L J 472; 16 C W N 329; 39 C 311 ... 388
Easton v. Ellis, 1 Handy (Ohio) 70 ... 294
Eaton v. Swansea Waterworks Company, (1851) 17 Q B 267; 20 L J Q B 482; 15 Jur 675; 117 E R 1282; 85 R R 455 ... 48
Eckowrie Sing v. Heeraloll Seal, 2 B L R (P. C.) 4; 11 W R (P. C.) 2; 12 M I A 136; 20 E R 292 ... 726
Edwards v. Edwards, (1852) 15 Beav 357; 21 L J Ch 324; 16 Jur 259; 51 E R 576; 92 R R 464. ... 513
Elder widow of Raja Chutter Sein v. Younger widow of Raja Chutter Sein, 1 Select Reports 239; 6 Ind Dec (o. s.) 176 ... 616
Emary v. Nolloth, (1903) 2 K B 264 at p. 269; 72 L J K B 620; 67 J P 354; 89 L T 100; 19 T L R 530; 52 W R 107; 20 Cox C C 507 ... 980
Embrey v. Owen, (1851) 6 Ex 353; 20 L J Ex 212; 15 Jur 633; 17 L T 79; 86 R R 331; 155 E R 579 ... 48
Emperor v. Ayshabai, 6 Bom L R 536; 1 Cr L J 599 ... 333
——— v. Hanmaraddi Ramaraddi, 26 Ind Cas 188; 39 B 58; 16 Bom L R 603; 15 Cr L J 690 ... 671
——— v. Karam Chand, 147 P L R 1901 ... 1060
——— v. Kehri, 29 A 434; 4 A L J 310; A W N (1907) 140; 5 Cr L J 360 ... 150
——— v. Khalpa Ranchod, 36 Ind Cas 581; 18 Bom L R 789; 17 Cr L J 533 ... 145
——— v. Mathura Prasad, 29 C 491 at p. 493 ... 715
——— v. Muhammad Khan, A W N (1902) 202 ... 321
——— v. Nilkanta, 14 Ind Cas 849; 35 M 247; (1912) M W N 207; 13 Cr L J 305; 22 M L J 490; 11 M L T 1 Supp. ... 670
——— v. Salay Gulam Ariff, Criminal Sessions Trial No. 29 of 1915 of this Court ... 6

E—concld.

Page.

Emperor v. Taberak Zaman Khan, A W N (1907) 288; 30 A 52 4 A 52; 4 A L J 1906; Cr L J 396 ... 100
Empress v. Ashootosh Chuckerbutty, 4 C 483; 3 C L R 270; 1 Shome L R Cr R 79; 2 Ind Dec (N. S.) 307 ... 151
Empress v. Ganpat Kalwar, 4 C W N 779 ... 523
——— v. Haidar, A W N (1883) 110; 3 Ind Dec (N. S.) 449 ... 989
Eshan Chunder Mitter v. Banku Behari Pal, 25 C 160, 1 C W N 660; 13 Ind Dec (N. S.) 109 ... 778
Eshen Chunder Singh v. Shamacharan Bhutto, 11 M I A 7 at p 21; 6 W R (P. C.) 57; 2 Sar P C J 209; 20 E R 3; 2 Ind Jur (N. S.) 87 ... 380
Evans v. Davis, (1879) 10 Ch D 747 at p 763; 48 L J Ch 223; 39 L T 391; 27 W R 285 626, 954

F

Farhall v. Farhall, (1872) 7 Ch 123; 41 L J Ch 146; 25 L T 865; 20 W R 157 .. 506
Farid-un-nisa v. Mukhtar Ahmad, 40 Ind Cas 488; 4 C L J 230 ... 903
Farid-un-nissa, *In the matter of the petition of* 5 A 92; A W N (1882) 184; 3 Ind Dec (N. S.) 109 ... 611
Fateh Chand v. Narsingh Das, 16 Ind Cas 988; 22 C L J 383 ... 957
Fatehyab Khan v. Muhammad Yusuf, 9 A 434; A W N (1887) 82; 5 Ind Dec (N. S.) 725 ... 725
Fatima v. Khanda, 25 P R 1895 ... 240
Fatma Boo v. Ghisan Boo, 4 Ind Cas 242; 11 Bom L R 1083; 33 B 719 ... 766
Faujdar Thakur v Kasi Choudhuri, 27 Ind Cas 186; 19 C W N 184; 21 C L J 53; 16 Cr L J 122; 42 C 612 ... 817
Fazal Illahi v. Emperor, 32 Ind Cas 678; 2 P R 1319 Cr.; 3 P W R 1916 Cr.; 17 Cr L J 86 ... 1004
Felix Lopez v. Muddun Mohun Thakoor, 13 M I A 467; 14 W R (P. C.) 11; 5 B L R 52'; 20 E R 625 ... 683
Fendall v. May, (1813) 2 M & S 76; 105 E R 310; 14 R R 593 ... 293
Fenn v. Smart, (1810) 12 East 444; 104 E R 173 ... 954
Fife v. Clayton, (1807) 13 Ves (Jun.) 546; 33 E R 398; 9 R R 220 ... 749
First Assistant Collector of Nasik v. Shamji Dasrath Patil, 7 B 209; 4 Ind Dec (N. S.) 141 .. 100
Fitzhardinge (Lord) v. Purcell, (1908) 2 Ch 139; 77 L J Ch 529; 99 L T 154; 72 J P 276; 24 T L R 584 ... 102
Flint v. Howard, (1893) 2 Ch 54 at pp 61, 73, 62 L J Ch 804; 2 R 386; 68 L T 390 ... 972
Flower v. Lloyd, (1877) 6 Ch D 297; 46 L J Ch 838; 37 L T 419; 25 W R 793 ... 942
Fluck v. Tollemache, (1823) 1 Car & P 5; 28 R R 765 ... 690
Foley v. Addenbrooke, (1844) 13 M & W 174; 14 L J Ex 169; 67 R R 540; 153 E R. 72 ... 771

F—concld.

Page.

Forster v Forster, (1790) 1 Hag Con 144 at p 154; 16 E R 504 ... 450
Framji Cursetji v. Goculdas Madhowji, 16 B. 338; 3 Ind Dec (N. S.) 703 ... 614
Frankenburg v. Great Horseless Carriage Co., (1900) 1 Q B 504; 69 L J Q B 147; 81 L T 681; 7 Manson 347 ... 947
Frederick Peacock v. Madan Gopal, 29 C 428; 6 C W N 577 ... 520
Freeman v. Freeman, (1854) Kay 479; 69 E R 203; 101 R R 712 ... 560
Friend v. Friend, *In re* Friend, (1897) 2 Ch 421; 66 L J Ch 737; 77 L T 50; 45 W R 139 ... 294
Fritts v. Fritts, 138 Ill 436; 28 N E 1059; 14 L R A 687; 32 Am St Rep 156 ... 454
Furnival v. Crew, (1744) 26 E R 851; 3 Atk 83 ... 229

G

Gadian Chetti v. Veerappa Chetti, 26 Ind Cas 899; 28 M L J 92 ... 163
Gandu Singh v. Natha Singh, 12 P R 1907; 6 P L R 1908, 92 P W R 1907 ... 484
Ganesh Bnagat v Sarada Prasad Mukerjee, 30 Ind Cas 941; 42 C 370; 19 C W N 895 ... 96
Ganeshdas v. Shankar, 13 Ind Cas 909, 8 N L R. 22 ... 955
Ganesh Dat Singh v. Sukhraj Singh, 14 Ind Cas 12 ... 963
Ganeshi Lal v. Nand Kishore, 15 Ind Cas 319; 34 A 487; 13 Cr L J 479; 10 A L J 45 ... 139
Ganesh Lala v. Bapu, 21 B 198; 11 Ind Dec (N. S.) 133 ... 180
Ganga Jati v. Ghasita, 1 A 46 at p. 50; 1 Ind Dec (N. S.) 69 ... 278
Ganga Ram v. Abdul Rahman, 28 P R 1907; 93 P L R 1908; 140 P W R 1907 ... 577
Ganga Ram v. Mahni, 9 P R 1904 Rev., 45 P L R 1905 ... 908
Gangapa Kardepa v. Emperor, 21 Ind Cas 673; 38 B 156 at p 164; 15 Bom L R 975; 14 Cr L J 625 ... 151
Gangava v. Sayava, 21 B. 699; 11 Ind Dec (N. S.) 470 ... 64
Ganpatsao v. Pandurang, 33 Ind Cas 758; 12 N L R 24 ... 955
Gauhra v. Har Bhaj, 16 P R 1905; 41 P L R 1905 ... 815
Gaya Din v. Jhuman Lal, 28 Ind Cas 910; 37 A 400; 13 A. L. J. 510 ... 425
Gee v. Lane, (1812) 15 East 592; 104 E R 967; 13 R R 534 ... 289
George Langridge v. Grace Atkins, 17 Ind Cas 792; 35 A 29; 13 Cr L J 856; 10 A L J 431 ... 139
Gethin v. Gethin, (1864) 31 L J Mat 43 ... 453
Ghulam Khan v. Muhammad Hassan, 29 C 167; 6 C W N 626 29 I A 5; 12 M L J 77; 4 Bom L R 161; 8 Sar P C J 154; 25 P R 1902 300, 885

G—contd.

Page.

Ghulam Nabi v. Allah Din, 19 Ind Cas 964; 143 P W R 1913; 241 P L R 1913; 204 P W R 1913 ... 163
Gibbons, *In the matter of*, 14 C 42; 7 Ind Dec (N. S.) 29 ... 1001
Giddigadu, *In re*, 1 Ind Cas 867; 9 Cr L J 404; 33 M 46; S M L T 116 ... 151
Girdharee Sing v. Koolahul Sing, 2 M I A 344; 6 W R (P. C.) 1; 1 Sar P C J 200; 1 Suth P C J 98; 18 E R 330 ... 211
Girdhari Singh v. Neeladhar Singh, 16 Ind Cas 1004; 10 A L J 159 ... 783
Girindra Chandra Ganguli v. Rajendra Nath Chatterjee, 1 C. W. N 530 ... 120
Girish Chandra Chongdar v. Satish Chandra Sarkar, 12 C W N 622 ... 98, 861
Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran, 10 M 375; 3 Ind Dec (N S.) 1015 ... 591
Gladwin v. Scot, (1751) Barnes 53; 94 E R 802 ... 293
Gnanasambanda Pandara Sannadhi v. Velu Pandaram, 27 I A 69; 23 M 271; 2 Bom L R 597; 4 C W N 32; 10 M L J 29, 7 Sar P C J 671; 8 Ind Dec (N. S.) 591 ... 617
Gobind Chunder Nundy v. Srigobind Chowdhry, 24 C 330; 1 C W N 179; 12 Ind Dec (N. S.) 887 ... 524
Gobind Chundra Gangopadhya v Sherajunnissa Bibi, 13 C L R 1 ... 464
Gobind Lal Roy v. Ramjanam Mi ser, 21 C 70; 20 I A 165; 17 Ind Jur 536; 6 Sar P C J 356; 10 Ind Dec 679 (P. C.) ... 462
Gobind Prasad v. Gomti, 30 A 288; 5 A L J 256; A W N (1908) 132 ... 594
Gobinda Mohun Doss v. Kunja Behary Doss, 4 Ind Cas 364; 14 C W N 147 at p 153; 10 C L J 407 ... 944
Godai Molla v. Aminuddi Howladar, 21 Ind Cas 957; 18 C L J 509 ... 93
Golab Koer v. Badshah Bahadur, 2 Ind Cas 129; 10 C L J 420; 13 C W N 197 ... 939
Golab Sao v. Chowdhury Madho Lal, 2 C L J 384; 9 C W N 956 ... 277
Golap Chand Marwaree v. Thakurani Mohokoom Koaree, 3 C 314; 2 C L R 1121; 2 Ind Jur 601; 1 Ind Dec (N. S.) 787 ... 508
Golap Jan v. Bhola Nath Khetry, 11 Ind Cas 311; 38 C 880; 15 C W N 917 ... 13
Goodrich, *In re*, Payne v. Benett, (1904) P. 138; 73 L J P 33; 90 L T 170; 20 T L R 203 ... 287
Goodright v. Catar, (1780) 2 Dougl 477; 99 E R 304 ... 953
Goodwin v. Robarts, (1875) 10 Ex 337, on Appeal (1876) 1 App Cas 476; 45 L J Ex 748; 35 L T 179; 24 W R 987 ... 962
Gooroo Doss Dutt v. Ooma Churn Roy, 22 W R 525 ... 349
Gopal Krishna v. Lakhiram, 14 Ind Cas 212; 16 C W N 634 ... 115
Gopal Mondal v. Eshan Chunder Banerjee, 29 C 148 ... 848
Gopendra Chandra Mitter v. Taraprasanna Mukerjee, 7 Ind Cas 790; 14 C W N 1049; 37 C 598 ... 967

G—contd.

Page.

Gopeshwar Pal v. Jiban Chandra, 24 Ind Cas 37; 41 C 1125; 18 C W N 804; 19 C L J 549 ... 583
Gopi v. Bisheshar, A W N (1885) 100; 4 Ind Dec (N. S.) 789 ... 724
Gopi Chand Bothra v. Kasimunnessa Khatun, 34 C 836; 6 C L J 130 ... 613
Gopinath Birbar v. Goluck Chunder Bose, 16 C 292n; 13 Ind Jur 339n; 8 Ind Dec (N. S.) 192n ... 712
Gopi Nath Chobey v. Bhugwat Pershad, 10 C 697; 5 Ind Dec (N. S.) 468 ... 779
Gopini Debi v. Lokenath Tewari, 11 Ind Cas 696; 19 C W N 140 ... 681
Gora Chand v. Basanta Kumar, 12 Ind Cas 684; 15 C L J 258 ... 599
Gorie Sanker v. Emperor, 41 Ind Cas 830 ... 832
Gossain Dalmar Puri v. Bepin Behary Mitter, 18 C 520; 9 Ind Dec (N. S.) 347 ... 170
Gossain Mohendra Giri v. Rajani Kant Das, 1 C W N 245 ... 381
Gossami Sri Gridharji v. Romanlalji Gossami, 16 I A 137; 17 C 3; 13 Ind Jur 211; 5 Sar P C J 350 8 Ind Dec (N. S.) 541 (P. C.) ... 590
Gouri Saran v. Moulvi Mahmed Latif, 11 C W N 211 ... 405
Goverdhun Das v. Waris Ali, 4 Select Reports 330; 7 Ind Dec (O. S.) 246 ... 350
Governor of Bengal v. Moti Lal, 20 Ind Cas 81; 17 C W N 1253; 18 C L J 452; 41 C 173; 14 Cr L J 321 ... 319
Govind v Shamtaya, 5 Bom L R 118 ... 771
Govinda Kuar v. Lala Kishun Proshad, 28 C. 370 ... 785
Gower v. Couldridge, (1898) 1 Q B 348; 67 L J Q B 251; 77 L T 707; 46 W R 214; 14 T L R 165 ... 950
Graham v. Jackson, (1845) 6 Q B 811; 14 L J Q B 129; 9 Jur 275; 115 E R 306 ... 294
Grant, W M. v. Ram Rakhar Bhagat, 6 Ind Cas 501; 14 C L J 110 ... 751
Grapel v. Hodges, 112 N Y 419 ... 294
Great Berlin Steamboat Company, *In re*, (1884) 26 Ch D 6 6; 54 L J Ch 68; 51 L T 445 ... 786
Greenwood v. Greenwood, (1909) 100 L T 68 ... 950
Gregory v. Midghell, (1811) 18 Ves (Jun.) 328; 34 E R 341; 11 R R 207 ... 178
Grey v. Anund Mohun Moitro, (1864) W R 108 ... 427
Greyvensteyn v. Hattingh, (1911) A C 355 at p. 359; 80 L J P C 158; 104 L T 360; 27 T L R 358 ... 864
Grimwood v. Moss, (1872) 7 C P 360 at p 364; 41 L J C P 230; 27 L T 268; 20 W R 972 ... 954
Gulabchand Parachand v. Fulbai Harichand, 3 Ind Cas 743; 33 B 411; 11 Bom L R 649 ... 784
Gulab Kuer v. Ram Ratan Pandey, 27 Ind Cas 229; 18 C W N 896 ... 117
Gullay v. Bakar Husain, 28 A 268, A W N (1905) 274; 3 Cr L J 53 ... 831
Gul Mahomed Sirvar v Cheharu Mandal, 10 C W N 53; 3 Cr L J 141 ... 657
Gunesh Chunder Roy v. Nil Komul Roy, 22 W R 264 ... 710

Page.

G—concld.

Gurai Kar v. Kuarmoni Singh, 29 Ind Cas 312; 19 C W N 118 ... 968
Gur Devi v. Sondha, 61 P R 1881 ... 907
Guru Charan Nath Bepari v. Kartik Nath, 10 C W N 44 ... 544

H

Habib Bakhsh v. Baldeo Prasad, 23 A 167; A W N (1901) 39 ... 599
Hadjee Ismail Hadjee Hubeeb v. Hadjee Mahomed Hadjee Jasoob, 13 B L R 91; 21 W R 303 ... 251, 947
Hadu v. Lala, 21 Ind Cas 951; 41 P R 1915; 15 P L R 1914; 16 P W R 1914 ... 731
Haigh v. Brooks, (1839) 10 Ad & E 309; 2 P & D 452; 9 L J Q B 194; 113 E R 119; 50 R R 399 ... 674
Haitunnessa Bibi v. Kailash Chandra Saha, 17 Ind Cas 224; 16 C L J 259 ... 339
Haji Buksh Ilahi v. Durlav Chandra Kar, 16 Ind Cas 821; 16 C W N 842; 23 M L J 206; 12 M L T 385; (1912) M W N 1005; 14 Bom L R 1063; 10 A L J 452; 16 C L J 620; 39 C 981 (P. C) ... 460
Haladhar Maiti v. Choytonna Maiti, 39 C 588; 7 C W N 547 ... 314
Halim-un-nissa Chawdhrani v. Secretary of State, 17 C 1036; 8 C W N 880 ... 461
Hall v. Cox, (1899) 1 Q B 198; 68 L J Q B 167; 47 W R 161; 79 L T 653; 15 T L R 82 ... 149
Hall v. Hall, (1891) 64 L T 837 ... 453
Hall v. Hall, (1891) P 302; 65 L T 206; 60 L J P 73 ... 453
Hambro v. Burnand, (1904) 2 K B 10 at p. 19; 73 L J K B 669; 90 L T 803; 52 W R 583; 9 Com Cas 251; 20 T L R 393 ... 178
Hameedoonnissa v. Anundamoyee Dassee, W R Full Bench Rulings 25 ... 864
Hamijuddi Mondol v. Damodar Ghose, 10 C W N 1026; 4 Cr L J 168 ... 987
Hannay & Co. v. Smurthwaite, (1893) 2 Q B 412 ... 919
Hansraj v. Ratni, 27 A 200; A W N (1904) 227 ... 931
Hanumantamma v. Rami Reddi, 4 M 272; 1 Ind Dec (N. S.) 1025 ... 962
Harak Chand v. Charu Chandra Singh, 8 Ind Cas 766; 13 C L J 102; 15 C W N 5 894, 957
Hare v. Burges, (1857) 70 E R 19; 4 K & J 45; 27 L J Ch 86; 3 Jur 1294; 6 W R 144; 116 R R 255 ... 229
Harendra Lal Roy v. Hari Dasi Debi, 23 Ind Cas 637; 41 C 972; 27 M L J 80; (1914) M W N 462; 16 M L T 6; 18 C W N 817; 19 C L J 484; 16 Bom L R 400; 12 A L J 774; 1 L W 1050 (P. C.) ... 6
Hari Charan Ghosh v. Manmatha Nath Sen, 19 Ind Cas 683; 41 C 1; 18 C W N 343 ... 588
Hari Doyal Singh Roy v. Sheikh Samsuddin, 5 C W N 240 ... 925
Harish Chandra Roy v. Atir Mahmud, 18 Ind Cas 474; 40 C 545; 17 C W N 517 ... 556
Harnabh Pershad v. Mandil Dass, 37 C 379; 14 Ind Dec (N. S.) 251 ... 551

Page.

H—contd.

Haro Chandra Poddar v. Umesh Chandra, 5 Ind Cas 39; 14 C W N 71; 11 C L J 20 ... 926
Har Prasad v. Jagan Lal, 27 A 56; A W N (1904) 161 ... 613
Har Prasad v. Pandurang, A W N (1905) 260; 3 Cr L J 48 ... 633
Har Prasad Das v. Emperor, 19 Ind Cas 197; 40 C 477; 17 C L J 245; 14 Cr L J 197; 17 C W N 647 ... 314
Harrington v. Sendall, (1903) 1 Ch 921; 72 L J Ch 396; 51 W R 463; 88 L T 323, 19 T L R 302 ... 739
Hasan Raza Sahib v. Hasan Ali Sahib, 38 Ind Cas 528, 5 L W 419, (1917) 1 M W N 389, 33 M L J 348 ... 740
Hashim Ali v. Abdul Rahman, 28 A 698; A W N (1906) 187; 3 A L J 467 ... 962
Hastings (Lord) v. Saddler, (1898) 79 L T 355 ... 533
Haswa v. Mahbub, 10 Ind Cas 559; 8 A L J 645 ... 296, 358
Heiniger v. Droz, 25 B 433; 3 Bom L R 1 ... 530
Hem Chunder Bhunjo v. Mon Mohini Dassi, 3 C W N 604 ... 355
Hem Chunder Ghose v. Thako Moni Debi, 20 C 533; 10 Ind Dec (N. S.) 362 ... 417
Hem Commaree Dassee v. Queen-Empress, 24 C 551; 1 C W N 333; 12 Ind Dec (N. S.) 1036 ... 610
Hem Kunwar v. Amba Prasad, 22 A 430; A W N 1900) 136; 9 Ind Dec (N. S.) 1324 ... 431
Henfrey v. Henfrey, (1842) 4 Moore P C 29; 13 E R 211; 59 R R 331 ... 558
Higham v. Ridgway, (1808) 10 East 109; 103 E R 717; 2 Smith L C 301; 10 R R 235 ... 119
High Court Proceedings, dated the 21st March 1871, 6 M. H. C. R. App XX; 1 Weir 801 ... 664
High Court Proceedings, 13th July 1877, No. 1427, 1 Weir 690 ... 1002
Hingu v. Emperor 3 Ind Cas 482; 31 A 453; 6 A L J 685, 10 Cr L J 297 ... 672, 1000
Hira Lal v. Gribala Debi, 34 Ind Cas 444; 23 C L J 429 ... 380
Hira Lal Mitra v. Uday Chandra Dey, 14 Ind Cas 33; 16 C L J 103; 16 C W N 1027 ... 935
Hira Lal Thakur v. King-Emperor, 8 C W N 715; 31 C 1053; 1 Cr L J 713 ... 657
Hiramoni Dassi v. Radha Churn Kar, 5 C W N 128 ... 420
Hiran Bibi v. Sohan Bibi, 24 Ind Cas 309, 18 C W N 929, 27 M L J 149, 1 L W 648 (P. C.) ... 885
H. H. The Nizam of Hyderabad, *In re*, 9 M 256; 3 Ind Dec (N. S.) 575 ... 943
Hodgins v. Hickson, (1878) 12 Ir L T 104; 39 L T 644 ... 951
Hollins v. Verney, (1884) 13 Q B D 304; 53 L J Q B 430; 51 L T 753; 33 W R 5; 48 J P 580 ... 48
Hooper v. Keay, (1875) 1 Q B D 178; 34 L T 574; 24 W R 485 ... 422
Houldsworth v. City of Glasgow Bank, (1880) 5 A C 317; 42 L T 194; 28 W R 677 ... 262
Howard, *In the goods of*, (1869) 1 P & D 636; 38 L J P 32; 20 L T 230 ... 560

H—concld.

Page.

Howson v. Hancock, (1800) 8 T R 575; 101 E R 1555 ... 785
Hriday Nath Parai v. Akshay Lal, 39 Ind Cas 963; 25 C L J 454 ... 935
Hukum Chand Boid v. Kamalanand Singh, 33 C 927; 3 C L J 67 ... 599
Hull and County Bank, *In re*, Burgess's case, (1880) 15 Ch D 507; 49 L J Ch 541; 43 L T 45; 28 W R 732 ... 262
Hunt v. Hunt, (1877) 47 L J P 22; 39 L T 45 ... 453
Hureehur Mookerjee v. Judoonath Ghose, 10 W R 153 ... 962
Huri Nath Chatterjee v. Mothurmohun Goswami, 20 I A 183; 21 C 8; 17 Ind Jur 481; 6 Sar P C J 334; 10 Ind Dec (N. s) 638 ... 548
Hurish Chunder Chowdhry v. Chunder Monee Debia, 24 W R 268 ... 514
Hurkissen Dass Serowgee v. Nibaran Chander Banerji, 6 C W N 27 ... 674
Hurmut-ool-nissa Begum v. Allahdia Khan, 17 W R 108 ... 361
Hurrish Chunder Chowdhry v. Kali Sunderi Debi, 9 C 482; 10 I A 4; 12 C L R 511; 7 Ind Jur 161; 4 Sar P C J 406; 4 Ind Dec (N. s.) 970 ... 251, 630, 947
Hurro Chunder Roy Chowdhry v. Shoorodhonee Debia, 9 W R 402 at p. 406, B L R Sup Vol 985 ... 632
Hurro Soondery Chowdhrain, *In the matter of*, 4 C 20; 3 C L R 93; 2 Ind Dec (N. s.) 14 ... 610
Hurry Churn Dass v. Nimai Chand, 10 C 138; 13 C L R 207; 5 Ind Dec (N s.) 94 ... 963
Hurryhur Mookhopadhya v. Madhub Chunder Baboo, 14 M I A 152; 8 B L R 566; 20 W R 459; 2 Sar P C J 713; 2 Suth P C J 434; 20 E R 743 ... 758
Husainara Begum v. Rahmannessa Begum, 8 Ind Cas 837; 13 C L J 3; 38 C 342 ... 922
Hyderman Kutti v. Syed Ali, 15 Ind Cas 576; 37 M 514; 12 M L T 147; (1912) M W N 889; 23 M L J 214 ... 933

I

Imam Ali v. Poresh Mundul, 8 C 468; 110 C L R 396; 4 Ind Dec (N. s.) 299 ... 864
Imperatrix v. Ratnya, 25 B 667 ... 641
Imrit Chamar v. Sirdhar Panday, 13 Ind Cas 120; 15 C L J 7; 17 C W N 108 ... 119
Inayat v. Ganga, 32 Ind Cas 829; 3 P R 1916 73
Incha Ram v. Bande Ali Khan, 11 Ind Cas 52; 8 A L J 877; 33 A 757 ... 614
Indar Mal v. Baldeo Das, 23 Ind Cas 424; 12 A L J 230 ... 931
Indar Narain v. Nanak Chand, 32 Ind Cas 454; 58 P R 1916; 74 P W R 1916; 58 P R 1917 ... 196
Indety China v. Potu Konchi, 8 Ind Cas 365; (1910) M W N 639; 8 M L T 376 ... 123
Indur Subbarami Reddy v. Kandadai Rajamannar Ayyangar, 26 M 47; 12 M L J 396 .. 300
Ingle v. Richards, (1860) 28 Beav 366 at p 368; 6 Jur (N. s.) 1178; 8 W R 697; 54 E R 406; 3 L T 46; 126 R. R. 172 ... 608

I—concld.

Page.

Ishan Chandra Mitter v. Raja Ramranjan Chakarbutty, 2 C L J 125 ... 115, 533
Ishan Chunder Hazra v. Rameswar Mondol, 24 C 831; 12 Ind Dec (N. s.) 1221 ... 951
Ishar Das v. Keshab Deo, 7 Ind Cas 68; 32 A 657; 7 A L J 807 ... 296, 358
Ishur Chunder Shaha, *In re*, 9 W R 34 at p 35 Cr ... 978
Israil v. Shamset Rahman, 21 Ind Cas 861; 41 C 426; 18 C W N 176; 19 C L J 47 ... 385

J

Jacobs v. Morris, (1902) 1 Ch 816; 71 L J Ch 363; 50 W R. 371; 86 L T 275; 18 T L R 384 ... 179
Jadab Gobinda Singh v. Anath Bandhu Saha, 5 Ind Cas 993; 37 C 171 ... 602
Jadu Mani Boistabee v. Ram Kumar Chakravarti, 29 C 239 ... 318
Jadunath Chowdhury v Kailash Chandra Bhattacharya, 2 Ind Cas 414; 10 C L J 31; 41 C W N 75; 37 C 63 ... 200
Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri, 13 I A 84 at p. 95; 13 C 308; 10 Ind Jur 307; 4 Sar P C J 715; 6 Ind Dec (N. s.) 705 ... 549, 846
Jagadindra Nath Roy v. Hemanta Kumari Debi, 32 C 129; 31 I A 203; 8 C W N 809; 6 Bom L R 765; 1 A L J 585; 8 Sar P C J 693 (P. C.) ... 590, 616, 838
Jagadindra Nath Roy v. Secretary of State, 30 I A 44 at p 52; 7 C W N 193; 30 C 291; 5 Bom L R 1; 8 Sar P C J 412 (P. C.) ... 103
Jagan Nath v. Champa, 28 A. 307; A W N (1906) 13; 3 A L J 87 ... 637
Jagannath v. Ram Nath, 26 Ind Cas 52; 12 A L J 913 ... 6
Jagannath Churn v. Akali Dassia, 21 C 463, 10 Ind Dec (N s.) 938 ... 742
Jagannath Prasad Gupta v. Runjit Singh, 25 C 354, 13 Ind Dec (N. s.) 237 ... 594
Jagapati Mudaliar v. Ekambara Mudaliar, 21 M 274; 8 M L J 40; 7 Ind Dec (N. s.) 550 ... 429
Jagat Chandra Mozumdar v. Empress, 26 C 786, 3 C W N 491, 83 Ind Dec (N. s.) 1103 ... 1006
Jagat Tarini Dasi v. Naba Gopal Chaki, 34 C 305; 5 C L J 270 ... 922
Jaggannath v. Lachman Das, 23 Ind Cas 32; 36 A 549; 12 A L J 889 ... 412
Jagjiban Ghose v Emperor, 2 Ind Cas 681 at p. 693; 13 C W N 861 at p. 892; 9 C L J 663; 10 Cr L J 125 ... 158
Jai Bansi Kunwar v. Chattar Dhari Singh, 5 B L R 181; 13 W R 396 ... 590
Jai Gopal Mukerji v. Lalit Mokan, 26 A 236; A W N (1904) 7 ... 976
Jaipal Kunwar v. Indar Bahadur Singh, 26 A 238; 31 I A 67; 8 C W N 465; 6 Bom L R 495; 14 M L J 149; 8 Sar P C J 625; 7 O C 239 (P. C.) ... 18
Jakhomull Mehera v. Saroda Prosad Dey, 7 C L J 604 ... 696
Jalim Singh v. Choonee Lal, 11 Ind Cas 540; 15 C W N 882 ... 380

J—contd. Page.

Jamna Das v. Sabapathy Chetti, 12 Ind Cas 521; 36 M 138; 10 M L T 278; (1911) 2 M W N 259; 21 M L J 1074; 12 Cr L J 545 ... 312, 314
Janaki Ammal v. Narayanasami Aiyar, 37 Ind Cas 161; 39 M 634; 31 M L J 225; 20 M L T 168; 14 A. L J 997; (1916) 2 M W N 188; 20 C W N 1323; 18 Bom L R 856 24 C L J 309; 4 L W 530 (P.C.) ... 603
Jankibai v Shrinivas Ganesh Valsankar, 20 Ind Cas 533; 38 B 120; 15 Bom L R 684 ... 916
Janki Das v. Bengal Nagpur Railway Company, 13 Ind Cas 509; 15 C L J 2 1; 16 C W N 356 ... 388
Janki Prasad v. Ishar Das, 21 A 374; A W N (1899) 126; 9 Ind Dec (N s) 947 ... 909
Jan Mahomed v. Datu Jaffar, 22 Ind Cas 195; 16 Bom L R 1044 at pp. 1097, 1107; 38 B 409 ... 764
Jarip Khan v. Durfa Bewa, 15 Ind Cas 476; 17 C W N 59; 16 C L J 144 ... 847
Jatindra Mohan Poddar v. Srinath Roy, 3 C W N 261; 23 C 267; 13 Ind Dec (N. s.) 775 ... 200
Javanmal Jitmal v. Muktabai, 14 B 5 6; 7 Ind Dec (N. s.) 808 ... 955
Jawahir v. Neki Ram, 28 Ind Cas 502; 13 A L J 190; 37 A 189 ... 162, 352, 938
Jenner v. Ffinch, (1880) 5 P D 106; 49 L J P 25; 42 L T 327; 28 W R 520 ... 560
Jervis v. Tomkinson, (1856) 1 H. & N 195; 26 L J Ex 41; 4 W R 683; 156 E R 1173; 108 R R 516 ... 771
Jessop v. Jessop, (1861) 2 Sw & Tr 301; 30 L J P 193; 4 L T. 308; 7 Jur (N. s.) 609; 9 W R 640 ... 453
Jevanand v. Beni Madho, 4 Ind Cas 159; 12 O C 320 ... 862
Jewun Doss Sahoo v. Shah Kubeerood-deen, 2 M I. A 390; 6 W R (P. C.) 3 1 Suth. P C J 100; 1 Sar P C J 206 18 E R 348 ... 737
Jhengar v. Baij Nath, 19 Ind Cas 709; 11 A L J. 277 ... 655
Jhingai Singh v. Ram Partap, 1 Ind Cas 762; 31 A. 150; 9 Cr L J 382; 6 A L J 113 ... 653
Jhunku Singh v. Chatkan Singh, 2 Ind Cas 221; 31 A 325; 6 A L J 247 ... 56
Jib Lal Gir v. Jaga Mohan Gir, 16 Ind Cas 453; 16 C W N 798 ... 621
Jogendra Narayan Roy v. Crawford, 32 C 1141; 2 C L J 569 ... 426
Jogesh Chandra Gupta, In the matter of, 33 Ind Cas 831; 20 C W N 283; 17 Cr L J 191 ... 329
Jogeshuri Chowdhrain v. Mahomed Ebrahim, 14 C 33; 7 Ind Dec (N s) 23 ... 953
Johnson, *Ex parte*, Chapman, *In re*, (1884) 26 Ch D 338; 53 L J Ch 763; 50 L T 214; 32 W R 693 ... 400
Johnson, *In re*, Sly v. Blake, (1885) 29 Ch D 964; 52 L T 682; 33 W R 502 ... 608
Johnson v. Pye, (1665) 1 Sid 258; 82 E R. 1091 ... 180
Johnston v. Chestergate Hat Manufacturing Company, Limited, (1915) 2 Ch 338, 84 L J Ch 914 ... 973
Joitaram v. Ram Kishna, 27 B 31; 4 Bom L R 754 ... 391

J—concld. Page.

Jones v. Carter, (1846) 15 M & W 718; 71 R R 800, 10 Jur 73, 153 E R 1040 ... 954
Jotindra Mohan Tagore v. Mahomed Basir Chowdhry; 32 C 332 ... 925
Joy Gobind Laha v. Monmotha Nath Banerji, 33 C 580 ... 431
Joy Krishen Mookerjee v. Doorga Narain Nag, 11 W R 348 ... 962
Joy Prokash Lall v. Sheo Golam Singh; 11 C 37; 5 Ind Dec (N. s.) 782 ... 300
Juggomohun Ghose v. Manickchund, 7 M I A 263; 4 W R (P. C.); 8 19 E R 308; 1 Suth P L J 357; 1 Sar P C J 681 ... 880
Jugobundhu Pattuck v. Jadu Ghose Alkushi, 15 C 47; 7 Ind Dec (N. s.) 617 ... 241
Justices of the Peace for Calcutta v. Oriental Gas Co, 8 B L R 433; 17 W R 364 251, 947
Jwala Sahai v. Ram Singh, 2 Ind Cas 954; 133 P L R 1909; 67 P R 1909; 98 P W R 1909 ... 348

K

Kachi Kaliyana Rengappa Kalakka Thola Udayar v. Kachi Yuva Rengappa Kalakka Thola Udayar, 28 M 508; 8 Sar P C J 855; 2 C L J 231; 10 C W N 95; 15 M L J 312; 2 A L J 845; 7 Bom L R 907; 1 M L T 12; 32 I A 261 (P. C.) ... 210
Kachi Yuva Rangappa Kalakka Thola Udayar v. Kachi Kalyana Rangappa Kalakka Thola Udayar, 24 M 562; 11 M L J 191 ... 217
Kadar Rowther v. Vencatachellapathy Chetty, 14 Ind Cas 573 ... 931
Kadhu Singh v. Baljit Singh, 29 A 423; 4 A L J 347; A W N (1907) 147 300, 358
Kadir Bacha Saheb v. Abdul Rahiman Saheb, 24 M 639 ... 420
Kadumbinee Dossia v Kasheenath Biswas, 13 W. R. 338 ... 93
Kailas Chandra v. Kiranendra Ghosh, 10 Ind. Cas. 882; 24 C. L. J. 187 ... 49, 931
Kailash Chandra Chuckerbutty v. Kashi Chandra Chuckerbutty, 24 C 339; 12 Ind Dec (N. s) 893 ... 633
Kailash Mondul v. Baroda Sundari Dasi, 24 C 711 at p. 714; 1 C W N 565; 12 Ind Dec (N s.) 1143 ... 585
Kaila Singh v. Tahal Singh, 143 P R. 1888 ... 231
Kakaralapudi Lakshmi Narayana v. Kandukuri Veera Saiabha, 29 Ind Cas 241; 39 M 554; 17 M L T 419; 28 M L J 650; (1915) M W N 626 ... 337
Kakarla Abbayya v. Raja Venkata Papayya Rao, 29 M 24; 16 M L J 8 ... 960
Kala Chara Tea Company Limited v. Sukul Singh, 13 C 280; 6 Ind Dec (N. s.) 686 ... 87
Kala Govind v. Municipality of Thana, 23 B. 248; 12 Ind Dec (N s.) 164 ... 716
Kalanagunta Venkata Kristnayya v. Kalanagunta Lakshmi Narayana, 3 Ind Cas 554; 32 M 185; 18 M L J 408; 4 M L T 1 ... 784
Kalanand Singh v. Eastern Mortgage and Agency Co. Ltd, 19 Ind Cas 701; 18 C L J 83 ... 562

K—contd.

Page.

Kalanand Singh v. Gunpat Singh, 11 Ind Cas. 974; 16 C W N 104 ... 953
Kalar Singh v. Mathura Prosad, 25 Ind Cas 547; 19 C L. J 402 ... 570
Kali Bakhsh Singh v. Ram Gopal Singh, 21 Ind Cas 985; 16 O C 378; 18 C W N 282; (1914) M W N 112; 14 A L J 115; 15 M L T 130; 19 C L J 172; 1 O L J 67; 26 M L J 121; 16 Bom L R 147; 36 A 81 ... 441
Kali Das Mullick v. Kanhaya Lal Pandit, 11 C 446; 11 I. A. 218; 8 Ind. Jur. 638; 4 Sar. P. C. J. 578; 5 Ind. Dec. (N. s.) 839 ... 591
Kali Kanta v Shyam Lal Das, 38 Ind Cas 598; 25 C L J 163 ... 588
Kali Kissen Tagore v. Jodoo Lal Mullick, 6 I A 190; 5 C L R 97; 4 Sar P C J 61 (P. C.). ... 99
Kali Kumar v. Bidhu Bhushan, 10 Ind Cas 382; 16 C L J 89 ... 585
Kali Prasanna Sil v. Panchanan Nandi, 33 Ind Cas 670; 23 C. L. J 489; 20 C W N 1000; 44 C 367 ... 21
Kali Roy v. Pratap Narain, 5 C L J 92 ... 585
Kali Sundari Debya v. Girija Sankar Sanyal, 11 Ind. Cas 184; 15 C W N 974 at p. 975 ... 700
Kalka Prasad v Manmohan Lal, 33 Ind Cas 86; 38 A 302; 14 A L J 373 ... 914
Kalu Mal Khetri, *In the matter of*, 29 C 606; 6 C W N 674 ... 978
Kalyanchand Lalchand v. Sitabai Dhanasa, 23 Ind Cas 325; 38 B 309; 16 Bom L R 5 ... 483
Kamakshi v. Nagarathnam, 5 M H C R 161 ... 409
Kamatchi Ammal v. Sundaram Ayyar, 26 M 492 ... 803
Kamini Debi v. Promotho Nath Mookerjee, 10 Ind Cas 491; 13 C L J 597; 39 C 33 ... 811
Kamini Debi v. Ramlochan Sirkar, 5 B L R 450 ... 525
Kamta Nath v. Municipal Board of Allahabad, 28 A. 199; 2 A L J 676; A W N (1905) 252; 2 Cr L J 793 ... 715
Kanai Lall Khan v. Sashi Bhuson, 6 C 777 at p. 781; 8 C L R 117; 4 Shome L R 110; 3 Ind Dec (N. s) 593 ... 20
Kandasamy Chetty v. Annamalai Chetty, 28 M 67; 15 M L J 402 ... 552
Kandukuri v. Secretary of State, 8 Ind Cas 67; 34 M 295; (1910) M W N 595; 20 M L J 822; 8 M L T 389 ... 99
Kangaya Gurukul v. Kalimuthu Annavi, 27 M 526 (F. B.) ... 407
Kanhaiya Lal v. Baldeo Prasad, 28 A 240 A W N (1905) 265 ... 497
Kanhaya Lal Kurmi v. Satiya, 1 N L R 1 ... 46
Kaniz Fatima v. Sajjad Hosain, 34 C 211 ... 345
Kannye Loll Sett v. Nistoriny Dossee, 10 C 443; 5 Ind. Dec. (N. s) 298 ... 771
Kantee Chandra Mukerji v. Ali Nabi, 9 Ind Cas 935; 33 A 414; 8 A L J 199 ... 633
Kanto Prasad Hazari v. Jagat Chandra Dutta, 23 C 335; 12 Ind Dec (N. s.) 224 ... 727
Kari Chengamma v. Jatti Kristnamnah, 1 Ind. Cas 219 ... 922

K—contd.

Page.

Kariyadan Pokkar v. Kayat Beeran Kutti, 19 M 461; 2 Weir 62; 6 Ind Dec (N. s.) 1027 ... 333
Karolal Sajawal v. Shyam Lal, 32 C 935; 9 C W N 864; 1 C L J 216; 2 Cr L J 215 ... 1004
Karri Narasayya v. Thavvala Nageswara Rao, 31 Ind Cas 207 ... 124
Karri Venkatareddi v. Kollu Narasayya, 1 Ind Cas 384; 32 M 76; 4 M L T 456; 19 M L J 10 ... 79
Kartick Chandra v. Ashutosh Dhara, 12 Ind Cas 163; 39 C 298; 16 C W N 26; 14 C L J 425 ... 616
Karuna Moyi Banerjee v. Surendra Nath Mookerjee, 26 C 176; 13 Ind Dec (N. s.) 717 ... 544
Karuppa Goundan v. Periathambi Goundan, 30 M 397; 2 M L T 336 ... 282, 749
Kashim Sheik v Prasanna Kumar Mukerjee, 33 C 595; 10 C W N 598; 5 C L J 299 ... 894
Kasturchand Gujar v. Parsha Mahar, 12 B 230; 6 Ind Dec (N. s.) 639 ... 42
Kasturi Singh v. Rajkumar Babu Bissun Pragas Narain Singh, 8 C W N 876 ... 87
Katama Natchiar v. Rajah of Shivagunga, 9 M I A 539; 2 W R (P. C.) 31; 1 Suth P C J 520; 2 Sar P C J 25; 19 E R 843 ... 217
Katki v. Lakpati Pujari, 27 Ind. Cas. 39; 20 C W N 19; 20 C L J 319 ... 376
Kaulesra v. Jorai Kasaundhan, 28 A 233 A W. N. (1905) 205; 2 A L J 663 ... 573
Kazi Newaz Khoda v. Ram Jadu Dey, 34 C 109; 5 C L J 33; 11 C W N 201 ... 834, 967
Kearley v. Thomson, (1890) 24 Q B D 742; 59 L J Q B 288; 63 L T 150; 38 W R 614; 54 J P 804 ... 785
Keats v. Keats, (1859) 1 Sw and Tr 334; 28 L J Mat 57; 5 Jur (N. s) 176; 7 W R 377 ... 448
Kedar Nath Mukerjee v. Prosonno Kumar Chatterjee, 5 C W N 559 ... 940
Kemp v. Kelsey, (1720) Prec Ch 544; 24 E. R. 245 ... 367
Khagendra Nath Chatterjee v. Sonatan Guha, 31 Ind Cas 987; 20 C W N 149 ... 851
Khagendra Nath Mahata v. Pran Nath Roy, 29 I A. 99; 29 C 395; 6 C W N 473; 4 Bom L R 362; 8 Sar P C J 266 (P. C.) ... 941
Khajooroonissa v Roshan Jehan, 2 C 184, 3 I A 291; 26 W R 36; 1 Ind Dec (N. s.) 412 ... 956
Khanderao Yeshwant, *In re*, 15 Ind Cas 799; 14 Bom L R 362; 83 Cr L J 527 ... 1066
Khanum Jan v. Jan Beebee, 4 S D A 210 ... 362
Kharda Company, Ltd v. Durga Charan Chandra, 5 Ind Cas 187; 11 C L J 45 ... 935
Khargai v. Debi, 9 Ind Cas 339 ... 637
Khatija v. Adam Husenally Vasi, 23 Ind Cas 949; 39 B 545; 17 Bom L R 574 ... 694
Khatija v. Ismail, 12 M 380; 4 Ind Dec (N. s.) 614 ... 188
Khetra Pal Singh v. Kritarthamoyi Dassi, 33 C 566; 10 C W N 547; 3 C L J 470 354, 526
Khiali Ram v Gulab Khan, 11 Ind Cas 392; 33 P R 1911; 190 P L R 1911 ... 921
Khiarajmal v Daim, 32 C 296; 1 C L J 584; 32 I A 23; 8 Sar P C J 734; 9 C W N 201; 2 A L J 71; 7 Bom L R 1 (P. C.) ... 534

K—contd. Page.

Khuda Bakhsh v. Alim-unnissa, 27 A 313, A W N (1904) 273; 1 A L J 715 ... 56
Khuda Bakhsh v. Mathra Das, 18 Ind Cas 182; 62 P R 1913, 85 P L R 1913, 89 P W R 1913 ... 731
Khunni Lal v. Gobind Krishna Narain, 10 Ind Cas 477, 33 A 356, 15 C W N 545; 8 A L J 552; 13 C L J 575, 13 Bom L R 417, 10 M L T 25, (1911) 1 M W N 432, 21 M L J 645, 38 I 87 (P. C.) ... 127, 633
Khwaja Muhammad Khan v. Husaini Begum, 7 Ind Cas 237; 32 A 410; 14 C W N 865; 7 A L J 871 (1910) M W N 313; 8 M L T 147; 12 C L J 205; 12 Bom L R 638; 20 M L J 614; 37 I A 152 (P. C.) ... 60
Khyroonissa v. Salehoonissa Khatoon, 5 W R 238 ... 762
Kilburn v. Ritchie, 2 California 145; 56 Am Dec 326 ... 118
King-Emperor v. Ayyan, 24 M 675; 2 Weir 699 660
——— v. Munna, 24 A 151, A W N (1901) 203 ... 993
——— v. Nga Pyu Di, 2 L B R 27, 10 Bur L R 1, 1 Cr L J 167 ... 671
Kirpa Sindhu Mukerjee v. Annada Sundari Debi, 35 C 34; 11 C W N 983; 6 C L J 273 at p. 293 ... 949
Kishen Singh v. Bhagwan Das, 31 Ind Cas 476; 89 P R 1915 ... 196
Kisto Kishore Bhuttacharjee v. Seetamonee Bhuttacharjee, 7 W R 320 ... 514
Kocherlakota Venkatakristna Row v. Vadrevu Venkappa, 27 M 262 ... 170
Koilash Chunder Roy v. Jodu Nath Roy, 14 C 380; 7 Ind Dec (N. S.) 252 ... 545
Kokilasari Dasi v. Mohunt Rudranand Goswami, 5 C L J 527 ... 616, 838
Kola Aheer v. Sajna Ahimur, 3 N W P C R 105 ... 204
Kollichina Venkatarmayya v. Gudavalli Subbarayudu, 25 Ind Cas 122 ... 529
Kollipara Venkamma, *In re*, 17 Ind Cas 391; 23 M L J 38; 12 M L T 348 ... 429
Komma Somakka v. Kodidola Pedda Ramiah, 13 Ind Cas 251; 36 M 39; 22 M L J 193; (1911) 2 M W N 519 ... 341
Kommeneni Chinna Veerayya v. Kommeneni Lakshminarasamma, 15 Ind Cas 213, 37 M 406; 11 M L T 184, 22 M L J 375, (1912) M W N 442 ... 884
Konduru Runga Reddi v. Subbiah Setty, 28 M 394 ... 47, 931
Kopil Pooree v. Manick Sahoo, 20 W R 287 at p. 288 ... 864
Korapalu v. Narayana, 20 Ind Cas 930; 38 M 445; 25 M L J 315; (1913) M W N 655 ... 953
Kota Chinna Mellayya v. Kannekanti Veeriah, 3 Ind Cas 671, 3 L W 551 ... 749
Kotha Subba Chetti v. Queen, 6 M 252; 7 Ind Jur 247; 1 Weir 116; 2 Ind Dec (N. S.) 454 ... 306
Kowsulliah Sundari Dasi v. Mukta Sundari Dasi, 11 C 588; 10 Ind Jur 66; 5 Ind Dec (N. S.) 1151 ... 118
Koylashbashiny Dossee v. Gocoolmoni Dossee, 8 C 230; 10 C L R 41, 4 Ind Dec (N. S.) 147 ... 758

K—concld. Page.

Kreglinger v. New Patagonia Meat and Cold Storage Co, (1914) A C 25 at p. 40; 83 L J Ch 79; 109 L T 802; 58 S J 97; 30 T L R 114 ... 257
Krishano Chunder Goopto v. Meer Sufdur Ali, 22 W R 326 ... 531
Krishen Doyal Gir v. Irshad Ali Khan, 31 Ind Cas 965; 22 C L J 525 ... 251
Krishna Chandra v. Jogendra Narain, 27 Ind Cas 139; 20 C L J 469; 19 C W N 537 ... 201
Krishna Chandra Goldar v. Mohesh Chandra Shah, 9 C W N 584 ... 471
Krishna Chandra Pal v. Protap Chandra Pal, 3 C L J 276 ... 588
Krishna Gobind Dhur v. Hari Churn Dhur, 9 C 367 at p. 369; 12 C L R 19, 4 Ind Dec (N. S.) 394 ... 381
Krishnaji Narayan Pokshe v. Municipality of Tasugaon, 18 B 547; 9 Ind Dec (N. S.) 874 ... 715
Krishna Kamini v. Abdul Jubbar, 30 C 155 at p. 193, 6 C W N 737 ... 486
Krishna Reddi v. Subbamma, 24 M 136; 2 Weir 544 ... 660
Krishnasami Chetti v. Virasami Chetti, 10 M 133, 3 Ind Dec (N. S.) 843 ... 742
Krishnasami Pillai v. Varadaraja Ayyangar, 5 M 345 at p. 357, 2 Ind Dec (N. S.) 240 ... 798
Krishnasawmi Aiyar, *In the matter of*, 16 Ind Cas 328; 35 M 543 at p. 551; 16 C W N 1081; 23 M L J 114; 13 Cr L J 680; 12 M L T 396; 14 Bom L R 1079; 16 C L J 634; (1912) M W N 963 (P. C.) ... 646
Krishnaswami Aiyangar v. Poovanna Nadar, 28 Ind Cas 955 ... 931
Kristamma Naidu v. Chapa Naidu, 17 M 410, 6 Ind Dec (N. S.) 284 ... 885
Kristna Ayyan v. Vencatachella Mudali, 7 M H C R 60 at p. 64 ... 99
Kristodhone Ghose v. Brojo Gobindo Roy, 24 C 895; 1 C W N 442 ... 408
Kshetra Mohan v. Man Gobinda Pal, 6 Ind Cas 13; 14 C W N 558 ... 956
Kuarmani Singha v. Wasif Ali Murza, 28 Ind Cas 818; 19 C W N 1193 ... 617
Kudrathi Begum v. Najibunnessa, 25 C 93; 13 Ind Dec (N. S.) 63 ... 57
Kulaikada Pillai v. Viswanatha Pillai, 28 M. 229 at p. 234; 15 M L J 212 ... 551
Kumban v. Moorthi, 7 Ind Cas 422; 8 M L T 208; (1910) M W N 359; 20 M L J 951; 34 M 406 ... 838
Kunhayan v. Ithukutti, 22 M 295; 9 M L J 1; 8 Ind Dec (N. S.) 210 ... 613
Kunhi Mamod v. Kunhi Moidin, 19 M 176; 6 M L J 62; 6 Ind Dec (N S 828 ... 3 1
Kunjamani Dasi v. Nikunja Behary Das, 32 Ind Cas 8-3; 22 C L J 404; 20 C W N 314 ... 536
Kunjo Behary Singh v. Madhub Chandra Ghose, 23 C 884; 12 Ind Dec N S.) 587 ... 843
Kuppelan v. Kunjuvalli, 9 Ind Cas 790; 9 M L T 373; (1911) 1 M W N 199 ... 603

Page.

L

Labouchere v. Tupper, (1857) 11 Moore P C 198; 5 W R 797; 14 E R 670; 117 R R 16 ... 506
Lachhman Singh v. Thakurain Sarfaraz Kunwar, 33 Ind Cas 550; 18 O C 361; 3 C L J 126 ... 408
Lachhmi Narain v. Turab-un-nissa, 14 Ind Cas 505; 9 A L J 297; 34 A 246 ... 841
Ladhaji Nathaji v. Hari, 1 Bom L R 176; 23 B 679; 12 Ind Dec (N. s.) 454 ... 205
Ladhu Shah v. Fazl Dad, 72 P R 1879 ... 917
Laidman v. Hearsey, 7 A 906; A W N (1885) 272; 4 Ind Dec (N. s.) 994 ... 697
Lakhan Chunder Sen v. Madhusudan Sen, 35 C 209; 7 C L J 59; 3 M L T 90; 12 C W N 326 ... 583
Lakhi Narain v. Ferlamani Dasi, 27 Ind Cas 11; 20 C L J 131; 18 C W N cxcvi *note* ... 702
Lakhrani Kuar v. Dhanraj Singh, 32 Ind Cas 634; 14 A L J 102 ... 468
Lakshman Dada Naik v. Ramchandra Dada Naik, 5 B 48, 7 I A 181; 4 Sar P C J 173; 3 Suth P C J 778; 3 Shome L R 217; 4 Ind Jur 472; 7 C L R 320; 3 Ind Dec (N. s.) 34 ... 487
Lakshmi Achi v. Subbarama Aiyar, 29 Ind Cas 142; 39 M 488; 2 L W 403; 28 M L J 490; (1915) M W N 327; 17 M L T 385 ... 269
Lakshmi Narain Chatterjee v. Nanda Rani Debi, 3 Ind Cas 287; 9 C L J 116 ... 777
Lakshmi Venkayyamma v. Venkatanarasimha, 34 Ind Cas 921; 20 C W N 1054; 14 A L J 797; 31 M L J 58; (1916) 2 M W N 23; 20 M L T 137; 4 L W 58; 18 Bom L R 651; 39 M 509; 24 C L J 279 (P. C.) ... 334
Lala Bharub Chandra Karpur v. Lalit Mohun Singh, 12 C 185; 6 Ind Dec (N. s.) 126 ... 695
Lal Bahadur Singh v. Abharan Singh, 27 Ind Cas 795; 37 A 165; 13 A L J 138 ... 535
Laldhari Singh v. Manager, Bhabatpura Estate, 12 Ind Cas 70; 16 C W N 132; 14 C L J 639 ... 271
Lalit Chandra v. Baikunta Nath, 5 Ind Cas 395; 14 C W N 463 at p. 465; 15 C L J 305 ... 777
Lalit Mohan Das v. Radha Raman Saha, 10 Ind Cas 434; 13 C L J 547; 15 C W N 1021 ... 706
Lalit Mohan Ghose v. Gopali Chauk Coal Company Limited, 12 Ind Cas 723; 39 C 284; 14 C L J 411; 16 C W N 55 ... 805
Laljit Shamji v. Walji Wardhman, 19 B 507 at p. 522, 10 Ind Dec (N. s.) 339 ... 740
Lalla Sheo Churn Lal v. Ramnandan Dobey, 22 C 8; 11 Ind Dec (N. s.) 7 ... 487
Lall Jha v. Negroo, 7 C 717; 3 Ind Dec (N. s.) 1009 ... 432
Lalman v. Nand Lal, 20 Ind Cas 894, 17 O C 1 ... 963
Lal Mohan Pal v. Surya Kumar Das, 11 C W N 1152 ... 297
Ledu, Coachman v. Hiro Lal Bose, 29 Ind Cas 625; 43 C 115; 21 C L J 537; 19 C W N 99 ... 783
Lekhraj Roy v. Kanhya Singh, 14 W R 262 ... 228

Page.

L—concld.

Lekhraj Roy v. Kunhya Singh, 3 C 210; 4 I A 222; 3 Suth P C J 453; 3 Sar P C J 758; 1 Ind Jur 636; 1 Ind Dec (N. s) 722 (P. C.) ... 228
Lewis v. Fothergill, (1870) 5 Ch 103 ... 771
Liakat Husain v. Rashid-ud-din, 29 A 125; 3 A L J 794; A W N (1906) 313 ... 10
Likal v. Sharif-ul-Hassan Khan, 48 P R 1904 ... 782
Liverpool Bread Company v. Firth, (1891) 1 Ch 367; 60 L J Ch 153; 63 L T 677; 39 W R. 269 ... 321
Lloyd v. Lloyd, (1859) 1 Sw & Tr 567; 30 L J P 97 ... 458
Lokha v. Hari, 64 P R 1893 ... 231
London Chatham and Dover Railway Co. v. South Eastern Railway Co., (1893) A C 429; 63 L J Ch 93; 1 R 275; 69 L T 637; 58 J P 36 ... 808
Long v. Thayer, 150 U S 520; 17 Law Ed 1167 294
Lopez v. Lopez, 12 C 706; 11 Ind Jur 62; 6 Ind Dec (N. s.) 478 ... 668
Lord Abinger v. Ashton, (1874) 17 Eq 358; 22 W R 582 ... 771
Lord Cloncurry's case, (1811) Macqueen H L Prac 606 ... 452
Lovelock & Lewes v. Malabar Timber and Saw Mills, 18 Ind Cas 997; 13 M L T 282 ... 949
Luchmeswar Singh Bahadur v. Syad Lutf Ali Khan, 8 B L R 110 at p. 112; 2 Sar P C J 700; 2 Suth P C J 461 ... 349
Luchmun Lal v. Mohun Lall, 16 W R 179 ... 376
Luke v. South Kensington Hotel Co., (1879) 11 Ch D 121; 48 L J Ch. 361; 40 L T 638; 27 W R 514 ... 839
Lutawan Kubar v. Lachiya, 21 Ind Cas 989; 36 A 69; 12 A L J 57 ... 358
Lutchimee Doss v. Secretary of State, 3 Ind Cas 456; 32 M 456; 6 M L T 242; 19 M L J 470 ... 101

M

Mabulla Sardar v. Hemangini Debi, 6 Ind Cas 629; 11 C L J 512 ... 935
Maclean v. Cristall, Perry's Oriental Cases 75; 4 Ind Dec (o. s.) 69 ... 668
MacNaughton v. Moore, 1 Hayward N C 189 ... 294
Madan Chandra Kapali v. Jaki Karikar, 6 C W N 377 378, 848
Maddala Bagavannarayana v. Vadepalli Perumallacharyulu, 31 Ind Cas 236; 29 M L J 231 ... 746
Maddison v. Alderson, (1883) 8 A C 467; 52 L J Q B 737; 49 L T 303; 31 W R 820, 47 J P 821 ... 852

M—contd. Page.

Madhab Moni Dasi v. Pamela Lambert, 6 Ind Cas 537; 37 C 796; 12 C L J 328; 15 C W N 337 ... 858
Madhabi Sundari Dassya v. Gaganendra Nath Tagore, 9 C W N 111 ... 727
Madhavji v. Ramnath, 30 B 457; 8 Bom L R 354 ... 749
Madho Pershad v. Mehrban Singh, 18 C 157; 17 I A 194; 5 Sar P C J 586; Rafique and Jackson's P C No 121; 9 Ind Dec (N. s) 105 ... 487
Madho Ram v. Nihal Singh, 30 Ind Cas 494; 38 A 21; 13 A L J 985 ... 209, 858
Madras Railway Company v. Zamindar of Carvatenagaram, (1874 1 I A 364; 22 W R 279; 14 B L R 209 (P. C.); 3 Sar P C J 391 ... 383
Mafazsal Hosain v Basid Sheikh, 34 C 36; 4 C L J 485; 11 C W N 71 ... 913
Mahabir Das v. Gaya Municipality, 26 Ind Cas 651; 16 Cr L J 59 ... 716
Mahabir Pershad Singh v. Macnaghten, 16 C. 682; 16 I A 107; 13 Ind Jur 133; 5 Sar P C J 345; 8 Ind Dec (N s.) 451. ... 536
Maha Daji Sadashiv Tilak, *In the matter of the petition of*, 11 B 375; 6 Ind Dec N. s.) 246 1000
Mahadeo v. Emperor, 6 Ind Cas 563; 32 A 397; 7 A L J 319; 11 Cr L J 372 ... 139
Mahadeo Kunwar v. Bisu, 25 A 537; A W N (1903) 102 ... 655
Mahadeo Prasad v. Nabi Bukhsh, 25 Ind Cas 104 ... 963
Mahadeva Iyer v. Gopala Iyer, 8 Ind Cas 320; 34 M 51; 8 M L T 289, (1911) 1 M W N 36 ... 749
Mahadin v. Sheo Prasad, 20 Ind Cas 577; 16 O C 161 ... 419
Mahamahopadyaya Rangachariar v. Municipal Council, Kumbakonam, 29 M 539 at p 547, 1 M L T 333, 16 M L J 582 ... 864
Mahamaya Debi v. Haridas Halder, 27 Ind Cas 400; 42 C 455 at p 471; 20 C L J 183; 19 C W N 208 ... 963
Mahammad Afzal Khan v. Ghulam Kasim Khan, 30 C 843 at p 862; 67 P R 1903; 112 P L R 1903; 8 C W N 81; 5 Bom L R 486; 30 I A 190; 3 Sar P C J 455 (P. C.) ... 210
Mahammad Husain v. Abdul Kareem, 29 Ind Cas 237; 39 M 544; 17 M L T 424 ... 269
Mahammad Zeaullah Miah v. Sukliannessa Bibi, 5 Ind Cas 352; 11 C L J 606; 14 C W N 446 ... 95
Maharaj Bahadur Singh v. Forbes, 35 C 737; 7 C L J 652 356, 544
Maharaj Singh v. Balwant Singh, 28 A 508 at pp 511, 521, 525; 3 A L J 274; A W N (1906) 117 ... 196
Maharaj Tiwari v. Har Charan Rai, 26 A 144; A W N (1903) 212; 1 Cr L J 339 ... 653
Maharaja Sir Rameswar Singh Bahadur v. Rateshwar Singh, 18 Ind Cas 841; 17 C L J 125 ... 677
Maharaja of Benares v. Har Narain Singh, 28 A. 25; A W N (1905) 167; 2 A L J 585 ... 349
haraja of Burdwan v. Apurba Krishna Roy, 10 Ind Cas 527; 14 C L J 50; 15 C W N 872 ... 447, 521, 803

M—contd. Page.

Maharajah Ishuree Persad Narain Singh v. Lall Chutterput Singh, 3 M I A 100 at p. 130; 6 W R (P. C.) 27; 1 Sar P C J 245; 18 E R 435 ... 949
Maharajah of Bobbili v. Narasaraju Peda Baliara, 36 Ind Cas 682; 21 C W N 162; 24 C L J 478; 31 M L J 300; 39 M 640; 18 Bom L R 903; 14 A L J 1129; 20 M L T 472; 4 L W 558; (1916) 2 M W N 541; 1 P L W 26 (P. C.) ... 857
Maharana Shri Ranmalsingji v. Vadilal Vakhatchand, 20 B 61; 10 Ind Dec (N. s.) 599 ... 37
Maharanee Shibessuree Debia v. Mothooranath Acharjo, 13 W R (P. C.) 18; 13 M I A 270; 2 Suth P C J 300; 2 Sar P C J 528; 20 E R 552 ... 796
Maharani Beni Pershad Koeri v. Raj Kumar Chowbey, 6 C W N 589 ... 855
Maharani of Burdwan v. Krishna Kamini Dasi, 14 C 365 at p 372; 14 I A 80; 11 Ind Jur 275; 4 Sar P C J 772; 7 Ind Dec (N. s.) 242 ... 85
Mahendra Nath Mukherjee v. Jogendra Nath Roy Chaudhury, 2 C W N 260 ... 748
Mahmud Ali v. Gobind Prasad, 28 Ind Cas 184, 18 O C 1 ... 121
Mahomed Ali v. Emperor, 20 Ind Cas 977; 41 C 466; 18 C W N 1; 14 Cr L J 497 ... 314
Mahomed Ali Khan v. Khaja Abdul Gunny, 9 C 744; 12 C L R 257; 4 Ind Dec (N. s.) 1145 ... 114
Mahomed Azhar v. Raj Chunder Roy, 21 C 354; 10 Ind Dec N s.) 867 ... 464
Mahomed Bhoy Puddumsee v. Chutterput Singh, 20 C 854; 10 Ind Dec (N. s. 574 ... 749
Mahomed Buksh Khan v. Hosseini Bibi, 15 C 684; 15 I A 81; 12 Ind Jur 291; 5 Sar P C J 175; 7 Ind Dec N. s.) 1040 ... 618
Mahomed Fayez Chowdhry v. Jamoo Gazee, 8 C 730; 4 Ind Dec N. s.) 471 ... 571
Mahomed Ismailjee Nada v. British India Steam Navigation Company, 9 W R 306 at p 397 ... 920
Mahomed Jackariah & Co. v. Ahmed Mahommed, 15 C 109; 12 Ind Jur 259; 7 Ind Dec (N. s.) 658 ... 661
Mahomed Musa v. Aghore Kumar, 28 Ind Cas 930; 42 I A 1; 42 C 801; 19 C W N 250; 13 A L J 229; 17 M L T 143; 2 L W 258; 21 C L J 23; 28 M L J 548; 17 Bom L R 420; (1915) M W N 621 (P. C.) 188, 433, 851
Majidan v. Ram Narain, 26 A 22; A W N (1903) 183 ... 933
Makhan Lal v. Ganeshi Lal, 30 Ind Cas 84, 42 P R 1915, 130 P W R 1915, 49 P L R 1916 ... 916
Makhan Lal Pal v. Bunku Behari Ghose, 19 C 623; 9 Ind Cas (N s.) 858 273, 780
Makund v. Bahori Lal, 3 A 824; A W N (1881) 86; 6 Ind Jur 321; 2 Ind Dec (N. s.) 537 ... 45
Makund Murari Dass v. Krishna Dhone Ghose, 9 Ind Cas 839 ... 963

M—contd.

Malaya Pillai Nadan v. Venganan Chetty, 24 Ind Cas 764; 1 L W 180 ... 931
Malik Rahim Bakhsh v. Fakhar-un-nisa, 31 P R 1898 ... 484
Malkarjan v. Narhari, 25 B 337 at p 347; 5 C W N 10; 2 Bom L R 927; 27 I A 216; 10 M L J 638; 7 Sar P C J 739 471, 536, 779
Ma Mya Me v. Maung Ba Dun, 2 L B R 224 ... 750
Mana Vikraman v. Sundaran Pattar, 4 M 148; 6 Ind Jur 188; 1 Ind Dec (N. s.) 938 ... 538
Manavikraman v. Unniappan, 15 M 170; 2 M L J 23; 5 Ind Dec (N. s.) 468 ... 269
Mandaram Nammaiya Chetty v. Mandaram Thiruvengadathan Chetty, 18 Ind Cas 601; 13 M L T 88; 24 M L J 223 ... 410
Mangat Ram v. Devi Chand, 20 P R 1906; 69 P L R 1906 ... 637
Mangena v. Wright, (1909) 2 K B 958 at p. 979; 78 L J K B 879; 100 L T 960; 53 S J 485; 25 T L R 534 ... 697
Manickam Pillai v. Ramalingam Pillai, 29 M 120 ... 368
Manik Borai v Bani Charan Mondal, 10 Ind Cas 469; 13 C L J 649 ... 848
Manik Chandra Chakravarti v Preo Nath Kuar, 17 Ind Cas 533; 17 C W N 205; 13 Cr L J 789; 17 C L J 397 ... 827
Mani Mohan Mandal v. Ramtaran Mandal, 33 Ind Cas 329; 43 C 148 ... 599
Manja v. Kadugochen, 7 M 89; 2 Ind Dec (N. s.) 647 ... 524
Manly v. Patterson, 7 C 394; 3 Ind Dec (N. s.) 803 ... 774
Manna Singh v. Bihari Singh, 27 Ind Cas 181; 19 O C 183, 3 O L J 720 ... 10
Mannava Annapurnamma v. Uppala Akkayya, 19 Ind Cas 12; 36 M 544; 24 M L J 333, 13 M L T 268, (1913 M W N 328 ... 922
Manners, H. v. Harihar Dutt Koer, 22 Ind Cas 563; 19 C W N 149 ... 681
Manohar Pal v. Ananta Moyee Dasya, 20 Ind Cas 198; 17 C W N 802 ... 396
Man Singh v. Dharmon, 18 P R 1894 Cr ... 332
Manurattan Nath v. Hari Nath Das, 1 C L J 500 at pp. 505, 512 ... 544
Mariamnissa Bibi v. Joynab Bibi, 33 C 1101; 10 C W N 934; 4 C L J 149 ... 66
Maria Susai Mudaliar v. Secretary of State, 14 M L J 350 ... 101
Market v. Knight Steamship Co, (1910) 2 K B 1021 at p. 1033; 79 L J K B 939; 103 L T 369 ... 946
Marlett v. Jackman, 3 Allen (Mass.) 287 ... 294
Maroti v. Balaji, 14 Ind Cas 786; 8 N L R 36 ... 47, 931
Marti v. Bhola Ram, 16 A 165; A W N (1894) 65; 8 Ind Dec (N. s.) 106 ... 234
Martin v. Hunt, 1 Allen (Mass.) 418 ... 294
Ma Sa Yi v. Ma Me Gale, 7 Bur L R 295, 2 L C 181 ... 749
Ma Shwe Hmyin v. Mg. Po Chat, 27 Ind Cas 841; 16 Cr L J 217; 8 L B R 105 ... 333

M—contd.

Mata Din v. Ahmad Ali, 13 Ind Cas 976; 34 A 213; 16 C W N 338; 11 M L T 145; (1912) M W N 183; 15 C L J 270; 9 A L J 215; 14 Bom L R 192; 15 O C 49; 23 M L J 6; 39 I A 49 (P. C.) ... 933
Mata Din v Jamna Das, 27 A 691 at p. 694; 2 A L J 685; A W N (1905) 159 ... 203
Ma Thet v. Ma San On, 2 L B R 85 ... 805
Mathews v. Munster, (1888) 20 Q B D 141; 57 L J Q B 49; 57 L T 922; 36 W R 178; 52 J P 260 ... 430
Mathura Prasad v. Tota Singh, 17 Ind Cas 177 16 C L J 298; 40 C 806 ... 566
Mathura Sundari Dassi v. Haran Chandra Shaha, 34 Ind Cas 634; 43 C 857; 20 C W N 504; 23 C L J 443 ... 183, 252, 948
Maung Aing v. Ma Kin, U B R (1892-99) II Buddhist Law 22 ... 750
Maung Shwe Goh v. Maung Inn, 38 Ind Cas 938, 21 C W N 500; 21 M L T 18; 15 A L J. 82; (1917) M W N 7; 32 M L J 6; 25 C L J 108; 19 Bom L R 179; 5 C W 532; 44 C 542; 10 Bur L T 69 (P C.) ... 852
Maung Thaung v. Ma Se, 8 Bur L R 323 ... 943
Maung Ya Gyaw v. Ma Ngwe, 2 L B R 56 ... 722
Mayandi Chettiyar v. Chokkalingam Pillay, 27 M 291, *et seq.*; 8 C W N 545; 31 I A 8314 M L J 200; 8 Sar P C J 587 (P. C.) ... 799
Mc Cartney v. Landonderry and Lough Swilley Railway Co, (1904) A C 301 at p. 313; 73 L J P C 73; 91 L T 105; 53 W R 385 ... 53
McIntyre v. McGavin, (1823) A C 268; 1 R 246; 57 J P 548 ... 53
Meah Uzir Ali Sardar v. Savi Behara, 32 Ind Cas 791; 43 C 938; 20 C W N 547 ... 599
Meajan Matbor v. Alimuddin Mea, 34 Ind Cas 571; 44 C 130; 20 C W N 1217; 25 C L J 42 ... 118
Meenakshi v. Muniandi Panikkan, 25 Ind Cas 957; 27 M L J 353; I L W 704; (1914) M W N 572; 16 M L T 270; 38 M 1144 ... 410
Meerangani Rawther v. Karupathi Nagur Meera Lubbai, 18 Ind Cas 185; 24 M L J 258; (1913) M W N 371 ... 362
Mehtab Bibi v. Alla Bakhsh, 17 P R 1885 Cr ... 333
Menzies v. Breadalbane, (1828) 3 Bligh (N. s.) 414; 4 E R 1387; 32 R R 103 ... 48
Merchant Shipping Co. v. Armitage, (1874) 9 Q B 99 43 L J Q B 24; 29 L T 809 ... 808
Merryweather v. Nixan, (1799) 8 T R 186; 16 R R 810; 101 E R 1337; 2 Sm L C 569, (Eleventh Ed, Vol. 1, 398) ... 524
Metropolitan Police Commissioner v. Cartman, (1896) 1 Q B 655; 65 L J M C 113, 74 L T 726, 44 W R 837, 18 Cox C C 341, 60 J P 357 ... 980
Midgley v. Wood, (1860) 30 L J P 57 ... 453
Midnapur Zamindar Co., Ltd. v. Ajambar Singh Mura, 36 Ind Cas 963; 1 P L J 601 ... 116
Miller v. Babu Madho Das, 23 I A 106; 19 A 76; 7 Sar P C J 73; 9 Ind Dec (N. s) 50 ... 119
Miller v. Grand Trunk Railway Company of Canada, (1906) A C 187; 75 L J P C 455; 94 L. T. 231; 22 T L R 297 ... 338

M—contd. Page.

Miller v. Ram Ranjan Chakravarti, 10 C 1014; 5 Ind Dec (N. s.) 677 ... 803
Miller's case, (1821) Macqueen H.L. Prac. 627... 452
Milroy v. Cord, (1862) 4 De G F & J 264; 31 L J Ch 798; 8 Jur (N. s.) 806; 7 L T 178 45 E R 1185, 135 R R 135 ... 880
Milson v. Stewart, (1861) 5 Clarke Pa L J 450 ... 294
Minet v. Johnson, (1891) 63 L T 507 ... 951
Mirabivi v. Vellayanna, 8 M 464; 9 Ind Jur 267; 3 Ind Dec (N. s.) 317 ... 962
Mir Sarwarjan v. Fakhruddin Mahomed, 13 Ind Cas 321; 39 I A I; 29 C 232; 16 C W N 74; (1912) M W N 22; 9 A L J 33; 15 C L J 69; 14 Bom L R 5; 11 M L T 8; 21 M L J 1156 (P. C.) ... 46
Mir Sarwarjan v. Fakharuddin Mohummad Chowdhury, 34 C 162; 11 C W N 34; 1 M L T 360, 4 C L J 431 ... 46
Mirza Sadik Hossein Khan v. Hashim Ali Khan, 36 Ind Cas 104; 1 P L W 157; 31 M L J 607; 19 O C 192; 18 Bom L R 1037; 21 C W N 130; (1916) 2 M W N 577; 14 A L J 1248; 21 M L T 40; 38 A 627; 4 O L J 22; 25 C L J 363 (P. C.) ... 391
Mi Saw v. S., 7 Ind Cas 460; 11 Cr L J 488; U. B R (1910) I, 1 ... 333
Mitchell v. Lapage, (1816) Holt N P 253; 17 R R 633 ... 749
Mi Thein v. Nga Po Nyun, 23 Ind Cas 486; 7 Bur L T 34; 15 Cr L J 278 ... 333
Mohamaya Prosad Singh v. Ram Khelawan Singh, 15 Ind Cas 911 at p. 913; 15 C L J 684 ... 21
Mohammad Abul Husan Khan v. Prag, 38 Ind Cas 814; 20 O C 8; 19 Bom L R 202; (1917) M W N 232 & 456; 32 M L J 388; 21 C W N 583; 15 A L J 113; 21 M L T 102 (P. C.) ... 17
Mohammad Ali Khan v. Jasram, 23 Ind Cas 464; 36 A 46. 11 A L J. 1015 ... 686
Mohammad Farrukh v. Birdhichand Oswal, 10 C P L R 98 ... 849
Mohammad Hashmat Ali v. Kaniz Fatima, 27 Ind Cas 701; 13 A L J 110 ... 362
Mohandas v. Krishnabai, 5 B. 597; 3 Ind Dec (N. s.) 393 ... 710
Mohan Lalji v. Tikait Sri Gordhan Lalji, 39 Ind Cas 337; 40 I A 97; 35 A 283; 17 C W N 741; 11 A. L J 548; 17 C L J 612; 15 Bom L R 606; (1913) M W N 536; 14 M L T 27 (P. C.) ... 590
Mohendra Nath Kalamcree v Koilash Chandra Dogra, 4 C W N 605 ... 544, 711
Mohesh Chunder Addy v. Manick Lall Addy, 26 C. 650; 3 C W N 751; 13 Ind Dec (N. s.) 1017 ... 610
Mohesh Chandra Addy v. Panchu Mudali, 32 Ind Cas 395; 20 C W N 287; 23 C L J 297; 43 C 884 ... 329
Mohesh Narain Munshi v. Taruck Nath Moitra, 20 C 487; 6 Sar P C J 261; 17 Ind Jur 164, 10 Ind Dec (N. s) 330, 20 I A 30 at p. 33 ... 549, 846

M—contd. Page.

Mohina Chunder Mozoomdar v. Mohesh Chunder Neoghi, 16 C 473; 16 I A 23; 5 Sar P C J 321; 8 Ind Dec (N. s.) 312 ... 722
Mohunt Madhusudan Das v. Maharaja Jagadindra Nath Roy, 16 C W N 292 (ccxcii) ... 621
Moideen Saiba v. Gopala Kudwa, 31 Ind. Cas. 454 ... 771
Mokhoda Dassee v. Nando Lal Haldar, 27 C 556; 4 C W N 669; 14 Ind Dec (N s) 365 ... 86
Montaignac v. Shitla, (1890) 15 A. C. 357 ... 178
Mookundee Misrain v. Sheo Lochun Puttuck, 21 W R 89 ... 891
Moore v. Ullcoats Mining Co. Ltd. (1908) 1 Ch 575; 77 L J Ch 282; 97 L T 845; 24 T L R 54 ... 954
Morgan, *In re*, Owen v. Morgan, (1887) 35 Ch D 492; 56 L J Ch 603; 56 L T 503; 35 W R 705 ... 904
Morley v. White, (1873) 8 Ch App 731; 42 L J Ch 880; 29 L T 822; 21 W R 828 ... 607
Morse v. Royal, (1806) 12 Ves (Jun) 355 at p. 361; 33 E R 134; 8 R R 338 ... 119
Mortimore v. Wright, (1840) 6 M. & W. 482; 9 L J Ex 158; 4 Jur 465; 55 R R 704; 151 E R 502 ... 689
Mothur Chandra Majumdar v. Tara Sunkar Ghose, 7 C W N 440 ... 751
Moti Chand v Khwaja Ikram Ullah Khan, 39 Ind Cas 454; 15 A L J 150; 5 L W 388; 21 M L T 267; 32 M L J 383; 21 C W N 616; 19 Bom L R 433; 39 A 173; 26 C L J 24; (1917) M W N 453 (P. C.) ... 892
Motilal Kashibhai v. Nana, 18 B 35; 9 Ind Dec (N s.) 532 ... 943
Moti Lal v. Karrabuldin, 25 C 179 at p 185; 24 I A 170; 1 C W N 639; 7 Sar P C J 222; 13 Ind Dec (N. s.) 21 (P. C.) 190, 471, 522
Moult v. Halliday, (1898) 1 Q B 125 at p. 129; 67 L J Q B 451; 77 L. T. 794; 46 W R 318; 62 J P 8; 14 T L R 109 ... 962
Mrinalini Dasi v. Abinash Chunder Dutt, 6 Ind. Cas 508, 11 C L J 533; 14 C. W N 1024 ... 811
Mubarak Husain v. Bihari, 16 A. 306; A W N (1894) 97; 8 Ind Dec (N. s.) 199 ... 338
Muhammad Kamil v. Imatiaz Fatima, 4 Ind Cas 457; 31 A 557; 10 C L J 297; 11 Bom L R 1210; 14 C W N 59; 19 M L J 697; 13 O C 183; 36 I A 211 (P. C) ... 961
Muhammad Najib Ullah v. Jai Narain, 26 Ind Cas. 59; 36 A 529; 12 A L J 908 ... 927
Muhammad Rustam Ali Khan v. Nawab Muhammad Azmat Ali Khan, 64 P R 1882 ... 484
Muhammad Sadiq v. Laute Ram, 23 A 29'; A W N (1901) 86 ... 913
Muhammad Sadiq v. Sahib Bibi, 54 P R 1902; 64 P L R 1902 ... 60
Muhammad Suleman Khan v. Fatima, 9 A 104; A W N (1886) 309; 5 Ind Dec (N. s.) 510 ... 654
Muhammad Umar Daraz Khan v. Maru, 1 Ind Cas. 821; 6 A L J 57; A W N (1908) 282 ... 725

M—contd.

Page.

Muhammad Umar v. Munshi Ram, 41 Ind Cas 802, 54 P R 1917 ... 810
Muhammad Umar Khan v. Munammad Niaz-ud-din Khan, 13 Ind Cas 344; 39 C 418; 6 P W R 1912; 39 I A 19; (1912) M W N 77; 11 M L T 76; 9 A L J 137; 15 C L J 172; 12 P L R 1912; 22 M L J 240; 14 Bom L R 182; 16 C W N 458; 126 P R 1912 (P C) ... 548
Muhi-ud-din Ahmad Khan v. Majlis Rai, 6 A 231; A W N (1884) 42, 3 Ind Dec (N. s.) 837 ... 809
Mujib-un-nissa v. Abdul Rahim, 23 A 233; 5 C W N 177; 38 I A 15; 11 M L J 58; 3 Bom L R 114; 7 Sar P C J 829 (P. C.) 293, 685, 956
Mukandi v. Bakhtawar Singh, 19 Ind Cas 215, 219 P W R 1913; 210 P L R 1913 ... 475
Mulji Virji v. Bangabashi Saha, 9 C W N 502 ... 184
Mullath Tarwed Karnavan v. Mullath Unni Nambi, 5 M L T 219 ... 538
Mullick Kefait Hosein v. Sheo Pershad Singh, 23 C. 821; 12 Ind Dec (N S) 545 ... 948
Mullikarjana v. Durga, 13 M 406; 17 I A 134; 5 Sar P C J 547; 4 Ind Dec (N. s) 995 ... 217
Mullins v. Collins, (1874) 9 Q B 292; 43 L J M C 67; 29 L T 838; 22 W R 397 ... 979
Mulluk Chand Das v. Satish Chandra Das, 3 Ind Cas 306; 11 C L J 56; 14 C W N 335 ... 632
Mulraju Lakshmi Venkayamma Rao v. Venkatadri Appa Rao, 30 Ind Cas 372 ... 782
Munchershaw Bezonji v. New Dhuramsey Spinning and Weaving Company, 4 B 576; 5 Ind Jur 482; 2 Ind Dec (N. s.) 891 ... 381
Munday v. South Metropolitan Electric Light Co., (1913) 29 T L R 346; 57 S J 427 ... 950
Mungul Pershud Dichit v. Grija Kant Lahiri, 8 C 51; 11 C L R 113; 8 I A 123; 4 Sar P C J 249; 4 Ind Dec (N. s.) 32 (P. C.) ... 75; 677, 857
Municipal Council, Tanjore v. Visvanatha Rau, 21 M 4; 7 M L J 273; 7 Ind Dec (N. s.) 359 ... 716
Munna Lal v. Sarat Chunder, 27 Ind Cas 683; 42 C 776; 17 M L T 120; 21 C L J 118; 2 L W 282, 19 C W N 561; 28 M L J 470; 17 Bom L R 408, 42 I A 88 (P. C.) ... 858
Munna Singh v. Gajadhar Singh, 5 A 577 at pp. 580, 581; A W N (1883) 130; 3 Ind Dec (N. s) 491 ... 926
Munshi Misser v. Bhimrajmam, 18 Ind Cas 824, 40 C 458; 17 C W N 306; 17 C L J 368 ... 864
Musahar Sahu v. Hakim Lal, 32 Ind Cas 343; 43 C 521; 30 M L J 116; 3 L W 207; 20 C W N 393; 14 A L J 198; (1916) 1 M W N 198; 19 M L T 203; 23 C L J 406; 18 Bom L R 378; 43 C 521 (P. C.) ... 400
Musammat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry, 10 M I A 279 at p. 311, 3 W R (P. C.) 15; 19 E R 978, 1 Suth P C J 574, 2 Sar P C J 111 ... 846
Musammat Rughoo Bibee v. Noor Jehan Begum, 12 W R 459; 4 B L R A C J 10 ... 184

M—concld.

Page.

Muthaya Pillai v. Tinnevelly South India Bank, Ltd, 37 Ind Cas 230; 5 L W 341 ... 227
Muthiah Chetty, *In re*, 13 Ind. Cas. 286; 36 M. 392; 11 M L T 21; (1912) M W N 455; 13 Cr L J 46 ... 663
Muthu v. Karuppan, 30 M 313; 17 M L J 167; 2 M L T 181 ... 535
Muthukumaraswami Pillai v. Emperor, 14 Ind Cas 896, 35 M 597, (1912) M W N 549, 13 Cr L J 352, 12 M L T 1 ... 670
Muthuraman Chettiar v. Ponnuswamy Udayar, 29 Ind Cas 549; (1915) M W N 405; 2 L W 533; 18 M L T 124; 29 M L J 214 ... 362
Muthusami Pillai v. Dorasami Pillai, 11 M L J 310 ... 221
Muthuswami Mudali v. Veeni Chetti, 30 M 382; 17 M L J 266; 2 M L T 239, 6 Cr L J 102 ... 987
Mutta Vaduganadha Tevar v. Dora Singha Tevar, 8 I A 99; 3 M 290; 4 Sar P C J 239; 5 Ind Jur 438; 1 Ind Dec (N. s) 757 (P. C.) ... 217
Muttukannu v. Paramesami, 12 M 214; 4 Ind Dec (N. s.) 499 ... 410

N

Nabadwipa Chandra Shaha v. Jugol Dasi Dassya, 7 Ind Cas 214; 15 C L J 57 ... 245
Nabadwipendra Mookerjee v. Madhu Sudan Mandal, 16 Ind Cas 741; 18 C W N 473 ... 380
Nabin Chandra Tripati v. Pran Krishna Dey, 20 Ind Cas 39, 41 C 108, 18 C L J 613 ... 599
Nabu Bepari v. Sheikh Mahomed, 5 C W N 207 ... 345
Nafar Chandra Pal Chowdhuri v. Ram Lal Pal, 22 C. 742; 11 Ind. Dec (N. s) 493 ... 680
Nagappa v. Venkat Rao, 24 M 265 ... 740
Nga Tun Baw v. Emperor, 17 Ind Cas 800, 5 Bur L T 175, 13 Cr L J 864, 6 L B R 100 ... 984
Nagendra Nath Bose v. Bhuban Mohan Chakravarti, 6 C W N 91 ... 544
Nagendra Nath Basu v. Satadal Basini Basu, 3 C W N 294; 26 C 536; 13 Ind Dec (N. s) 944 ... 85
Nana v. Sheku, 32 B 337, 10 Bom L R 330 ... 583
Nanak Chand v. Dayan, 103 P R 1894 ... 487
Naragunty Lutchmeedavamah v. Vengama Naidoo, 9 M I A 66; 1 W R (P. C.) 30; 1 Suth P C J 460; 1 Sar P C J 820; 19 E R 666 ... 217
Narain Babu v. Gouri Persad Bias, 5 C 21; 4 Ind Jur 407; 2 Ind Dec (N. s.) 625 ... 425
Narain Chunder Chuckerbutty v. Dataram Roy, 8 C 597; 10 C L R 241; 4 Ind Dec (N. s.) 384 ... 273
Narain Das v. Faiz Shah, 157 P R 1889 ... 484
Narasanna v. Gangu, 13 M 133; 4 Ind Dec (N. s.) 804 ... 410
Narasimha Chetti v. Vijiapala Nainar, 27 Ind Cas 944; 2 L W 206 ... 640
Narasimha Nayanevaru v. Ramalingama Rao, 10 M L J 104 ... 65
Narayanan Chettiar v. Lakshmanan Chettiar, 29 Ind Cas 1, 28 M L J 571 ... 594

N—contd. Page.

Narayan Dei v. Durga Dei, 16 Ind Cas 489; 10 A L J 97 at p. 100 ... 361
Narayan Pursbottam Gargote v. Laxmibai Datto Bhagwan, 23 Ind Cas 513; 38 B 416; 16 Bom L R 89 ... 497
Narendra Kumar Ghose v. Gora Chand Poddar, 33 C 683 3 C L J 391 ... 570
Narendra Mohan Ghose Chowdhury v. Emperor, 14 Ind Cas 431; 13 Cr L J 239 ... 650
Narendra Nath Barari v. Abhoy Charan Chattopadhya, 34 C 51; 4 C L J 437; 11 C W N 20; 1 M L T 364 ... 618, 904
Narsing Das v. Bibi Rafikan, 5 Ind Cas 198; 37 C 197; 11 C L J 250; 14 C W N 507 ... 678
Narsingh Dyal Sahu v. Ram Narain Singh, 30 C 883 at p. 887 ... 228
Narsing Narain v. Jahi Mistry, 13 Ind. Cas 414, 15 C L J 3 ... 873
Narottam Rajaram v. Mohanlal Kahandas, 17 Ind Cas 891; 37 B 289; 14 Bom L R 1154 ... 603
Nasirul Haq v. Fyaz-ul-Rahman, 9 Ind Cas 530; 33 A 457; 8 A L J 275 ... 361
Nataraja Chetty v. Kolandavelu Chetty, 15 M L J 456 ... 377
Nathu Khan v. Sewak Koeri, 9 Ind Cas 161; 15 C W N 498 ... 783
Nathu Mal, *In the matter of the petition of*, 24 A. 315; A W N (1902) 74 ... 654
Nathu Ram v. Emperor, 39 Ind Cas 701; 15 A L J 270; 18 Cr L J 557 ... 654
Natwar v. Alkhu, 18 Ind Cas 752; 11 A L J 139 ... 119
Nazir Ahmad v. Abid Ali, 11 Ind Cas 38; 8 A L J 910 ... 976
Neale v. Gordon Lennox, (1902) A C 465; 71 L J K B 939, 87 L T 341, 51 W R 140; 66 J P 757, 18 T L R 791 ... 957
Neelkisto Deb Burmono v. Beerchunder Thakoor, 12 M I A 523; 12 W R (P. C.) 21; 3 B L R (P. C.) 13; 2 Sar P C J 523; 2 Suth P C J 243; 20 E R 436 ... 211
Negi Puran Singh v. Hira Singh, 1 Ind Cas 146; 6 A L J 333 ... 358
Neill v. Devonshire (Duke), (1883) 8 A C 135 at p. 149; 31 W R 622 ... 532
Nekhan v. Muhammad Khan, 46 P R 1898 ... 43
Nelson v. Dahl, (1879) 12 Ch D 568, on Appeal Dahl v. Nelson Dankin, (1881) 6 App Cas 38; 50 L J Ch 411; 44 L T 381; 29 W R 543; 4 Asp M C 392 ... 962
Nemai Chand Adhya v. Mir Golam Hossein, 3 Ind Cas 353; 11 C L J 317, 14 C W N 535; 37 C 179 at p. 187 ... 736
Nemi Chand v. Wallace, 34 C 495; 11 C W 537 ... 541
Nihal Devi v. Kishore Chand, 8 Ind Cas 999; 97 P R 1910; 142 P W R 1910; 11 P L R 1911 ... 488
Nihal Singh v. Khazan Singh, 24 P R 1902 ... 301
Nil Kant Sahoy v. Jujoo Sahoo, 20 W R 328 ... 723
Nilmani Mitra v. Mathura Nath Joardar, 5 C L J 413 ... 494
Nilmoni Kumar v. Kedar Nath Ghosh, 20 Ind Cas 151; 17 C W N 750 ... 700

N—concld. Page.

Nim Chand Shah v. Joy Chandra Nath, 15 Ind Cas 256; 39 C 839; 16 C W N 857 ... 374
Ningappa v. Shivappa, 19 B 323; 10 Ind Dec (N. s) 219 ... 618
Nirbikar Chandra Mukherji v. Emperor, 1 Ind Cas 78, 13 C W N 580; 9 Cr L J 148 ... 993
Nistarini Dassi v Nundo Lall Bose, 26 C 891; 3 C W N 670; 13 Ind Dec (N s) 1171 ... 938
Nistarini Dassi v. Nundo Lal Bose, 30 C 369; 7 C W N 353 ... 938
Nityanund Roy v. Juggat Chandra Guha, 7 C W N 105 ... 925
Nitya Nunda Sarkar v. Ram Narain Das, 6 C W N 66 ... 779
Noban Nusya v. Dhon Mahomed, 5 C. 820; 6 C L R 136; 2 Ind Dec (N s.) 1130 ... 65
Noor Mahomed v. Kaikhosru, 4 Bom L R 268 1006
Norendra Nath Sarcar v. Kamalbasini Dasi, 23 C 563; 23 I A 18; 6 Sar P C J 667; 6 M L J 71; 12 Ind Dec (N s.) 374 ... 512
North Cheshire and Manchester Brewery Co., v. Manchester Brewery Co., (1899) A C 83; 68 L J Ch 74; 79 L T 645; 15 T L R 110 ... 541
Nripendro Nath v. Ashutosh Ghosh, 29 Ind Cas 128; 21 C L J 167; 19 C W N 157 ... 400
Nripendro Nath v. Ashutosh Ghosh, 33 Ind Cas 548; 43 C 640; 20 C W N 420 ... 400
Nritta Gopal Singh v. Chandi Charan Singh, 10 C W N 1088; 4 Cr L J 215 ... 821
Nrityamoni Dassi v. Lakhan Chunder Sen, 33 Ind Cas 452; 43 C 600; 20 C W N 522; 30 M L J 529; (1916) 1 M W N 332; 3 L W 471; 18 Bom L R 418; 24 C L J 1; 20 M L T 10 (P. C.) ... 582
Nund Kishore Lal v. Kanee Ram Tewary, 29 C 355; 6 C W N 395 ... 633
Nundo Kumar Nasker v. Banomali Gayan, 29 C 871 ... 619, 951
Nundo Lal Bose v. Corporation of Calcutta, 11 C. 275; 5 Ind. Dec. (N. s.) 943 ... 320
Nupa Singh v. Sobrai, 116 P R 1879 ... 476
Nuri Miah v. Ambica Singh, 34 Ind Cas 869, 20 C W N 1099, 44 C 47 ... 909
Nursing Chunder Bysack, *In the goods of*, 3 C. W N 635 ... 777

O

Ome v. Ome, (1824) 2 Addam. 384 ... 455
Onkar Singh v. Bhagwan Dat Singh, 25 Ind Cas 694; 17 O C 242 ... 910
Oodey Koowar v. Ladoo, 13 M I A 585; 15 W R (P. C.) 16; 6 B L R 233; 2 Suth P C J 388; 2 Sar P C J 628; 20 E R 689 ... 365
Oxford & Cambridge Universities v. George Gill, (1899) 1 Ch 55; 68 L J Ch 34; 79 L T 338; 47 W R 248; 15 T L R 21 ... 949

P

	Page.
Pachayappan v Narayana, 11 M 269; 12 Ind Jur 92, 381; 4 Ind Dec (N S.) 187 ..	926
Padmanabaya v. Ranga, 6 Ind Cas 447, 34 M 161, 20 M L J 930, 8 M L T 110, (1910) M W N 462 ...	953
Padmanand Singh v. Rama Prosad, 11 Ind Cas 422; 16 C W N 14; 14 C L J 127 ...	519
Palakdhari Rai v. Manners, 23 C 179; 12 Ind Dec (N. S.) 119 ...	962
Pala Mal v. Tulla Ram, 119 P R 1908, 206 P W R 1908 ...	916
Palmer v Hutchinson, (1881) 6 A C 619; 50 L J P C 62; 45 L T 180 ...	4
Palmer v. Wick Steam Shipping Co, (1894) A C 318 at p. 324; 6 R 245; 71 L T 163 ...	525
Pamu Sanyasi v. Zamindar of Jayapur, 25 M 540 ..	204
Panchanada Velan v. Vaithinatha Sastrial, 29 M 333; 16 M L J 63 ...	66
Panchanan Singha Roy v. Dwarka Nath Roy, 3 C L J 29 ...	602
Panchkori Ghosh v. Hari Das Jati, 34 Ind Cas 341; 25 C L J 925; 21 C W N 394 ...	243
Parameswaram Munpu v. Narayanan Namboodri, 34 Ind Cas 384, 40 M 110, 3 L W 305, (1916) 1 M W N 402, 31 M L J 279 ...	746
Parankusa Zatindra Mahadesikaswami v. Subramania Pillai, 26 Ind Cas 117 ...	123
Parathy Valappil Moideen, *In re*; 21 Ind Cas 469; 14 M L T 223; 25 M L J 355; (1913) M W N 997; 14 Cr L J 597 ...	333
Pardoe, *In re*, McLaughlin v. Penny, (1906) 1 Ch 265; 75 L J Ch 161; 94 L T 88; 54 W R 210 ...	608
Paresh Nath Mallik v Hari Charan Dey, 10 Ind Cas 361; 38 C 622; 15 C W N 875; 14 C L J 300 ...	754
Pareyasami v. Saluckai Tevar, 8 M H C R 157 ...	219
Park v. Lawton, (1911) 1 K B 588; 80 L J K B 396; 104 L T 184; 75 J P 163; 18 Manson 151; 27 T L R 192 ...	308
Parmessar Singh v. Kailaspati, 35 Ind Cas 801; 1 P L J 336; 17 Cr L J 369; 1 P L W 95; (1917) Pat 1 ...	654
Parsidh Narain Singh v. Ghansyam Narain Singh, 9 C W N 873 ... 297,	358
Parsotam Gir v. Narbada Gir, 21 A 505; 1 Bom L R 700; 3 C W N 517; 26 I A 175; 7 Sar P C J 538; 9 Ind Dec (N. S.) 1028 (P. C.) ...	20
Partab Bahadur Singh v. Gajadhar Bakhsh Singh, 24 A 521; 29 I A 148; 7 C W N 97; 4 Bom L R 845; 8 Sar P C J 310 (P. C.) ...	55
Pate v. Pate, (1915) A C 1100; 84 L J P C 234 ...	765
Patte Muhammad v. Davood, 30 Ind Cas 569; 18 M L T 269; 29 M L J 525; (1915) M W N 852; 39 M 1010 ...	212
Pauliem Valoo Chetty v. Pauliem Sooryah Chetty, 4 I A 109; 1 M 252; 1 Ind Jur 323; 3 Suth P C J 387; 3 Sar P C J 695; 1 Ind Dec (N. S.) 167 ...	782

P—contd.

	Page.
Peake v. Ledger, (1850) 8 Hare 313; 4 De G & Sm 137; 64 E R 769; 68 E R 380 ...	603
Peacock v. Peacock, (1858) 1 Sw & Tr 183; 27 L J Mat 71; 6 W R 866 ...	452
Peary Mohun Mukerjee v Ambica Churn Bandopadhya, 24 C 903; 12 Ind Dec (N. S.) 1269 ...	486
Peary Mohan Mukerjee v. Jote Kumar Mukerjee 11 C W N 83 ...	961
Percival v. Nanson, (1851) 7 Ex 1; 21 L J Ex 1; 86 R R 547; 155 E R 830 ...	119
Pereira, *In re*, Worsley v. Society for Propagation of the Gospel, (1912) 28 T L R 479; 56 S J 614 ...	561
Perry v. Shipway, (1859) 4 De G & J 353; 1 Giff 1; 28 L J Ch 660; 5 Jur (N. S.) 1015, 45 E R 136; 7 W R 574; 124 R R 286 ...	742
Petherpermal Chetty v. Muniandy Servai, 35 C 551; 10 Bom L R 590; 12 C W N 562; 5 A L J 290, 7 C L J 528, 14 Bur L R 108; 18 M L J 277; 35 I A 98; 4 M L T 12; 4 L B R 256 (P. C.) ...	786
Perumal v. Ramasami Chetti, 11 M 16 at p. 22; 4 Ind Dec (N. S.) 11 ...	99
Perumbra Nayar v. Subrahmanian Pattar, 23 M. 445; 10 M L J 61; 8 Ind Dec (N. S) 712 ...	602
Pfannebecker v. Pfannebecker, 133 Iowa 425; 110 N W 618; 119 A S R 608; 12 Ann Cas 543 ...	454
Pfleger, *In re*, (1868) 6 Eq 426 ...	811
Phillips v. Alhambra Palace Co, (1901) 1 Q B 59; 70 L J Q B 26; 49 W R 223; 83 L T 431; 17 T L R 40 ...	294
Phillips v. Bury, (1788) 2 Term Rep 346; 100 E R 186 ...	597
Phul Kumari v Ghanshyam Misra, 35 C 203; 7 C L J 36; 12 C W N 169; 10 Bom L R 1; 5 A L J 10; 17 M L J 618; 2 M L T 506; 14 Bur L R 41; 35 I A 22 (P. C.) ...	93
Piare Lal v. Ram Chand, 11 Ind Cas 443; 21 P R 1912; 112 P W R 1911 ...	487
Pilu Appa Nalwade v. Babaji Naru Mang, 4 Ind Cas 584; 34 B 165; 11 Bom L R 1291 ...	634
Pindi Das v. Lal Chand, 36 Ind Cas 209; 102 P L R 1916; 177 P W R 1916 ...	577
Pindiprolu Sooraparju v. Pindiprolu Veerabhadrudu, 30 M 486; 17 M L J 505; 2 M L T 443 ...	809
Pitam Mal v. Sadiq Ali, 24 A 229; A W N (1902) 19 ... 300,	358
Plimmer v. Wellington Corporation, (1884) 9 A C 699; 53 L J P C 101; 51 L T 475; 49 J P 116 ...	178
Pollard v. Rouse, 6 Ind Cas 754; 33 M 288 at p. 292; (1910) M W N 187; 8 M L T 97 ...	573
Ponnusami Pillai v Samu Ammal, 38 Ind Cas 937; 31 M L J 247 ...	640
Ponnusami Tevar v. Collector of Mydura, 5 M H C R 6 at pp 11, 12, 19, 22, 25 ...	99
Ponnuswamy Padayachi v. Karuppudoyan, 24 Ind Cas 247; 26 M L J 285; 1 L W 218; 15 M L T 299; 38 M 843 ...	124
Pool v. Pool, (1889) 61 L T 401; 58 L J P 67 ...	292
Poosia Naicken, *In re*, 1 Weir 151 ...	307

P—concld.

Page

Postlethwaite v. Freeland, (1880) 5 App Cas 599; 49 L J Ex 630; 42 L T 845; 28 W R 833; 7 Asp M C 302 ... 962
Prabhakarbhat v. Nishwambhar Pandit, 8 B 313; 4 Ind Dec (N. s.) 583 ... 205
Prafulla Krishna Deb v. Nosibannessa Bibi, 37 Ind Cas 425; 24 C L J 331 356, 526
Pramatha Nath Gangooly v. Khetra Nath Banerjee, 32 C 270; 9 C W N 247 ... 802
Pramatha Nath Sandal v. Dwarka Nath Dey, 23 C 851; 12 Ind Dec (N. s.) 565 ... 508
Pran Krishna Saha v. Traiblakhya Nath Chowdhury, 27 Ind Cas 883; 19 C W N 911 ... 700
Pran Nath Roy v. Mohesh Chandra Moitra, 24 C 546; 12 Ind Dec (N s) 1032 ... 941
Priestman v. Thomas, (1884) 9 P D 70; 53 L J P 58 ... 941
Priestman v. Thomas, (1884) 9 P D 210; 53 L J P 109; 51 L T 843; 32 W R 842 ... 941
Priya Nath v. Mahendra Kumar, 10 Ind Cas 376; 14 C L J 578; 16 C W N 317 ... 120
Prodyot Coomar Tagore v. Krishnamoni Dasya, 40 Ind Cas 513; 21 C W N 809 ... 228
Prodyote Kumar Tagore v. Rakhal Chandra, 5 Ind Cas 243; 11 C L J 209, 14 C W N 487, 37 C 322 ... 680, 963
Protap Chandra Roy v. Judhister Das, 23 Ind Cas 69; 19 C W N 143; 19 C L J 408 ... 681
Puchha Lal v. Kunj Behary Lal, 20 Ind Cas 803, 18 C W N 445, 19 C L J 213 ... 851
Pudmanund Singh v. Baij Nath Singh, 15 C 828, 7 Ind Dce (N. s.) 1135 ... 568
Pulin Chandra Mandal v. Bolai Mandal, 35 C 939; 12 C W N 837; 8 C L J 280 ... 634
Pullamma v. Pradosham, 18 M 316; 5 M L J 148; 6 Ind Dec (N. s.) 569 ...
Purna Chandra Bakshi v. Nobin Chandra Gangopadhya, 8 C W N 362 ... 6
Purnendu Narain Roy v. Dwijendra Narain Roy, 8 C L J 289 at p. 291 ... 904
Pursonchund Golacha v. Kanooram, 10 B L R 355; 19 W R 203 ... 318
Puticam Ruidas v. Mahomed Kasem, 3 C W N 33 ... 1006
Pyari Mohun Bose v. Kedarnath Roy, 26 C 409; 3 C W N 271, 13 Ind Dec (N. s.) 864 ... 838
Pyari Mohun Mukhopadhya v. Gopal Paik, 25 C 531; 2 C W N 375; 13 Ind Dee (N. s.) 352 ... 501

Q

Qadir Bakhsh v. Prag Narain, 14 Ind Cas 747; 9 A L J 794 ... 953
Qamar-ud-din Ahmad v. Jawahir Lal, 32 I A 102; 27 A 334; 1 C L J 381; 2 A L J 397; 9 C W N 601; 15 M L J 258, 7 Bom L R 433; 8 Sar P C J 810 (P. C.) ... 857
Quartz Hill Gold Mining Company v. Eyre, (1883) 11 Q B D 674 at p. 681; 52 L J Q B 483; 49 L. T. 249; 31 W. R. 668 ... 523
Queen v. Jaffir Ali, 19 W R Cr 57 ... 151
—— v. Naga, 23 W R Cr 24 ... 151
——— v. Rajcoomar Bose, 19 W R 41 Cr ... 989
——— v. Sadhu Mundul, 21 W R Cr 96 at p. 71 ... 151
——— v. Salamut Ali, 23 W R Cr 59 ... 829

Q—concld.

Page

Queen v. Sheik Jakir, 22 W R 39 Cr ... 989
——— v. Sristidhara Shaha, 25 W R 42 Cr 978
——— v. Surrendra Nath Roy, 13 W R Cr 27, 5 B L R 274 ... 1003
Queen-Empress v. Basvanta, 25 B 168; 2 Bom L R 761 ... 153
——— v. Bharma, 11 B 702; 6 Ind Dec (N s.) 462 ... 206
——— v. Bhimappa, 19 B 732, 10 Ind Dec (N. s.) 490 ... 1001
——— v. Chagan Dayaram, 14 B. 331 at p. 342, 7 Ind Dec (N. s) 681 ... 831
——— v. Sri Charan Chungo, 22 C 1017; 11 Ind Dec (N. s.) 676 ... 820
——— v. Daya Bhima, 13 B 147; 7 Ind. Dec. (N. s.) 98 ... 159
——— v. Dorysami, 9 M 284; 2 Weir 266, 3 Ind Dec (N. s) 595 ... 989
——— v. Dosa Jiva, 10 B 231; 10 Ind Jur 383; 5 Ind Dec (N. s.) 541 ... 151
——— v. Durga Charan, 7 A 672; A W N (1885) 177, 4 Ind Dec (N. s) 867 ... 1001
——— v. Fischer, 14 M 342, 1 M L J 458, 1 Weir 802, 5 Ind Dec (N. s.) 239 ... 666
——— v. Fox, 10 B 176; 5 Ind Dec (N. s.) 502 ... 1001
——— v. Ganesh Ramkrishna, 23 B 50, 12 Ind Dec (N. s.) 33 ... 1001
——— v. Gundya, 13 B 502; 13 Ind Jur. 469; 7 Ind Dec (N. s.) 333 ... 660
——— v. Hanumantha Reddi, 23 M 225; 2 Weir 543; 8 Ind Dec (N. s.) 560 ... 660
——— v. Janardhan, (1880) Rat Unrep Cr C 145 ... 656
——— v. Khandia, 15 B 66; 8 Ind Dec (N. s) 45 ... 151
——— v. Mohun Abhesing, (1895) Unrep Cr C 791 ... 1001
——— v. Nga Pyon Cho, S J L B 636 ... 154
——— v. Narottamdas Motiram, 13 B 681; 7 Ind Dec (N. s.) 451 ... 145
——— v. Nirmal Das, 22 A 445; A W N (1900) 169; 9 Ind Dec (N. s.) 1334 ... 151
——— v. O'Brien, 19 A 111; A W N (1896) 191; 9 Ind Dec (N. s.) 72 ... 139
——— v. Paul, 20 M 12; 1 Weir 820, 7 Ind Dec (N. s.) 9 ... 665
——— v. Ram Saran, 8 A 306; A W N (1885) 311; 4 Ind Dec (N. s.) 1028 ... 151
——— v. Reolah, 14 C 887; 7 Ind Dec (N s.) 585 ... 831
——— v. Sarya, 15 B 505; 8 Ind Dec (N. s) 342 ... 641
——— v. Subbayya, 12 M 451; 1 Weir 113; 4 Ind Dec (N. s.) 664 ... 306
——— v. Teja, 17 A 86; A W N (1895) 12; 8 Ind Dec (N. s.) 380 ... 154
——— v. Tyal Alli, 24 B 423, 2 Bom L R 52, 12 Ind Dec (N s) 815 ... 979
——— v. Venkataramanna, 23 M 223; 1 Weir 152; 8 Ind Dec (N s.) 558 ... 307
——— v. Yohan, 17 M 391; 1 Weir 813; 6 Ind Dec (N. s.) 271 ... 664
Quinn v. Leatham, (1901) A C 495 at p. 506; 70 L J P C 76; 85 L T 289; 50 W R 139; 65 J P 708; 17 T L R 749 ... 357

Page

R

R v. Hardwick, (1809) 11 East 578 at p. 585; 103 E R 1129 ... 119
Radha Charan Roy Chowdhry v. Golak Chandra Ghose, 31 C 834; 8 C W N 529 ... 570
Radha Gobind Roy Saheb v. Inglis, 7 C L R 264; 3 Suth P C J 809 (P. C.) ... 114
Radhakissen Rowra Dakna v. Chooneeloll Dutt, 5 C 445; 5 Ind Jur 312; 5 C L R 172; 2 Ind Dec (N. s.) 396 ... 57
Radha Mohun Mundul v. Jadoomonee Dosee, 23 W R 369; 3 Sar P C J 82 ... 626
Radha Prosad Singh v. Bal Kowar Koeri, 17 C 726 at p. 759; 8 Ind Dec (N. s.) 1026 ... 564
Radha Raman Shaha v. Pran Nath Roy, 28 C 475; 5 C W N 757 ... 678, 941
Radhika Nath Roy v. Samir Fakir, 38 Ind Cas 49, 21 C W N 636 ... 495
Raghava Chariar v. Raghava Chariar, 8 Ind Cas 545; 20 M L J 726; 8 M L T 404 ... 168
Raghubar Dayal v. Mahesh Gir, 20 Ind Cas 147 ... 17
Raghunath Das v. Sundar Das Khetri, 24 Ind Cas 304; 18 C W N 1058; 1 L W 567; 27 M L J 150; 16 M L T 353; (1914) M W N 147; 16 Bom L R 814; 20 C L J 555; 13 A L J 154; 42 C 72; 41 I A 251 (P. C.) ... 520, 856
Raghunathji Tarachand v. Bank of Bombay, 2 Ind Cas 173; 34 B 72; 11 Bom L R 255 ... 35
Raghunath Kuari v. Munnun Misr, 20 A 191; A W N (1898) 13; 9 Ind Dec (N. s.) 485 ... 637
Rahimjan Bibi v. Imamjan Bibi, 15 Ind Cas 698, 17 C L J 173 ... 879
Rai Charan Sar Mazumdar v. Administrator-General of Bengal, 2 Ind Cas 169; 36 C 856; 9 C L J 578; 13 C W N 853 ... 95
Raja Baikunta Dey Bahadur v. Udoy Chand Maiti, 2 C L J 311 ... 243
Rajab-un-nissa v. Habib Bakhsh, 57 P R 1907; 66 P W R 1907 ... 484
Rajagopala Pandarithar v. Muthu Kumara Chettiar, 17 Ind Cas 762; 23 M L J 676; 13 M L T 19 ... 721
Rajah of Ramnad v. Seetharam Chetty, 26 M 120 ... 42
Rajah of Venkatagiri v. Mukku Narsaya, 7 Ind Cas 202; 37 M 1; (1910) M W N 369; 8 M L T 258 ... 800
Rajam Aiyar v. Anantharatnam Aiyar, 31 Ind Cas 318; 29 M L J 634; 18 M L T 475; (1916) 1 M W N 127 ... 702
Rajamannar v. Venkatakrishnayya, 25 M. 361; 12 M L J 183 ... 608
Rajani Kanta Ghose v. Rama Nath Roy, 27 Ind Cas 56; 20 C L J 209; 19 C W N 458 ... 544
Rajani Kanta Mukherjee v. Yusuf Ali, 34 Ind Cas 92; 21 C W N 188 at p. 193 ... 230
Rajani Kumar Dass v. Gaur Kishore Shaha, 35 C 1051; 7 C L J 586; 12 C W N 761 ... 216
Raja Nur Khan v. Darab Khatun, 25 P R 1889 ... 896
Raja of Venkatagiri v. Raja Muddukrishna, 28 M 15 ... 48
Raja of Vizianagaram v. Dantivada Chelliah, 28 M 84; 14 M L J 468 ... 209

Page.

R—contd.

Raja Row Vencata Niladry Row v. Vutchavoy Vencatapatty Raz, (1834) 3 Knapp. 23; 12 E R 554 ... 212
Raja Thakur Barmha v. Jiban Ram, 21 Ind Cas 956; 41 C 590 at p. 599; 18 C W N 312; 15 M L T 137; 12 A L J 156; 19 C L J 161; 26 M L J 89; 16 Bom L R 156; (1914) M W N 118 (P. C.) ... 282
Raj Bahadoor Singh v. Achumbit Lall, 6 I A 110; 6 C L R 12; 4 Sar P C J 15 ... 549, 846
Raj Bahadur Singh v. Chandrapal, 37 Ind Cas 170; 9 O C 185 ... 10
Raj Chunder Roy v. Shama Soondari Debi, 4 C 583; 2 Ind Dec (N. s.) 370 ... 523
Raj Chunder Sen v. Ganga Das Seal, 31 I A 71; 31 C 487; 8 C W N 442; 1 A L J 145; 14 M L J 147; 8 Sar P C J 623 (P. C.) ... 431
Rajendra Kishore Adhikari v. Chandra Nath Dutt, 12 C W N 878 ... 961
Rajendra Nath Mukerjee v. Hira Lal Mukerjee, 7 Ind Cas 554, 14 C W N 995 ... 957
Rajendro Kumar Bose v. Mohim Chandra Ghose, 3 C W N 763 ... 680
Rajendro Nath Holdar v. Jogendro Nath Banerjee, 15 W R (P. C.) 41; 14 M I A 67; 7 B L R 216; 2 Suth P C J 422; 2 Sar P C J 666; 20 E R 701 ... 548
Rajendronath Dutt v. Shaikh Mahomed Lal, 8 C 42; 8 I A 135; 4 Sar P C J 254; 5 Ind Jur 545; 4 Ind Dec (N. s.) 27 (P. C.) ... 616
Rajkishen Singh v. Ramjoy Surma Mozoomdar, 1 C 186; 19 W R 8; 3 Sar P C J 174; 8 M L J 151; 2 Suth. P C J 744; 1 Ind Dec (N. s.) 119 (P. C.) ... 211
Raj Krishna Dey v. Bipin Bihari Dey, 18 Ind Cas 961; 40 C 251 at p. 257; 17 C L J 189 ... 591
Raj Kumar Roy v. Hara Krishna Chakravarty, 10 Ind Cas 355, 15 C L J 217 ... 957
Raj Mohan De v. Mati Lal Saha, 33 Ind Cas 331; 22 C L J 546 ... 953
Raj Mohan Pal v. Gobinda Chandra Pal, 14 Ind Cas 53; 17 C W N 524 ... 754
Rajnarain Mitter v. Ekadasi Bag, 27 C 479; 4 C W N 494; 14 Ind Dec (N. s.) 315 ... 431
Rajrani Dasi v. Gonesh Prosad, 5 Ind Cas 650; 14 C W N 626; 37 C 407 ... 464
Rajrup Koer v. Abul Hossein, 6 C. 394 at p. 404; 7 C L R 529, 7 I A 240, 4 Shome L R 7; 4 Sar P C J 199, 3 Suth P C J 816; 4 Ind Jur 530; 3 Ind Dec (N. s.) 257 ... 864
Rajrup Singh v. Ramgolam Roy, 16 C 1; 13 Ind Jur 139; 8 Ind Dec (N. s.) 1 ... 66
Rakhal Das v. Madhab Chandra, 8 Ind Cas 828; 13 C L J 169; 15 C W N 61 ... 894
Rakhmabai v. Govind, 6 Bom L R 421 ... 60
Raktoo Singh v. Sudhram Ahir, 8 C L J 557 ... 115
Ralla v. Atti, 24 Ind Cas 843; 115 P L R 1914; 21 P W R 1914 Cr 15 Cr; L J 529 ... 333
Ramachandra v. Narayanasami, 16 M 333; 2 M L J 279; 5 Ind Dec (N. s.) 959 ... 100
Ramachandraiyar v. Noorulla Sahib, 30 M 101; 1 M L T 314; 16 M L J 477 ... 627
Ramadhin Singh v. Jadunandan Singh, 27 Ind Cas 263, 19 C W N 54 ... 864
Ramakkal v. Ramasami Naicken, 22 M 522; 9 M L J 101; 8 Ind Dec (N. s.) 337 ... 633

R—contd. Page.

Ramakrishna Mallay v. Baburaya, 17 Ind Cas 947: 23 M L J 715; 12 M L T 656 ... 953
Rama Krishna Rao v Court of Wards, 22 M 383 at p. 396; 1 Bom L R 277; 3 C W N 415, 26 I A 83; 7 Sar P C J 481; 9 M L J Sup 1; 8 Ind Dec (N. s.) 276 ... 211
Ramalakshmamma v. Collector of Godavari, 26 I A 107 at pp. 111, 112; 22 M 464; 1 Bom L R 696; 3 C W N 777; 7 Sar P C J 534; 8 Ind Dec (N. s.) 332 (P. C.) ... 104
Ramanathan Chetty v. Arunchalam Chetty, 22 Ind Cas 99; 38 M 766; (1914) M W N 46; 15 M L T 151; 26 M L J 275; 1 L W 22 ... 753
Ramanathan Chetty v. Murugappa Chetty, 27 M 194; 13 M L J 341 ... 592, 836
Ramanathan Chetti v. Murugappa Chetti, 29 M 283; 10 C W N 825; 33 I A 139; 9 M L T 327; 3 A L J 707, 4 C L J 189; 16 M L J 265; 8 Bom L R 498 (P C) ... 592, 837
Rama Nath v. Ishan Chandra Banerjee, 2 Seves. 463 ... 428
Ramnandan Prosad v. Sheo Parson Singh, 6 Ind Cas 301; 11 C L J 623 ... 486
Ramasami Ayyar v. Vengidusami Ayar, 22 M 113; 8 M L J 170; 8 Ind Dec (N. s.) 79 ... 54
Ramaswami Kone v. Sundara Kone, 31 M 28 at p. 30; 17 M L J 495; 3 M L T 26 ... 269
Ramaswamy v. Muniandy Servai, 5 Ind. Cas. 343; 7 M L T 253; (1910) M W N 550; 20 M L J 709 ... 922
Ram Autar v. Abul Husan Khan, 28 Ind Cas 307; 2 O L J 131 at p. 137 ... 17
Ram Autar Sahu v. Kishnuput Ram, 4 Ind Cas 577, 13 C W N 188, 5 M L T 92; 11 Cr L J 11 ... 1005
Ram Bhaj v. Devia, 123 P R 1881 ... 234
Ram Bhushan Mahto v. Jebli Mahto, 8 C 853, 4 Ind Dec (N. s) 550 ... 861
Ram Bilas v. Lal Bahadur, 30 A 311; 4 M L T 169; 5 A L J 456; A W N (1908) 112 ... 962
Ram Bishen Raut v. Rajaram, 33 C. 882 ... 92
Ram Chand Dutt v. Mosai Santal, 11 C 738; 5 Ind Dec (N. s.) 1251 ... 204
Ram Chandra Bhanj Deo v. Nanda Nandanand Deb, 20 Ind Cas 298; 18 C W N 938; 19 C L J 197 ... 699
Ram Chandra Bhanj Deo v. Secretary of State, 37 Ind Cas 223; 43 C 1104; 20 C W N 1245; 20 M L T 235; (1916) 2 M W N 175; 4 L W 251; 14 A L J 1009; 18 Bom L R 838; 24 C L J 296; 31 M L J 745; 43 I A 172 (P. C.) ... 163
Ram Chandra v. Goswami Rajjan Lal, 5 Ind Cas 129; 32 A 164; 7 A L J 99 ... 922
Ram Charan Sanyal v. Anukul Chandra Acharya 34 C 65; 4 C L J 578; 11 C W N 160 ... 933
Ram Chunder Sao v. Bunseedhur Naik, 9 C 741; 7 Ind Jur 653; 4 Ind Dec (N. s.) 1143 ... 726
Ram Din v. Kalka Prasad, 7 A. 502; 12 I A 12; 4 Sar P C J 619; 4 Ind Dec (N. s.) 440 ...
Ram Harakh Tewari v. Ishardat Tewari, 3 Ind Cas 558 ... 963

R—contd. Page.

Ram Hit Singh v. Narain Rai, 26 A. 389; A W N (1904) 68; 1 A L J 209 ... 909
Ram Kirpal v. Rup Kuari, 11 I A 37; 6 A 269; 4 Sar P C J 489; 3 Ind Dec (N. s.) 718 ... 587
Ram Kumar Shaha v. Ram Gour Shaha, 2 Ind Cas 559; 37 C 67; 13 C W N 1050; 10 C L J 558 ... 925
Ram Kumar Singh v. Jagan Mohan Singh, 9 Ind Cas 80; 33 A 315; 8 A L J 63 ... 532
Ram Narain Singh v. Chota Nagpur Banking Association, 36 Ind Cas 321; 43 C 332 228, 876
Ram Narayan Singh v. Adhindra Nath Mukhurji, 34 Ind Cas 900 4 L W 15; 20 C W N 989; (1916) 1 M W N 428; 31 M L J 251; 20 M L T 216; 14 A L J 1017; 18 Bom L R 862; 25 C L J 115 ... 585
Ram Natb v. Bulaqi Ram, 17 Ind Cas 735; 50 P R 1913; 69 P L R 1913; 15 P W R. 1913 ... 196
Ram Nirunjun Singh v. Prayag Singh, 8 C 138; 10 C L R 66; 4 Ind Dec (N. s.) 88 ... 369, 633
Ram Nundun Singh v. Janki Koer, 29 C 829; 29 I A 178; 7 C W N 57; 178 P R 1902; 4 Bom L R 654; 8 Sar P C J 351 (P. C.) ... 217
Ram Parshad v. Moti, 20 Ind Cas 749; 14 Cr L J 493; 11 A L J 754 ... 141
Ram Pratap Nemani v. Emperor, 16 Ind Cas 171; 16 C W N 858; 39 C 968; 16 C L J 250; 13 Cr L J 603 ... 145
Ram Prosad Malla v. Raghubar Malla, 4 Ind Cas 6; 37 C 13; 13 C W N 1038; 10 Cr L J 454 ... 312, 314
Ram Sahay v. Jagdamba Singh, 37 Ind Cas 163, 19 O C 153 at p. 157, 3 O L J 683 ... 910
Ram Saran Pattak v. Raghu Nandan Gir, 9 Ind Cas 6; 38 C 387, 13 C L J 445, 16 C W N 574, 12 Cr L J 3 ... 827
Ram Soondur Mookerjee v. Ram Shurun Mookerjee, 6 W R 25 ... 299
Rambilas, *In re*, 26 Ind Cas 136; (1914) M W N 804; 16 M L T 505; 29 M L J 175; 15 Cr L J 688 ... 138
Ramdayal v. Gulabia Bai, 4 N L R 120 ... 955
Ramdin v. Raj Rani, 17 Ind Cas 101, 8 N L R 113 ... 884
Ramdin Bania v. Sew Baksh Singh, 6 Ind Cas 473; 37 C 714; 14 C W N 806; 11 Cr L J 357 ... 312, 314
Rameshur Kulwar v. Beharee Seth, 3 N W P H C R 208 ... 204
Rameshur Pershad Narain Singh v. Koonj Behari Pattuk, (1879) 4 A C 121; 6 I A 33; 4 C 633; 3 Sar. P C J 856; 3 Ind Jur 179; 2 Shome L R 194; 2 Ind Dec (N. s.) 402 ... 99
Rameshwar Singh v. Mohendra Narain, 19 Ind Cas 249 ... 405
Ramgati Mandal v. Shyama Charan Dutt, 6 C W N 919 ... 848
Ramjiban v. Taj-ud-din, 9 Ind. Cas. 489; 15 C W N 404 ... 696
Ramjit v Khemchand, 23 Ind Cas 8 ... 922
Ramkristo Dass v. Sheikh Narain, 9 C 517, 12 C L R 141, 4 Ind Dec (N. s.) 993 ... 860
Ramnad case, 24 M 613 note. ... 217

R—contd.

Page.

Rampartab Samrathrai v. Foolibai, 20 B 767; 10 Ind Dec (N. s.) 1082 ... 35
Ramphul Sahoo v. Misree Lall, 24 W R 97 ... 864
Ramsden v. Dyson, (1866) 1 H L 129 at p. 174; 12 Jur (N. s.) 506; 14 W R 926 ... 177, 724
Rancho:das Nathubhai v. Bhagubhai Parmanandas, 18 B 594; 9 Ind Dec (N. s.) 771 ... 85
Rangappa Naik v. Kamti Naik, 31 M 366; 3 M L T 355 18; M L J 309 ... 634
Rangasawmi Aiyangar v. Sowri Aiyangar, 29 Ind Cas 585, 29 M L J 229, 39 M 792; (1915) M W N 448, 18 M L T 75 ... 749
Rangaswami Aiyar v. Swami Aiya, 17 M L J 394 ... 300
Ranjha v. Rajji, 22 P R 1878 ... 474
Ranjit Singh v. Jagannath Prosad Gupta, 12 C 375 at p. 380; 6 Ind Dec (N. s.) 255 ... 594
Ranjit Singh v. Kali Dasi Debi, 40 Ind Cas 981, 21 C W N 609; 32 M L J 565, 15 A L J 390, 25 C L J 499, 19 Bom L R 462, 2 P L W 1, (1917) M W N 459, 6 L W 101 (P. C.) ... 113, 760, 894, 965
Rao Girraj Singh v. Lala Haragobind Sahai, 4 Ind Cas 304, 32 A 125, 7 A L J 36 ... 963
Rash Behari Pal Chowdhry v. Sridhar Belal, 6 C W N 687 ... 627
Rashid-un-nisa v. Muhammad Ismail Khan, 3 Ind Cas 864, 10 C L J 318, 13 C W N 1182, 6 A L J 822; 11 Bom L R 1225; 6 M L T 279; 19 M L J 631 (P. C.) ... 873
Rashmoni Dasi v. Ganada Sundari Dasi, 26 Ind Cas 275; 20 C L J 213; 19 C W N 84 241, 299
Rasseswari Chowdhurani v. Sorendra Mohun Tagore, 5 Ind Cas 105; 11 C L J 601 ... 95
Rasul Karim v. Pirbhai Amirbhai, 24 Ind Cas 625; 38 B 381; 16 Bom L R 288 ... 385
Ratan Mahanti v. Khatoo Sahoo, 29 C 400; 6 C W N 573 ... 42
Ratcliffe v. Ratcliffe and Anderson, (1859) 1 Sw & Tr 467; 5 Jur (N. s.) 714; 7 W R 726 ... 287
Ratnamasari v. Akilandammal, 26 M. 291 at p. 297; 13 M L J 27 ... 445
Ravulapati Papi Reddi v. Nanduru Peda Venkatacharyulu, 26 Ind Cas 67; (1914) M W N 794; 16 M L T 247; 27 M L J 567 ... 795
Raw v. Alderson, (1817) 7 Taunt 452; 1 Moore 145; 129 E R 182; 18 R R 535 ... 289
Rawlings v. Lambert, (1869) 1 J & H 458 at p. 466; 70 E R 826; 128 R R 468 ... 625
Razi-un-nissa v. Sabar Husain, 26 A 57, A W N (1903) 195 ... 955
Read v Brown, (1889) 22 Q B D 128; 58 L J Q B 120; 60 L T 250; 37 W R 131 ... 234, 392
Redgate v. Haynes, (1876) 1 Q B 89; 45 L J M C 65; 33 L T 779 ... 980
Reeves v. Butcher, (1891) 2 Q B 509; 60 L J Q B 619; 65 L T 329; 39 W R 626 ... 425
Reg. v. Bhuja, (1872) Rat Un Cr C 63 ... 650
Reg. v. Exeter Guardians, (1869) 4 Q B 341; at p. 344; 10 B & S 433; 38 L J M C 126; 20 L T 693; 17 W R 850 ... 119
Reg v. Millis, (1844) 10 Cl & Fin 534, 8 Jur 717; 17 Rul Cas 66; 59 R R 134; 8 E R 844 ... 667

R—contd.

Page.

Reg. v. Pearce, (1863) 3 B & S 531; 32 L J M C 75; 9 Jur (N. s.) 647; 7 L T 597; 11 W R 235; 9 Cox C C 258; 122 E R 200; 129 R R 447 ... 307
Rex v. Bellringer, (1792) 4 T R 810, 100 E R 1315 ... 739
Rex v. Varlo, (1775) 1 Cowp 248; 98 E R 1068 ... 742
Reynolds v. Reynolds, (1910) 68 W Va. 15; 69 S E. 381 Ann Cas 1912 A 889 ... 454
Richards v. Delbridge, (1874) 18 Eq 11; 43 L J Ch 459; 22 W R 584 ... 882
Robert Fischer v. Secretary of State, 2 Ind Cas 325; 32 M 141; 5 M L T 149; 19 M L J 131 ... 26, 102
Roberts v. Davey, (1833) 4 B & Ad 664, 1 N & M 443, 2 L J K B 141, 110 E R 606; 38 R R 348 ... 954
Rodricks v. Secretary of State, 21 Ind Cas 1; 40 C 308 ... 314
Rohan Singh v. Bhao Lal, 3 Ind Cas 43, 31 A 530, 6 A L J 699 ... 910
Romanath Paul v. Kani Lal Dey, 7 C W N 104 ... 506, 621
Rowe v. Rand, (1887) 111 Ind 206; Huffenth. Cases on Agency 126 ... 294
Rowe v. Row, (1865) 4 Sw. & Tr. 162; 24 L J P 111; 12 L T 639; 11 Jur (N. s.) 568; 13 W R 1048 ... 455
Run Bahadur Singh v. Lucho Koer, 11 C 301; 12 I A 23; 4 Sar P C J 602; 9 Ind Jur 202; 5 Ind Dec (N. s.) 960 (P C.) ... 484
Rup Narain v. Gopal Devi, 3 Ind Cas 382; 36 C 780; 6 A L J 567; 10 C L J 58; 13 C W N 920; 5 M L T 423; 11 Bom L R 833; 93 P R 1909; 63 P L R 1910; 146 P W R 1909; 36 I A 103; 19 M L J 548 (P. C.) ... 168, 633
Russo Chinese Bank v. Li Yau Sam, (1910) A C 174; 79 L J P C 60; 101 L T 689; 26 T L R 203 ... 179
Rustomji v. Vinayak Gangadhar, 7 Ind Cas 955; 35 B 29; 12 Bom L R 723 ... 927
Rylands v. Fletcher, (1868) L R 3 H L 330; 37 L J Exch. 161; 19 L T 220 ... 383

S

Sabta Prasad v. Dharam Kirtisaran, 18 Ind Cas 629; 35 A 107; 11 A L J 66 ... 300, 358
Sadasiva Pillai v. Kalappa Mudaliar, 24 M 39 ... 583
Sadayan, *In re*, 4 Ind Cas 1126, 5 M L T 216, 11 Cr L J 193 ... 998
Sadhu Charan Pal v. Radhika Mohan Roy, 8 C W N 695 ... 98
Sadiq Husain Khan v. Hashim Ali Khan, 36 Ind Cas 104; 21 C W N 130 at p. 154; 31 M L J 607; 12 O C 192; 18 Bom L R 1037; (916) 2 M W N 577; 14 A L J 1248; 21 M L T 40; 38 A 627; 1 P L W 157; 4 O L J 22; 25 C L J 363 (P. C.) ... 487
Sadler v. Great Western Ry Co, (1896) A C 450; 65 L J Q B 462; 74 L T 561; 45 W R 51 ... 950

S—contd. Page.

Sahadu Manaji v. Devlya Jaba Mahar, 14 Ind Cas 780; 14 Bom L R 254 ... 535
Sahu Ram Chandra v. Bhup Singh, 39 Ind Cas 280; 21 C W N 698; 1 P L W 557; 15 A L J 437; 19 Bom L R 498; 26 C L J 1; 33 M L J 14; (1917) M W N 439; 22 M L T 22 (P. C.) ... 195
Sailabala Debi v. Sriram Bhattacharya, 7 C L J 303; 11 C W N 873 ... 381
Sajjad Ali v. Muhammad Zulfikar Ali Khan, 33 Ind Cas 943; 83 P R 1916; 125 P W R 1916 ... 933
Sakrabhai v. Maganlal, 26 B 206, 3 Bom L R 738 ... 35
Sakyabani Ingle Rao v. Bhavani Bozi, 27 M 588 ... 884
Salig Ram v. Chuba Mal, 11 Ind Cas 712; 8 A L J 1160; 34 A 49 ... 905
Salig Ram v. Ramji Lal, 28 A 554; 3 A L J 394; A W N (1906) 103; 3 Cr L J 400; 1 M L T. 219 ... 318
Salomibai, *In re*, (1888) Rat Unrep Cr C 428; Cr Rg No. 92 of 1888 ... 656
Sambhu Chandra Hazra v. Purna Chandra Pal, 7 C L J 103; 12 C W N 122; 35 C 176 ... 751
Samdani v. Kamlakant Jha, 15 Ind Cas 424 ... 405
Sampson v Hoddinott, (1857) 1 C B (N. s.) 590; 26 L J C P 148; 3 Jur (N s.) 243; 5 W R 230; 140 E R 242; 28 L T (o. s.) 304; 107 R R 809 ... 53
Sanka Krishnamurthi v. Bank of Burma, Ld., 11 Ind Cas 79; 14 Ind Cas 389; 35 M 692; 21 M L J 620; (1911) 1 M W N 385; 11 M L T 56 ... 227
Sankara Reddy v. Errama Reddi, 4 Ind Cas 618; 19 M L J 113 ... 931
Sankaravadivelu Pillai v. Secretary of State, 28 M 72; 15 M L J 32 ... 48, 100
Sarala Sundari Dasi v. Saroda Prosad Sur, 2 C L J 602 at p. 606 ... 951
Sarat Chandra v. Apurba Krishna Roy, 11 Ind. Cas 187; 15 C W N 925; 14 C L J 55 ... 803
Sarat Chandra Dhal v. Damodar Manna, 12 C W N 885 ... 497
Sarat Chandra Singh v. Brojo Lal Mukerjee, 30 C 986 ... 314
Sarat Chandra Singh v. Chandra Mohan Bandhopadhya, 7 Ind Cas 140; 12 C L J 216 ... 427
Sarat Sundari Debia v. Bhobo Pershad Khan Chowdhury, 13 C 101; 6 Ind Dec (N. s.) 563 ... 381
Sarbesh Chandra Basu v. Hari Dayal Singh, 5 Ind Cas 236; 11 C L J 346, 14 C W N 451 ... 957
Sardar v. Fatteh Chand, 89 P R 1894 ... 677
Sardha Prasad v. Pitamber Lal, 17 Ind Cas 409; 10 A L J 465; 13 Cr L J 777 ... 655
Sariatullah Sarkar v. Pran Nath Nandi, 26 C 184; 13 Ind Dec (N. s.) 723 ... 962
Sarip Jan Bibi v. Aftabuddin, 8 Ind. Cas 30; 13 C L J 115 ... 94
Sarju Prasad's case, 10 A 71; A W N (1888) 1; 6 Ind Dec (N. s.) 48 ... 587
Saroda Prosad Bhattacharjee v. Manmotho Nath Mitter, 28 Ind. Cas. 371; 19 C. W. N. 870 ... 95

S—contd. Page

Sartaj Kuari v. Deoraj Kuari, 10 A 272; 15 I A 51; 5 Sar P C J 139; 12 Ind Jur 213; 6 Ind Dec (N. s.) 182 (P. C.) ... 210
Sarthakram Maiti v. Nundo Ram Maiti, 11 C W N 579 ... 940
Sasi Bhushan Bose v. Manindra Chandra, 38 Ind Cas 835; 24 C L J 448; 21 C W N 310 ... 694
Sathappayyar v. Periasami, 14 M 1; 5 Ind Dec (N. s.) 1 ... 591
Satis Chandra Ghose v. Rameswari Dasi, 31 Ind Cas 894; 22 C L J 409; 20 C W N 665 ... 201
Satish Chandra Sarkar v. Emperor, 13 Ind Cas 913; 39 C 456; 16 C W N 499; 15 C L J 396; 13 Cr L J 161 ... 650
Satu v. Hanmantrao, 23 B 318; 12 Ind Dec (N. s.) 211 ... 720
Satya Charan Mukherji v. Madhub Chunder Karmokar, 9 C W N 693 ... 447
Satya Kumar Banerjee v. Satya Kirpal Banerjee, 3 Ind Cas 247; 10 C L J 503 ... 694
Satya Prashad Pal Chowdhry v. Motilal Pal Chowhry, 27 C 683; 14 Ind Dec (N. s.) 448 ... 506
Satya Sri Ghoshal v. Kartik Chandra Das, 13 Ind Cas 596; 15 C L J 227; 16 C W N 418 ... 796
Savile v. Roberts, 1 Ld. Raymond 374; 91 E R 1147 ... 524
Sawan v. Sahib Khatun, 2 Ind Cas 71; 44 P R 1909; 69 P W R 1909; 67 P L R 1909 ... 240
Sayadali v. Aminbi, (1898) P J 393 ... 766
Sayad Gulam Hussein v. Bibi Anvarnissa, (1885) P J 170 at p. 171 ... 762
Sayad Shahu v. Hapija Begam, 17 B. 560 at p. 562; 9 Ind Dec (N. s.) 306 ... 976
Schweppes, Ltd. v. Gibbens, (1905) 22 R P C 601 ... 541
Scott v. Sampson, (1882) 8 Q B D 491; 51 L J Q B 380; 46 L T 412; 30 W R 541; 46 J P 408 ... 697
Secretary of State v. Ambalavana Pandarasannidhi, 8 Ind Cas 357; 34 M 366; 9 M L T 47; (1911) 1 M W N 19 ... 101
——— v. Bai Rajbai, 30 Ind Cas 303; 42 I A 229; 19 C W N 1087; 13 A L J 953; (1915) M W N 563; 29 M L J 242; 18 M L T 179; 2 L W 731; 17 Bom L R 730; 39 B 625; 23 C L J 1 (P. C.) ... 218
——— v. Chelikani Rama Rao, 35 Ind Cas 902; 25 C L J 69; 43 I A 197; 31 M L J 324; 20 C W N 1311; (1916) 2 M W N 224; 39 M 617; 14 A L J 1114; 20 M L T 435; 4 L W 486; 18 Bom L R 1007 (P. C.) ... 114
——— v. Forbes, 17 Ind Cas 180; 16 C L J 217 ... 229
——— v. Haibatrao Hari, 28 B 276 at 286; 6 Bom L R 43 ... 740
——— v. Kannepalli Janakiramayya, 18 Ind Cas 770; 37 M 322; 13 M L T 235; 24 M L J 365; (1913) M W N 225 ... 102
——— v. Kannepalli Janakiramayya, 30 Ind Cas 609; 29 M L J 389; 2 L W 763; 18 M L T 277; (1915) M W N 671 ... 102

S—contd. Page.

Secretary of State v. Kasturi Reddi, 26 M 278 12 M L J 453 ... 287
——— v. Maharaja of Bobbili, 32 Ind Cas 279; 30 M L J 163; 19 M L T 6; 3 L W 119; (1915) M W N 1025 ... 102
——— v. Perumal Pillai, 24 M 279; 11 M L J 117 ... 26, 101
——— v. Rajah of Venkatagiri, 25 Ind Cas 266; 31 M L J 97; (1916) 2 M W N 96; 4 L W 133; 20 M L T 284 ... 216
——— v. Swaminatha Koundan, 12 Ind Cas 167; 37 M 25; 10 M L T 291; (1911) 2 M W N 303; 21 M L J 947 ... 471
——— v. Swami Nautheswarar, 6 Ind Cas 199; 34 M 21; 7 M L T 407; 20 M L J 766; (1910) M W N 495 ... 101
Seena M. Maniff & Co. v. Liptons, Limited, 23 Ind Cas 639, 7 L B R 306 at p. 309; 7 Bur L T 116; 15 Cr L J 337 ... 978
Sekh Chand v. Romoni Mohan Roy, 17 Ind Cas 603; 17 C W N 1105 ... 960
Sekrabhai v. Maganlal, 26 B 206 at p. 215, 3 Bom L R 738 ... 506
Seller v. Seller, (1850) 1 Sw. & Tr 482; 28 L J Mat 99; 5 Jur 686; 8 W R 5 ... 452
Serjeant v. Nash, Field and Co., (1903) 2 K B 304; 72 L J K B 630; 89 L T 112; 19 T L R 510 ... 774, 954
Seshachala Chetty v. Para Chinnasami, 40 Ind Cas 909; 32 M L J Sup 1; 40 M 410 ... 218
Shafaqat Ullah v. Wali Ahmad Khan, 30 A 116; A W N (1908) 25, 3 M L T 124; 7 Cr L J 48 ... 831
Shahbaz Khan v. Rahiman, 11 Ind Cas 536 ... 963
Shahebzada Mahomed Kazim Shah v. Hills, 35 C 388; 12 C W N 373 ... 418
Shakul Kameed Alim Sahib v. Syed Ebrahim Sahib, 26 M 373 ... 525
Shamanta Radha Charan Das v. Sharfuddin Hossein, 20 Ind Cas 423; 41 C 276 at p. 284; 17 C W N 1135 ... 466
Shambhu Nath Singh v. Sheo Proshad Singh, 18 Ind Cas 689; 40 C 432; 17 C W N 276; 17 C L J 227 ... 544
Shambhu Singh v Daljit Singh, 33 Ind Cas 19; 14 A L J 293; 38 A 243 ... 912
Shamjee Nashye, *In re*, 1 C L R 481 ... 989
Sham Ram v. Hemi Bai, 73 P R 1896 ... 231
Sharp v. Jackson, (1899) A C 419 at p 421; 68 L J Q B 866; 80 L T 841; 15 T L R 418; 6 Manson 264 ... 400
Shamsher Mundul v. Ganendra Narain Mitter, 29 C 498 ... 317
Sham Sunder Lal v. Achhan Kunwar, 21 A 71; 2 C W N 729; 25 I A 183; 7 Sar P C J 417; 9 Ind Dec (N. s) 755 ... 633
Shamsunder Saha v. Anath Bhandhu Saha, 6 Ind Cas 97; 37 C 574; 14 C W N 662 ... 816
Shamu Patter v. Abdul Kadir Rowthan, 16 Ind Cas 250; 35 M 607; 16 C W N 1009; 23 M L J 321; 12 M L T 33; (1912) M W N 935; 10 A L J 259; 14 Bom L R 1034; 16 C L J 596; 39 I A 218 ... 585

S—contd. Page.

Shankar Baksh v. Daya Shankar, 15 I A 66; 15 C 422; 5 Sar P C J 107; 12 Ind Jur 132; Rafique and Jackson's P C No 100; 7 Ind Dec (N s) 866 ... 906
Shankar Das v. Jasodan, 102 P R 1908 ... 916
Shanto Chandar Mukerji v. Nain Sukh, 23 A 355 at p 356; A W N (1901) 101 ... 926
Sharat Chunder Ghose v. Kartik Chunder Mitter, 9 C 810; 12 C L R 453; 4 Ind Dec (N. s) 1188 ... 957
Sharif Ahmad v. Emperor, 12 Ind Cas 304; 8 A L J 1097; 12 Cr L J 536 ... 649
Shedden v. Patrick, (1854) 1 Macq H L C 535 at p 607; 14 R R 55 ... 978
Sheikh Ibrahim v. Rama Aiyar, 10 Ind Cas 874; 21 M L J 508; (1911) 1 M W N 442; 35 M 685 ... 922
Sheik Ismail Rowther v. Rajab Rowther, 30 M 295; 17 M L J 165; 2 M L T 186 ... 260
Sheikh Mohammed Aga v. Jadunandan Jha, 10 C W N 137; 2 C L J 325 ... 462
Sheo Charan Singh v. Bhikai, 11 Ind Cas 534; 14 O C 156 ... 910
Sheo Nandan Ahir v Ram Lagan Singh, 30 Ind Cas 908; 13 A L J 921 ... 794
Sheo Narain v. Ram Din, 11 Ind Cas 526; 14 O C 129 ... 424
Sheo Prasad v. Aya Ram, 29 A 663; 4 A L J 565; A W N (1907) 210 ... 590
Sheorania v. Bharat Singh, 20 A 90; A W (1897) 203; 9 Ind Dec (N. s.) 417 ... 510
Sheoratan Kunwari v. Ram Pargash, 18 A 227; A W N (1896) 37; 8 Ind Dec (N. s) 858 ... 590
Sheo Sohye Roy v. Luchmeshur Singh, 10 C 577; 5 Ind Dec (N s) 387 ... 381
Sher Khan v. Bivi, 30 P R 1905; 38 P L R 1905 ... 476
Shew Prosad Bungshidhur v. Ram Chunder Haribux, 23 Ind Cas 977; 41 C 323 at p 339 ... 447, 920
Shiam Lal v. Ram Piari, 4 Ind Cas 706; 32 A 25; 6 A L J 947 ... 71
Shib Nath v Alliance Bank of Simla, Ltd., Lahore, 25 Ind Cas 480; 3 P R 1915; 110 P W R 1914; 215 P L R 1914 ... 196
Shibo Raut v. Baban Raut, 35 C 353; 12 C W N 359; 7 C L J 470 ... 906
Shitanath Biswas v. Kishen Mohun Mokerjee, 5 W R 130 ... 299
Shoojat Ali v. Zumeerooddeen, 5 W R 158 ... 737
Shrinivas Murar v. Hanmant Chavdo, 24 B 260; 1 Bom L R 799; 12 Ind Dec (N. s.) 709 ... 548
Shri Vishwambhar Pandit, *In re*, 20 B 699; 10 Ind Dec (N s.) 1035 ... 782
Shuppa Ammal v. Subramanian, 4 Ind Cas 1083; 32 M 238; 19 M L J 739; 33 M 238; 8 M L T 249 ... 60
Shurnomoyee Dasi v. Srinath Das, 12 C 614; 10 Ind Jur 458; 6 Ind Dec (N. s.) 418 ... 774
Sibendrapada Banerjee v. Secretary of State 34 207; 5 C L J 380 ... 9
Sidebotham, *Ex parte*, Sidebotham, *In re*, (1880) 14 Ch D 458; 49 L J Bk 41; 42 L T 783, 28 W R 715 ... 97
Siliman Sahib v. Bontala Haman Sahib, 20 Ind Cas 418; 38 M 247; (1913) M W N 554; 25 M L J 125 ... 906

S—contd. Page.

Simpson v. Bloss, (1816) 7 Taunt. 246; 2 Marsh 542; Holt N P 273, 129 E R 99; 17 R R 509 ... 786
Sir Dinshaw v. Sir Jamsetji, 2 Ind Cas 701; 33 B 509 at pp 510, 529; 11 Bom L R 85; 5 M L T 301 ... 638
Sital Das Babaji v. Pertap Chunder Sarma, 3 Ind Cas 408; 11 C L J 2 ... 591
Sitanath Midda v. Basudev Midda, 2 C L J 540 ... 953
Sitaram v. Shridhar, 27 B 292; 5 Bom L R 91 ... 922
Sivaprosad Ram v. Tricomdas, 27 Ind Cas 917; 42 C 926 ... 241, 944
Sivarama Aiyar v. Alagappa Chetty, 31 Ind Cas 211; (1915) M W N 845, 2 L W 946 ... 953
Sivasangu v. Minal, 12 M 277; 4 Ind Dec (N. s.) 543 ... 410
Sivasubramania Naicker v. Krishnammal, 18 M 287; 5 M L J 168; 6 Ind Dec (N. s.) 549 ... 212
Sivatha Muthu Asari v. Revd J N H Mesguita, 19 Ind Cas 824; 24 M L J 642 at p 651; (1913) M W N 480; 13 M L T 513 ... 799
Slatterie v. Pooley, (1840) 6 M & W 664 at p 669; 10 L J Ex. 8; 4 Jur. 1018; 151 E R 579; 55 R R 760 ... 165
Smith v. Blakey, (1867) 2 Q B 326; 8 B & S 157; 36 L J Q B 156; 15 W R 492 ... 119
Smith v. Kenrick, (1849) 7 C B 515; 18 L J C P 172; 13 Jur 362; 137 E R 205; 78 R R 745 ... 864
Smurthwaite v. Hannay, (1894) A C 494; 63 L J Q B 737; 6 R 299; 71 L T 157; 43 W R 113; 7 Asp M C 485 ... 948
Sonai Chutia v Sonaram Chutia, 34 Ind Cas 692; 20 C W N 195 ... 9
Soni Ram v. Kanhaiya Lal, 19 Ind Cas 291 40 I A 74; 17 C W N 605; 11 A L J 389; 13 M L T 437; (1913) M W N 470; 17 C L J 488; 15 Bom L R 489; 25 M L J 131; 35 A 227 (P. C.) ... 582, 607
Soobul Chunder Law, *In re*, Soobul Chunder Law v. Russick Lall Mitter, 15 C 203; 12 Ind Jur 307; 7 Ind Dec (N. s. 719 ... 520
Soorendronath Roy v. Heeramonee Burmoneah, 12 M I A 81 at p 91; 10 W R 35 (P. C.); 1 B L R (P. C.) 26; 2 Suth P C J 147; 2 Sar P C J 372; 20 E R 271 ... 211
Soshi Bhusun Guha v. Gogan Chunder Shaha, 22 C. 364; 11 Ind Dec (N. s.) 244 ... 544
Southwick v. Southwick, (1867) 97 Mass 327; 93 Am Dec 95 ... 454
Spencer v. National Association for Prevention of Consumption, *In re*, (1915) 1 Ch 673; 84 L J Ch 489 ... 561
Sree Kanta Pershad v. Irshad Ali Sarkar, 17 Ind Cas 173; 16 C L J 225 ... 569
Sreemutty Kurani Dassi v. Sajani Kant Singh, 12 C W N 530 ... 960
Srikant Mondal v. Saroda Kant Mondul, 26 C 46; 13 Ind Dec (N. s.) 633 ... 848
Srimant Roy v. Mahadeo Mahata, 31 C 550; 8 C W N 531 ... 356
Srimath Kidambi v. Pidipiti Kutumbarayadu, 25 Ind Cas 891; 27 M L J 233; 39 M 21 ... 124

S—contd. Page.

Sri Mohan Thakur v. Narsing Mohan Thakur, 27 C 259; 4 C W N 420, 14 Ind Dec (N. s.) 171 ... 827
Sri Narain v. Chulhai Khan, 18 C W N 172 (clxxii) ... 405
Sri Narain v. Raghubans Rai, 17 Ind Cas 729; 17 C W N 124; 25 M L J 27; (1913) M W N 768 (P. C.) ... 196
Srinath Roy v. Ainaddi Halder, 24 C 295; 1 C W N 217; 12 Ind Dec (N. s.) 930 ... 1000
Srinath Roy v. Dinabandhu Sen, 25 Ind Cas 467; 18 C W N 1217 at p 1234; (1914) M W N 654; 1 L W 733; 16 M L T 319; 12 A L J 1193; 20 C L J 385; 16 Bom L R 901; 42 C 489; 42 I A 221 (P. C.) ... 104, 426
Sripati Churn v. Belchambers, 8 Ind Cas 22; 15 C L J 123; 15 C W N 661 ... 857
Sri Raman Lalji Maharaj v. Sri Gopal Lalji Maharaj, 19 A 428; A W N (1897) 103; 9 Ind Dec (N s.) 276 ... 616, 836
Sri Sethuramaswamy Iyer v. Sri Meruswami Iyer, 4 Ind Cas 76; 34 M 470; 6 M L T 319; 20 M L J 108 ... 591
Steeds v Steeds, (1889) 22 Q B D 537; 58 L J Q B 302; 60 L T 318; 37 W R 378 ... 922
Steel v. Haddock, (1855) 10 Ex 643 at p 645; 24 L J Ex 78; 3 C L R 326; 3 W R 172; 156 E R 597; 102 R R 748 ... 749
Stewart v. Stewart, 73 Maine 548; 57 Am Rep 822 ... 454
Stewarts Trusts, *In re*, (1852) 22 L J Ch 369; 16 Jur 1063; 1 W R 17 ... 419
Stroud, *In re*, (1849) 8 C B 502 at p 529; 19 L J C P 117; 137 E R 604; 79 R R 608 ... 532
Stroud v. Lawson, (1898) 2 Q B 44; 67 L J Q B 718; 78 L T 729; 46 W R 626; 14 T L R 421 ... 625, 949
Subbaraya Pillai v. Ramasami Pillai, 23 M 172; 8 Ind Dec (N. s.) 518 ... 410
Subbarayalu Naidu v. Papammal, 29 Ind Cas 579 ... 552
Subbiah Naicker v. Ramanathan Chettiar, 22 Ind Cas 899: 37 M 462; 26 M L J 189; (1914) M W N 205; 1 L W 251 ... 588
Subhadra v. Tribhuan Dat, 15 Ind Cas 247 ... 962
Subhan v. Niamat Khan, 4 P W R 1908 Rev., 2 P R 1908 Rev ... 907
Subrahmania Ayyar v. King Emperor, 28 I A 257; 25 M 61; 11 M L J 233; 3 Bom L R 540; 5 C W N 866; 2 Weir 271 (P. C.) ... 657, 948
Sudaburt Pershad Sahoo v. Foolbash Koer, 12 W R (F. B.) 1; 3 B L R (F. B.) 31 ... 289
Sudalai Ammal v. Gomati Ammal, 16 Ind Cas 428; 12 M L T 288; 23 M L J 355; (1912) M W N 908 ... 633
Sudisht Lal v. Sheobarat Koer, 7 C 215; 8 I A 39; 4 Sar P C J 222; 5 Ind Jur 270: 3 Ind Dec (N. s.) 707 ... 440
Sukeena Katum v. Mahomed Abdul Aziz, 29 Ind Cas 239; 38 M 221 ... 522
Sukhbir Singh v. Nihal Singh, 18 Ind Cas 232 ... 594
Sukhdeo Singh v. District Magistrate of Muzaffarpur, 38 Ind Cas 754; 2 P L J 1; 18 Cr L J 370 ... 312

S—concld.

Page.

Suleman Kadr v. Mehdi Begum Surreya Bahu, 21 C 135; 20 I A 144; 17 Ind Jur 535; 6 Sar P C J 347; Rafique and Jackson's P C No 132; 10 Ind Dec (N. S.) 722 ... 436
Sumsuddin v. Abdul Husein, 31 B 165; 8 Bom L R 781 ... 362, 633
Sundar Lal v. Upendra Nath Seal, 35 Ind. Cas. 15; 1 P. L. J. 193 ... 888
Sundar Singh v. Gurdevi, 31 Ind Cas 27; 163 P. W. R. 1915 ... 763
Suraiya Qadr v. Qudsia Begam, 24 Ind Cas 643; 1 O L J 281 ... 437
Suraj Bansi Koer v. Sheo Persad Singh, 5 C 148 at p 174; 6 I A 88; 4 Sar P C J 1; 3 Suth P C J 589; 4 C L R 226; 2 Shome L R 242; 2 Ind Dec (N. S.) 705 (P. C.) ... 190
Surajpal Singh v. Gajraj Singh, 26 Ind Cas 600, 1 O L J 698 ... 488
Surat Lall Mondal v. Umar Haji, 22 C 877; 11 Ind Dec (N S.) 580 ... 78
Surbo Chunder Doss v. Woomanund Roy, 11 W R 412 ... 204
Surendra Mohini Debi v. Loharam Chattopadhya, 14 Ind Cas 67; 39 C 687; 16 C W N 570 ... 754
Surendra Nath v. Bansi Badan, 36 Ind Cas 457; 24 C L J 533 ... 277, 447
Surendra Nath Ghose v. Beni Madhab Misra, 10 C W N 274 ... 925
Surendra Nath Sarkar v. Atul Chandra Roy, 34 C 892; 7 C L J 87 ... 35
Surendra Nath Sen v. Dinabandhu Naik, 4 Ind Cas 535; 13 C W N 595 ... 230
Surendro Keshub Roy v. Doorgasoondery Dossee, 19 C 513 at p 532; 19 I A 108; 6 Sar P C J 150; 9 Ind Dec (N. S.) 786 ... 593
Surjan Singh v. Kharak Singh, 96 P R 1908; 79 P. W. R. 1908 ... 928
Surjya Kanta Roy Chowdhry v. Emperor, 31 C 350, 1 Cr L J 341 ... 993
Surput Singh v. Imrit Tewari, 5 C 720; 6 C L R 62; 2 Ind Dec (N. S.) 1066 ... 524
Syam Mandal v. Sati Nath Banerjee, 38 Ind Cas 493; 24 C L J 523; 21 C W N 776 ... 857
Syeda Khatun v. Lal Singh, 25 Ind Cas 324; 36 A 233; 12 A L J 344; 15 Cr L J 572 ... 653
Syed Mahammad Khan v. Maharaja Ram Narain Singh Bahadur, 7 C L J 90 ... 228
Synge v. Synge, 1900) P. 180 at p 207; 69 L J P 106; 83 L T 224; 64 J P 454; 16 T L R 338 and in Court of Appeal (1901) P 317; 70 L J P 97; 85 L T 83; 17 T L R 718 ... 450
Syud Ali v. Gopal Doss, 13 W R 420 ... 962

T

Tadikonda Buchi Virabhadrayya v. Sonti Venkanna, 20 Ind Cas 769, 24 M L J 659; (1913) M W N 782 ... 124
Tafazul Husain v. Than Singh, 6 Ind. Cas. 426, 32 A 567; 7 A L J 715 ... 909
Tahal v. Bisheshar, 8 A 57; A W N (1885) 331; 4 Ind Dec (N. S.) 1063 ... 583
Tahawwar Khan v. Madho Ram, 11 O C 290 11, 909

T—contd.

Page.

T A Martin, *In the matter of the petition of*, 27 A 296; A W N (1904) 234; 1 Cr L J 917 ... 655
Tappenden v. Randall, (1801) 2 Bos & P 467; 5 R R 662; 126 E R 1388 ... 785
Taqui Jan v. Obaidulla, 21 C 866; 10 Ind Dec (N. S.) 1209 ... 510
Tarini Kanta Majumdar v. Ishur Chandra Chakravarti, 18 Ind Cas 240; 21 C L J 603 ... 371
Tarujan Bibee v. Asamuddi Bepari, 4 C W N 426 ... 827
Tasker v. Shepherd, (1861) 6 H & N 575; 30 L J Ex 207; 4 L T 19; 9 W R 476; 123 R R 697; 158 E R 237 ... 292
Tathayya, *In re*, 12 M 47; 2 Weir 164; 4 Ind Dec (N. S.) 382 ... 746
Taylor v. Bowers, (1876) 1 Q B 291; 45 L J Q B 163; 35 L T 938; 24 W R 499 ... 785
Taylor v. Chester, (1869) 4 Q B 109; 10 B & S 237; 38 L J Q B 225; 21 L T 359 ... 785
Taylor v. St Helens Corporation, (1877) 6 Ch D 264; 46 L J Ch 857; 37 L T 253; 25 W R 885 ... 532
Tejendro Narain Singh v. Bakai Singh, 22 C 658; 11 Ind Dec (N. S.) 439 ... 228
Telam Pramanik v. Adu Shaikh, 18 Ind Cas 791; 17 C W N 468 ... 847
Tet Tun v. Ma Chein, 8 Ind Cas 978; 5 L B R 216 at p 218; 4 Bur L T 7 ... 750
Thacoor Prosad v. Baluck Ram, 12 C L R 64 ... 497
Thakur Pershad Singh v. Emperor, 10 C W N 775; 3 Cr L J 473 ... 1002
Thakur Prasad v. Fakir-Ullah, 22 I A 44; 17 A 106; 5 M L J 3; 6 Sar P C J 526; 8 Ind Dec (N. S.) 393 (P. C.) ... 587
Thakur Prosad Singh v. Emperor, 10 C W N 1090; 4 Cr L J 217 ... 1003
Thakur Sheo Narain Singh v. Bodal Singh, 8 O C 177 ... 83
Than Pe v. Ba Than, 11 Ind Cas 1005; 4 Bur L T 206; 12 Cr L J 469; 6 L B R 25 ... 316
Thamman Pande v. Maharaja of Vizianagram, 29 A 593; A W N (1907) 185; 4 A L J 726 ... 381
Thathara Nannabha Chetty v. Kuppal Krishnammal, 16 Ind Cas 799; 14 M L T 194 ... 269
Thattoli Kothilan Aliyamma v. Kunhammed, 8 Ind Cas 1090; 34 M 527; 20 M L J 946; 9 M. L. T. 100 ... 368
Thiagaraja v. Giyana Sambandha Pandara Sunnady, 11 M 77; 4 Ind Dec N. S.) 54 ... 798
Thomas v. Hamlyn & Co., Limited, (1916) 33 L T R 129, (1917) 1 K B 527, 86 L J K B. 1009 ... 972
Thomas v. Hobler, (1862) 4 De G F & J 199; 45 E R 1160; 135 R R 91; 8 Jur (N. S.) 125; 5 L T 564 ... 617
Thompson v. London County Council, (1899) 1 Q B 840 at p 842; 68 L J Q B 625; 47 W R 433; 80 L T 512 ... 946
Thorne v. Rooke, 2 Curt 799 ... 516

Thuljaram Row v. Gopala Aiyan, 40 Ind Cas 611; (1917) M W N 274 at p 237; 12 M L T 229; 32 M L J 434 ... 281

T—concld.

Page.

Tilak Chandra Dass v. Fatik Chandra Dass, 25 C 803; 13 Ind Dec (N. s.) 523 ... 976
Tilukdari Singh v. Chultan Mahton, 17 C 131; 16 I A 152; 13 Ind Jur 251; 5 Sar P C J 408; 8 Ind Dec (N s) 625 (P. C.) ... 564
Times Cold Storage Co. v. Lowther, (1911) 2 K B 100 at p 107; 80 L J K B 901; 104 L T 637; 55 S J 442 ... 946
Tirbhuwan Bahadur Singh v. Rameshar Bakhsh Singh, 28 A 727; 3 A L J 695; 10 C W N 1065; 8 Bom. L R 722; 16 M L J 440; 4 C L J 405; 1 M L T 265; 9 O C 377; 33 I A 156 (P. C.) ... 929
Tirkha v. Rizak Ram, 8 Ind Cas 811; 8 P L R 1911, 138 P W R 1910 ... 917
Tirthu v. Lachhman, 15 Ind Cas 195; 71 P W R 109 1912 P L R 1912 ... 976
Tirumal Raju v. Pandla Muthial Naidu, 9 Ind Cas 289; 35 M 114; (1911) 1 M W N 113; 9 M L T 286; 21 M L J 169 ... 213
Tiruvangadial v. Thiruvangadih, 24 Ind. Cas 617; 26 M L J 364 ... 522
Todd v Dodd, (1781) 1 Wils K B 312; 95 E R 636; Barnes 48; 94 E R 800; Sayer 5, 96 E R 784 293
Tohra (Zohra) Bibi v. Zabeda Khatoon, 7 Ind Cas 75; 12 C L J 368 ... 599
Toolsee Doss Seal, *In re*, 7 W R 228 ... 314
Townsend v. Moore, (1905) P 66 at p 78; 74 L J P 17; 92 L T 335; 53 W R 338 ... 557
Tribhuwan Bahadur Singh v. Rameshar Bakhsh Singh, 33 I A 156; 28 A 727; 10 C W N 1065; 8 Bom L R 722; 16 M L J 440; 3 A L J 695; 4 C L J 405; 1 M L T 265; 9 O C 37 (P. C.) ... 548
Tricomdas Cooverji Bhoja v. Gopinathji Thakur, 39 Ind Cas 156; 19 Bom L R 450; 1 P L J 262; 15 A L J 247; 25 C L J 279; 32 M L J 357; 21 M L T 242; 21 C W N 577; (1917 M W N 363; 5 L W 654; 44 C 759 (P. C.) ... 765
Tripurari Pal v. Jagat Tarini Dasi, 17 Ind Cas 696; 40 I A 37; 17 C W N 145; 13 M L T 1; (1913) M W N 34; 17 C L J 159; 15 Bom L R 72; 40 C 274 (P. C.) ... 596
Tukaram Manaji Dhangar v. Ramchandra Hari Peshkar, 2 N L R 25 ... 25
Tulaji v. Balabhai, 22 B 39; 11 Ind Dec (N. s.) 607 ... 522
Tuljaram Row v. Alagappa Chettiar, 8 Ind Cas 340; 35 M 1; (1910) M W N 696; 8 M L T 453; 21 M L J 1 251, 947
Tulshi Pershad Singh v. Ramnarain Singh, 12 C 117; 12 I A 205; 9 Ind Jur 433; 4 Sar P C J 646; 6 Ind Dec (N. s.) 80 (P. C.) 228, 976
Tulsi Ram v. Empress, 23 P R 1881 Cr ... 44

U

Page.

Ubilack Rai v. Dallial Rai, 3 C 557; 1 Ind Dec (N. s) 939 ... 794
Uda Begam v. Imam-ud-din, 1 A 82; 1 Ind Dec (N. s.) 74 ... 725
Uggrakant Chowdhry v. Hurroo Chunder Shickdar, 6 C 209, 3 Ind Dec (N. s.) 137 ... 794
Umabai v. Bhavu Balvant, 3 Ind Cas 165; 34 B 358; 11 Bom L R 499 ... 950
Umabai Mangeshrao v. Vithal Vasudeo Shetti, 1 Ind Cas 120; 33 B 293; 11 Bom L R. 34; 5 M L T 230 ... 947
Umabai Shankar Godbole v. Amritrao Anant, 28 Ind Cas 18; 39 B 80 at p 85; 17 Bom L R 133 ... 522
Umar-ud-Din v. Janto, 101 P R 1906; 156 P L R 1906 ... 815
Umatul Batul v. Nauji Kuar, 6 C L J 427; 11 C W N 705 ... 93
Ummi Begam v. Kesho Das, 30 A 462 at p 463; 5 A L J 474; A W N (1908) 220 ... 933
Umrao Singh v. Hardeo, 29 A 418; A W N (1907) 112; 4 A L J 392 ... 161, 352
United Kingdom Mutual Steamship Assurance Association v. Houston, (1896) 1 Q B 567; 65 L J Q B 484 ... 265
United States v. Burr, 4 Cranch 470 at pp 482; 488; 58 U. S. 604 ... 357
Upadrasta Venkata v. Devi Sitaramudu, 24 Ind Cas 224; 26 M L J 585; 38 M 891 ... 124
Upendra Chandra v. Shaikh Sabhan, 11 Ind Cas 183; 15 C L J 6 ... 599
Upendra Lal v. Ataulla, 36 Ind Cas 404; 21 C W N 108 ... 566
Upendra Nath Bose v. Bindeshri Prosad, 32 Ind Cas 462; 22 C L J 452; 20 C W N 210 ... 251
Urmston v. Newcomen, (1833) 4 Ad & E 899; 6 N & M 454; 5 L J K B 175; 111 E R 1022; 43 R R 514 ... 690
Usto Sahebdino v. Ghulam Kadir, 27 Ind Cas 924; 8 S L R 241 ... 646
Uttam Singh v. Barkat Ali, 19 Ind Cas 235; 15 P R 1913; 202 P L R 1913 ... 933

V

Vaidyanath Aiyar v. Aiyasamy Aiyar, 1 Ind Cas 408; 32 M 191; 5 M L T 49; 19 M L J 94 ... 488
Vallamkondu Subbiah v. Maldi Venkupedataramiah, 31 M 343; 4 M L T 195; 18 M L J 347 ... 79
Varadaraja Mudali v. Murugesam Pillai, 30 Ind Cas 707; 30 M L J 460; 18 M L T 313; (1915) M W N 762; 39 M 923 ... 702
Varadarajulu Chettiar v. Pattra Narayanaswamy Chetty, 20 Ind Cas 518; 24 M L J 693; 14 M L T 46; (1913) M W N 879 ... 931
Varadayya Chetty v. Munusami Chetty, 13 Ind Cas 232, 10 M L T 514 ... 747
Vasudev Bhat v. Venkatesh Sanbhav, 10 B H C R 139 ... 221
Veera Pillai v. Poonnambala Pillai, 9 M L J 13 ... 249
Veerappa Naick, *In re*, 40 Ind Cas 752; 8 Cr Law Rev 314; 18 Cr L J 752 ... 137

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V—concld. Page.

Vemula Jambalaya v. Iskala Rajamma, 15 Ind. Cas. 859; 36 M. 492; (1912) M. W. N. 1000; 24 M L J 512 ... 603
Venkatanarayana Pillay v. Subbammal, 29 Ind Cas 298; 38 M 406; 28 M L J 535; 17 M L T 475; 21 C L J 515; 17 Bom L R 468; 19 C W N 641; 2 L W 526; (1915) M W N 555; 42 I A 125 (P. C.) ... 884
Venkataramana Bhatta v. Gunduraya, 31 M 403; 4 M L T 221 ... 953
Venkatasubbaramiah v. Nambura Ramiah Sethi, 24 Ind Cas 622 ... 803
Venkatesha Mallia v. Rammampalli Ramayya Hegade, 26 Ind Cas 202; 38 M 192; 27 M L J 241 ... 745
Venkata Subramania Ayyar v. Koran Kannan Ahmad, 26 M 19; 12 M L J 113 ... 213
Venkateshwara Iyen v. Shekhari Varma, 3 M 384; 5 Ind Jur 512; 8 I A 143; 4 Sar P C J 259; 1 Ind Dec (N. s.) 822 537, 782
Venku v. Mahalinga, 11 M. 393; 12 Ind Jur 421; 4 Ind Dec (N. s.) 274 ... 410
Venkubai v. Lakshman Venkoba Khot, 12 B 617; 13 Ind Jur 270; 6 Ind Dec (N. s.) 895 ... 241
Vidyapurna Thirtha Swamiar v. Rangappayya, 21 Ind Cas 405; 25 M L J 486; 14 M L T 344; (1913) M W N 901 ... 953
Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami, 27 M 435 at p 457; 14 M L J 105 ... 591
Vijiaraghavalu Naidu v. Srinivasalu Naidu, 28 M 399 ... 702
Villers v. Beaumont, (1682) 1 Vern 100; 23 E R 342 ... 881
Vir Singh v. Tirath Ram, 35 Ind Cas 583; 64 P R 1916; 15 P L R 1917 ... 782
Vishnu v. Krishnan, 7 M 3; 2 Ind Dec (N. s.) 588 ... 960

W

Wali Ahmad Khan v. Ajudhia Kandu, 13 A 537; A W N (1891) 196; 7 Ind Dec (N. s.) 340 ... 975
Walian v. Banke Behari Pershad Singh, 30 C 1021; 30 I A 182; 7 C W N 774; 5 Bom L R 822; 8 Sar P C J 512 (P. C.) ... 872
Wallace v. Kelsall, (1840) 7 M & W 264; 8 D P C 841; 10 L J Ex 12; 4 Jur 1064; 56 R R 707; 151 E R 765 ... 922
Wankford v. Wankford, 1 Salk. 299 91 E R 265 ... 608
Warde v. Warde, (1852) 16 Beav 103 at p 105; 51 E R 716; 93 R R 49 ... 532
Watson v. Watson, 52 N. J. Eq. 349 ... 454
Watts v. Kelson, (1871) 6 Ch App 166 at p 175; 40 L J Ch 126; 24 L T 203; 19 W R 338 ... 101
Wazir Khan v. Emperor, 5 P R 1902 Cr; 57 P L R 1902 ... 826
Weaver v. Richards, 144 Mich 395; 6 L R A (N. s) 855; 108 N W 382 ... 294
Weld v. Acton, (1735) 2 Eq Cas Abr 771; 22 E R 661 ... 560

W—concld. Page.

West v. Dobb, (1870) 5 Q B 460; 10 B & S 987; 39 L J Q B 190; 23 L T 76; 18 W R 1167 ... 774
West Cumberland Iron and Steel Company v. Kenyon, (1879) 11 Ch D 782 at pp 786, 787; 48 L J Ch 793; 40 L T 703 ... 48
Whalley v. Lancashire and Yorkshire Railway Company, (1884) 13 Q B D 131; 53 L J Q B 285; 50 L T 472; 32 W R 711; 48 J P 500 ... 48
Wheatley v. Westminister Brymbo Coal Co., (1870) 9 Eq 538; 39 L J Ch 175; 22 L T 7; 18 W R 162 ... 771
White v. White, (1906) A C 72 at p 85; 75 L J P C 14; 49 L T 65 ... 53
Whitmore v. Humphries, (1872) 7 C P 1; 41 L J C P 43; 25 L T 496; 20 W R 79 ... 533
Wilkinson, *Ex parte*, Berro, *In re*, (1883) 22 Ch D 788 at P 794; 52 L J Ch 657; 48 L T 495; 31 W R 649 ... 400
Williams Hollins & Co., Limited v. Paget, (1915) 1 Ch 187; 89 L J Ch 287 ... 972
Wills v. Great Western Railway Company, (1915) 1 K B 199; 84 L J K B 449 ... 388
Wingrove v Wingrove, 56 P R 1904; 84 P L R 1904 ... 484
Wintle, *In re*, (1870) 9 Eq 573; 21 L T 781; 18 W R 394 ... 287
Womes Chunder Chatterjee v. Chundee Churn Roy Chowdhry, 7 C 293; 3 Ind Dec (N. s.) 737 ... 118
Womesh Chander Goopto v. Raj Narain Roy, 10 W R 15 ... 381
Wood v Cox, (1887) 4 T L R 652 at p 655 ... 697
Wood v. Waud, (1849) 3 Ex 748 at p 770; 18 L J Ex 305; 15 Jur 472; 77 R R 809; 154 E R 1047 ... 48

Y

Yaramati Krishnayya v. Chundru Papayya, 20 M 3 6 at p 329; 7 Ind Dec (N. s.) 231 ... 785
Yashvant v. Vithal, 21 B 267; 11 Ind Dec (N s.) 181 ... 73, 234
Yasin v. King-Emperor, 28 C 689; 5 C W N 670 ... 151
Young v. Bankier Distillery Company, (1893) A C 691; L T 838; 58 J P 100 ... 53

Z

Zamindar of Karvetnagar v. Trustee of Tirumalai, 2 Ind. Cas 18; 32 M 429; 19 M L J 410 ... 209

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